

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. _____

CHO HYUN SHIN AND KISUK SHIN, INDIVIDUALLY AND AS
ADMINISTRATORS OF THE ESTATE OF ELIZABETH H. SHIN,
PLAINTIFFS/APPELLEES,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, et al.,
DEFENDANTS/APPELLANTS.

ON APPEAL FROM AN INTERLOCUTORY ORDER OF
THE SUPERIOR COURT, MIDDLESEX COUNTY

**BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION,
AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND
ADMISSIONS OFFICERS, AMERICAN ASSOCIATION OF
COMMUNITY COLLEGES, AMERICAN ASSOCIATION OF STATE
COLLEGES AND UNIVERSITIES, ASSOCIATION OF AMERICAN
UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF
STATE UNIVERSITIES AND LAND-GRANT COLLEGES,
AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL
ADMINISTRATORS IN SUPPORT OF PETITION FOR RELIEF
UNDER G.L. C. 231, § 118 (FIRST PARAGRAPH)
BY MIT ADMINISTRATORS ARNOLD HENDERSON
AND NINA DAVIS-MILLIS**

Sheldon E. Steinbach
Vice President
and General Counsel
AMERICAN COUNCIL
ON EDUCATION
One DuPont Circle
Washington, D.C. 20036
(202) 939-9300

Jonathan S. Franklin
Martin A. Price (#640165)*
Jake M. Shields
HOGAN & HARTSON, L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

February 24, 2006

Counsel for Amici Curiae

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**BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION,
ET AL. IN SUPPORT OF PETITION FOR RELIEF
UNDER G.L. C. 231, § 118 (FIRST PARAGRAPH)**

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are eight associations of universities, colleges, educators, administrators and other representatives of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, graduate and undergraduate institutions and faculty. Together, *amici's* members include most higher education institutions in the United States. *Amicus* American Council on Education represents all higher education sectors. Founded in 1918, its approximately 1800 members include a substantial majority of United States colleges and

universities. The Addendum to this brief contains descriptions of the other *amici*.

Amici filed this brief because they are vitally concerned about the adverse effects that this lawsuit has had, and is continuing to have, on the well-being of college and university students. The Superior Court decision has had the opposite of its intended result. By imposing a legal duty to prevent student suicides on non-clinician university employees untrained in medicine or psychiatry, the decision below has created incentives for those personnel to disengage from troubled students at just the time when those students can benefit most from a nurturing campus community.

SUMMARY OF ARGUMENT

Far from being an effective means of encouraging intervention into potential student-suicide attempts, to impose on people who lack clinical training a legal duty to prevent student suicides will have the opposite effect. Such a duty discourages members of campus communities from engaging students at-risk for suicide. For under the decision below, even the most well-intentioned efforts to participate in students' lives will potentially involve both subjecting at-risk students to the inexpert medical judgment of non-clinicians and subjecting those university administrators and

staff to the specter of enormous liability meted out by juries acting with hindsight.

This case has already had that effect on some higher-education administrators. In a recent study, researchers found that the mere pendency of this case contributed to reluctance by college and university administrators to identify suicidal students, out of fear that doing so would result in students not seeking appropriate psychiatric attention from trained medical professionals, and in liability to the university in the event of suicide. See Ann Pollinger Haas, et al., Suicide in College Students, 35 American Behavioral Scientist, at 1234-35, 1237 (May 2003). Now that the Superior Court has held that administrators have a legal duty to prevent suicide whenever a jury believes there is sufficient notice of a problem, the incentives for disengagement are likely to increase.

The perverse result will be to deprive many at-risk students of something very valuable to their mental stability -- a nurturing, supportive campus community. Many students arrive on college and university campuses with emotional and social problems. These institutions strive to respond appropriately to these students by providing supportive environments that supply the stability and structure needed to help students address their

problems, and by referring students to medical professionals who have the expertise to diagnose and treat mental illness. This support has helped keep college and university suicide rates below those of the general population.

To impose on non-clinician members of campus communities a legal duty to recognize and prevent student suicides, based on a standard of "foreseeability" best reserved to persons with advanced medical training, will impede the supportive mechanisms prevalent on college and university campuses. It will discourage institutional officials from engaging at-risk students, out of fear that doing so will harm those students through health and safety judgments made without the necessary medical and psychiatric training and will subject themselves to tort liability. It will also signal colleges and universities not to admit potentially unstable students, or to send them away, precisely when such actions are likely to be most ill-timed and dangerous. By forcing these students from supportive university communities, the rule in this case is likely to put many of them at greater risk of suicide.

