

Disruptive Students: A Liability, Policy, and Ethical Overview

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I. INTRODUCTION

Colleges and universities¹ long ago made the necessary accommodations and structural changes necessary to allow students with physical impairments to attend and eventually complete their studies.² Sign language interpreters are present even at graduations as an accommodation to the hearing impaired. Sight dogs, guide dogs, and dogs that assist with mobility

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¹The term “college” will be used hereinafter and is meant to include all post-high school educational institutions including universities, academies, and community colleges.

²Colleges have been subject to the provisions of the Rehabilitation Act of 1973 and its requirements for federal contractors, which include equal access to programs offered by federal contractors. 29 U.S.C. §§ 701–705 (2005) which provide, in part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance

The act was often referred to as the Vietnam Veteran’s Rehabilitation Act, because it was passed with the backdrop of ensuring that Vietnam-era veterans receive reasonable accommodations in the use of government programs and facilities. Colleges had already made substantial adjustments and created infrastructure that was suited to managing the more universal application of the Americans with Disabilities Act (ADA) passed in 1991, 42 U.S.C. §§ 12101–12213 (2005). For details on the scope of ADA coverage, see 28 C.F.R. §§ 36.102–36.104 (2005). For details on who is afforded ADA and Rehabilitation Act protection, see 28 C.F.R. §§ 36.104 (2005), although see *infra* notes 33–34 and accompanying discussion for the limitations on definitions and scope under the Act itself.

and impairments are part of the college landscape.³ Students with physical impairments enjoy a full range of accommodations. Wheelchair basketball is now a varsity college sport.⁴ Students with the so-called “invisible disabilities,” such as Attention Deficit Disorder, or ADD have also become a part of college and university life.⁵ Their disorders are documented, filed with the appropriate student office, and handled with discretion by professors and staff.⁶ Extra time and separate facilities have become routine examination procedures for students with Attention Deficit Disorder (ADD).⁷ In fact, the

³See the guidelines for assistance animals, at <http://www.usdoj.gov/crt/ada/qasrvc.htm> (last visited Apr. 8, 2006).

⁴Welch Suggs, *Varsity with an Asterisk*, CHRON. HIGHER EDUC., Feb. 13, 2004, at <http://chronicle.com/prm/weekly/v50/i23/23a03501.htm>. For example, the sport can be found at the University of Illinois.

⁵Estimates are that from 0.5 to 5 percent of college students, or from 65,000 to 650,000 students, have ADHD. However, the anecdotal and statistical evidence about college programs is fairly limited. Some colleges offer no assistance and others offer tutors, notetakers, and, as noted in the text, extra time for exams and quizzes. Elizabeth F. Farrell, *Paying Attention to Students Who Can't*, CHRON HIGHER EDUC., Sept. 26, 2003, at <http://chronicle.com/prm/weekly/v50/i05/05a05001.htm>.

⁶For example, at the University of Florida, there is a Disability Resources Office that handles the student filings as well as the accommodations for those students who have filed with the office as having a disability. There is also an Americans with Disabilities Compliance Office at the university to handle complaints from students who are using the Disability Resources Office. See <http://www.ada.ufl.edu> (last visited Apr. 8, 2006). The office and other agencies in the state publish a significant number of guidelines designed to answer questions and provide disclosure to students of their rights and university policy. For example, the *Resource Guide to Programs and Services for Students with Disabilities Attending State Funded Community Colleges in Florida* was printed in 2004. Likewise, there is a handbook for those who provide the services for and work with students with disabilities. See, e.g., UNIVERSITY OF FLORIDA, FACULTY GUIDE: PROVIDING SERVICE AND ACCESS TO STUDENTS AND EMPLOYEES WITH DISABILITIES IN HIGHER EDUCATION: EFFECTIVE AND REASONABLE ACCOMMODATIONS (4th ed. 2004). Both manuals are available at http://www.ada.ufl.edu/publication/faculty_guide.htm (last visited Apr. 8, 2006). For a full discussion of the types and extent of assistance required, see U.S. DEPARTMENT OF EDUCATION, AUXILIARY AIDS AND SERVICES FOR POSTSECONDARY STUDENTS WITH DISABILITIES: HIGHER EDUCATION'S OBLIGATIONS UNDER SECTION 504 AND TITLE II OF THE ADA (2000), available at <http://www.ed.gov/searchResults.jhtml?q=Americans+with+Disabilities+Act+1990&odq=Americans+with+Disabilities+Act+1990&st=31&>.