This Court should therefore review the Superior Court's denial of summary judgment under G.L. c. 231, § 118, and reverse that decision.

ARGUMENT

I. COLLEGES AND UNIVERSITIES PROVIDE SUPPORTIVE CAMPUS COMMUNITIES TO STUDENTS AT-RISK FOR SUICIDE.

Every year more than a thousand of the approximately 15 million college and university students in the United States commit suicide. See Daniel McGinn & Ron Depasquale, Taking Depression On, Newsweek, Aug. 23, 2004, at 59. Although these institutions acknowledge that they are faced with student populations that increasingly suffer from depression and other mental illness, see Jeremy Kisch, et al., Aspects of Suicidal Behavior, Depression, and Treatment in College Students: Results from the Spring 2000 National College Health Assessment, 35 Suicide & Life - Threatening Behavior, American Ass'n of Suicidology, at 4 (Feb. 2005), the proportion of college and university students who commit suicide is lower than that of the overall population, see Haas, supra, at 1226 (college suicide rate "was only half the rate of . . . a national sample").¹

¹ "College itself is not a risk factor" for student suicide. Kisch, supra, at 12. Rather, the increase in student depression and suicide is due to the greater number of students who enter college with preexisting psychological disorders, see Haas,

The lower suicide rate for students in higher education is due in part to the "more supportive peer and mentor environment" found on university campuses. See id. Colleges and universities are not uniquely positioned to prevent student suicides; their expertise is education. These institutions do, however, provide at-risk students with supportive social environments that can help many of these students effectively address emotional and psychological problems. These environments depend on the work of tens of thousands of dedicated individuals who do not have medical training, including professors, resident advisors, coaches, teaching assistants, and non-clinician administrators at all levels.

This community support is critically important to potentially suicidal students. "[T]he factor of human isolation and withdrawal appears to be the single most effective distinction between those who kill themselves and those who do not." Richard H. Seiden, The Problem of Suicide on College Campuses, The Journal Of School Health, at 244 (May 1971); see Carlette J. Hardin & Philip G. Weast, Campus Suicide: The Role of College Personnel From Intervention to Postvention, at 3 (Apr. 1, 1989) (unpublished supra, at 1229, and increased feelings of being overwhelmed by pressures associated with a new and important stage of their lives, see id. at 1228 ("76% of students felt 'overwhelmed'").

manuscript on file with the U.S. Dept. of Education) ("alienation" and "withdrawal from others" leads to student suicide). Positive attention from college and university administrators and staff can have a soothing emotional effect on at-risk students, and can relieve some of the social isolation that is a major risk factor for student suicide. See Seiden, supra, at 246; Richard D. Kadison & Theresa Foy DiGeronimo, College of the Overwhelmed: The Campus Mental Health Crisis and What to Do About It 170, 174-175 (2004). These campus community members can engender a feeling of belonging that is absent from the lives of many of these troubled youths.

The benefits of involvement by the campus community in the lives of at-risk students are not limited to emotional support. Non-clinician administrators and staff can also approach at-risk students about how to get help from trained medical professionals. See National Mental Health Ass'n, Safeguarding Your Students Against Suicide, at 5 (2002) (available at www.nmha.org/suicide/report.pdf) ("campus personnel who are close to the students, such as student advisors, resident advisors, faculty, and coaches . . . [can] advise students . . . where to go for help"). Depressed students are more likely to seek medical assistance if they are encouraged by those with whom they have

longstanding and trustworthy relationships. Community outreach to these students can also have "the added benefit of helping to reduce the stigma associated with mental illness." Kadison & DiGeronimo, supra, 175.

In sum, at-risk students benefit most if surrounded by members of a nurturing and supportive campus community who are willing to figure positively in the students' daily lives. As next shown, however, the Superior Court decision in this case fosters perverse disincentives for college and university administrators and staff to engage troubled students.

II. TO IMPOSE LIABILITY FOR STUDENT SUICIDES ON NON-MEDICAL COLLEGE AND UNIVERSITY PERSONNEL WILL DETER INSTITUTIONAL INVOLVEMENT, ISOLATE AT-RISK STUDENTS, AND INCREASE THE LIKELIHOOD OF SUICIDES.

In its unprecedented decision, the Superior Court held that non-clinician university administrators have a legal duty to take steps to prevent a student's suicide whenever a jury might believe that the suicide was "foreseeable." This prospect of open-ended and unpredictable liability has had and will continue to have the opposite of its intended effect. Unable to predict what a jury might consider improper in hindsight, and lacking the psychiatric training to diagnose or treat troubled or at-risk students, many non-clinician

college and university personnel will naturally choose to disengage from these students rather than subject students to their inexpert judgment about those students' psychological states and potentially expose themselves to liability they lack the expertise to avoid. Even highly dedicated university officials are likely to be deterred from identifying and supporting depressed students, out of fear that by gaining knowledge of the "foreseeability" of these students' suicides, they will be forced to make decisions about students' health and safety that they are not prepared or trained to make and then be held liable should those efforts not succeed.

This deterrent effect is not hypothetical. In fact, this very case has been cited as a major factor interfering with the efforts of suicide prevention advocates and university officials to address effectively student suicide. In a recent effort to study and test new methods for colleges to prevent student suicides, researchers from the American Foundation for Suicide Prevention found that although administrators were eager to explore new ideas to prevent suicides, they were reluctant "to actively identify suicidal students on the grounds that this will increase [their] liability in

the event of a completed suicide." Haas, supra, at 1237.

The researchers found that

virtually all administrators wanted the [student] questionnaire to be returned anonymously, fearing that some students might identify themselves as seriously depressed and at-risk for suicide and then refuse to come for treatment. If the university were to know the identity of such a student, administrators fear, it would face the choice of having to take action against the student's wishes or not acting and risk being sued if the student were to die by suicide.

Id. at 1234.

The researchers specifically noted that a recent case "brought by the parents of Elizabeth Shin, an MIT sophomore" was driving much of these fears. Id. at 1235. The researchers identified fear of tort liability as a "key concern" in efforts to prevent student suicides. Id. at 1237. This study, moreover, was conducted before the Superior Court's summary-judgment ruling. Now that the court has actually imposed a legal duty on non-clinician administrators, the deleterious effects will only increase.

Thus, the pendency of this case, and the Superior Court's decision, have caused college and university officials to refrain from engaging in outreach efforts to identify at-risk students, for fear that knowledge of the students' problems will endanger those students and subject officials to

liability they lack the expertise to avoid. Other negative effects are readily predicted. If legal duties are imposed on non-clinician administrators to prevent suicides when the administrators lack medical training to detect or treat mental illness, colleges and universities will have incentives not to admit those they feel have the potential for such problems, or to dismiss students upon early signs of trouble. Given the rise in numbers of troubled students who enter college, and the potential for massive tort liability, it is "inevitable that mental-health issues are starting to filter into admissions conversations at various colleges." McGinn & Depasquale, supra, at 59. To manage this liability risk, some institutions are now "focused on admitting a class that [is] 'rock solid' emotionally." Id. These institutions may also conclude that to minimize potential tort liability they will need to remove from campus students who show signs of being at-risk for suicide.

The result will be to erode the supportive campus community structure precisely when it can be most helpful. This will remove an important stabilizing element in students' lives and will fray the often fragile bonds of trust that encourage students to seek help in the first place. Such incentives will also unfairly affect students who

may never be suicidal, but who may experience negative treatment based on administrators' perception that these students will become a threat to themselves. Until now, thousands of deans, administrators, professors, coaches, and resident advisors have chosen to engage troubled students. They befriend at-risk students, learn about their problems, provide them with attention and support, and refer them to professional medical help. But these compassionate, dedicated officials understand that "[s]uicide is a personal act" and that "[e]ven the most effective intervention programs [may] not prevent an individual from completing suicide." Hardin & Weast, supra, at 13, 15.

The paradoxical incentives the decision below entails are demonstrated by comparison of the decision with a recent Pennsylvania ruling that addressed the same issue. The court in Mahoney v. Allegheny College, No. AD 892-2003 (Pa. Commw. Ct Dec. 22, 2005) (order granting summary judgment) (attached at Appellants' Petition for Relief, Tab C), refused to recognize a duty on the part of a university official to prevent an Allegheny College student's suicide. Id. at 22-23. The court, however, also distinguished the Superior Court's ruling in this case on its facts, absolving the Allegheny College administrator on the ground that

he lacked sufficient contact and exchange of information with the deceased student to create the "special relationship" and the duty to act recognized in this case. See id. The clear message from these two rulings is that engaging troubled students creates the potential for tort liability, while disengaging from them decreases such liability.

The reluctance of college and university officials to engage at-risk students results not only from the risk of tort liability, but also from the knowledge that they will be held to a legal standard best reserved for trained medical professionals -- and best applied by those professionals. Members of campus communities who engage students know that their ability to help has limits. They know that they can make a difference by providing the kind of support and attention that may otherwise be absent from troubled students' lives. They also know that they can endanger at-risk and other students if they substitute their own judgment about the identity and best treatment of these students for the judgments of trained mental health professionals.

Such students' psychological problems are complex, and have consequences that cannot reliably be predicted. A student may seem fine one moment, but may destabilize quickly. Symptoms of

psychological disorders confuse even the most well-trained medical professionals. Laypersons such as resident advisors and coaches do not and cannot fully understand these complicated issues. They cannot be expected to unerringly plumb the often subtle or inscrutable difference between a cry for attention and a catastrophic threat. That which seems obvious to a jury acting with hindsight may seem equivocal and perplexing to a layperson who lives through the situation. Unlike trained medical professionals, most college and university staff cannot sensibly be expected to decipher and diagnose the behavior of the psychologically disturbed. Not only do these non-clinicians lack expertise to diagnose mental illness, but also, unlike mental health professionals and police, they lack legal authority to commit involuntarily persons suspected of being a threat to themselves.

This Court should therefore exercise its discretion under G.L. c. 231, § 118 to review the Superior Court decision now. That decision already adversely affects students who may be at-risk for suicide. Those effects will only multiply if review is delayed until after trial -- assuming there is even an adverse judgment to review. The Superior Court's imposition of a duty on non-clinician members of campus communities to recognize and

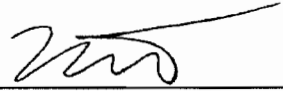
prevent supposedly "foreseeable" student suicides is disrupting the supportive campus environments that demonstratively help students grapple with their psychological problems and limit the student suicide rate. These administrators and staff should be encouraged not to distance themselves for fear of harming students or being sued, but should instead be encouraged to engage students, and to refer them to medical help.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should review and reverse the Superior Court's denial of summary judgment.

Respectfully submitted.

Sheldon E. Steinbach
Vice President
and General Counsel
AMERICAN COUNCIL
ON EDUCATION
One DuPont Circle
Washington, D.C. 20036
(202) 939-9300

By: 
Jonathan S. Franklin
Martin A. Price (#640165)*
Jake M. Shields
HOGAN & HARTSON, L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600

* Counsel of Record

February 24, 2006

Counsel for Amici Curiae

ADDENDUM

DESCRIPTIONS OF AMICI CURIAE

- American Council on Education represents all higher education sectors. Founded in 1918, its approximately 1800 members include a substantial majority of United States colleges and universities.
- American Association of Collegiate Registrars and Admissions Officers promotes standards and best practices in admissions, enrollment management, information technology, instructional management, and student services.
- American Association of Community Colleges represents 1,100 two-year institutions.
- American Association of State Colleges and Universities represents over 400 state colleges and universities.
- Association of American Universities represents 62 public and private major research universities.
- National Association of Independent Colleges and Universities represents over 900 independent colleges and universities on public policy issues before the federal government.
- National Association of State Universities and Land-Grant Colleges is the nation's oldest higher education association, and represents

approximately 210 public universities and colleges enrolling 3.1 million students in all 50 states.

- National Association of Student Personnel Administrators serves student affairs administrators at all levels.

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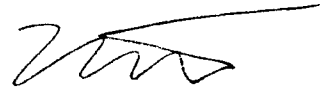
I, Martin A. Price, certify that on February 24, 2006, a true copy of the above document was served by first-class mail upon:

Daryl J. Lapp, Esq.
Edwards, Angell, Palmer & Dodge LLP
111 Huntington Avenue
Boston, MA 02199-7613

David A. DeLuca, Esq.
Murphy, Hesse, Toomey & Lehane LLP
300 Crown Colony Drive, Ste. 410,
Quincy, MA 02269-9146,

James P. Donohue, Jr., Esq.
Sloane & Walsh LLP
3 Center Plaza
Boston, MA 02108, and

Curtis R. Diedrich, Esq.
Sloane & Walsh LLP
3 Center Plaza,
Boston, MA 02108.



Martin A. Price