⁷See *supra* note 5. There are occasional dust-ups over ADA protections. For example, the University of California (UC), Berkeley and Davis campuses, settled a lawsuit brought in federal district court by several of its hearing-impaired students over its policies on providing interpreters for deaf students. The settlement reflects the refined nature of the ADA provisions and compliance. UC agreed to drop its “three strikes you’re out” policy on student reservations for interpreters. The policy had permitted the termination of interpreter services

SAT scores of students who were allotted extra time for that exam on the basis of disability are no longer tagged with the extra-time flag.⁸

However, the issues of disability and accommodation continue to evolve as more gray areas of the applicable laws emerge.⁹ Issues, such as the disruptive student or the student who verbalizes violence or includes threats of violence as part of an assignment, are emerging as an area of faculty concern.¹⁰ Some of these students enjoy protections under the Americans with Disabilities Act (ADA), and have filed with campus disability offices. Protocol, processes, and procedures for exams and physical impairment are now well established. But registration with the appropriate campus office and routine and reasonable accommodations do not address all faculty obligations and concerns. What are the faculty member's obligations to such students when accommodations translate into a loss of control of the classroom or loss of lecture or discussion time? What are faculty rights when they have a fear for personal safety? How should professors respond to odd behavior? What should we do when we find a student's comments to be off the wall? Do we take action or do we assume, as most of

if the student made a reservation for such services, did not use the services, and failed to cancel forty-eight hours prior to the time in the reservation. Also, UC officials agreed to have interpreters wait fifteen minutes instead of ten minutes for students who had reserved interpreters for class and were to meet the interpreters at their classes. UC also agreed to have a panel review its accommodations on campus telephones, fire warning devices, etc. and implement panel recommendations. The suit, *Siddiqi v. Regents*, was filed in 1999, and it was settled in 2002. Michael Arnone, *U. of California Settles Federal Lawsuit*, CHRON. HIGHER EDUC., Nov. 22, 2002, at <http://chronicle.com/prm/weekly/v49/i13/13a02802.htm>.

⁸Eric Hoover, *Removing the Scarlet Letter*, CHRON. HIGHER EDUC., July 26, 2002, at <http://chronicle.com/prm/weekly/v48/i46/46a04101.htm>.

⁹Experts in higher education rank dealing with disability issues as one of the top five issues for the next five years. One law professor notes, "Elementary and secondary schools are already accommodating many students with learning disabilities. Overly ambitious parents will increasingly demand similar treatment from colleges as a way to give their kids an edge." *Pressing Legal Issues: Ten Views for the Next Five Years*, CHRON. HIGHER EDUC., June 25, 2004, at <http://chronicle.com/prm/weekly/v50/i42/42b00401.htm>.

¹⁰See Thomas Bartlett, *Taking Control of the Classroom*, CHRON. HIGHER EDUC., Sept. 17, 2004, at A8. Since the time this article was authored, the tragedy, with the loss of 33 lives, occurred at Virginia Tech University. Student Cho Seung-Hai had written assignments for his courses that had caused concern among fellow students and faculty. Campus security had been involved with Cho because of complaints about his inappropriate contact and comments. Cho engaged in a shooting spree across the campus on April 16, 2007. The spree ended when he took his own life. Professor: Shooter's Writing Dripped with Anger, www.cnn.com/2007/US/04/17/vtech.shooting. (hereinafter referred to as CNN Report).

us do, that the behavior is annoying, but innocuous? In this era of hidden disabilities and mounting rage, ignoring or minimizing such behaviors can result in tragedy. For example, Robert Flores, the nursing student who shot and killed three of his professors at the University of Arizona, was universally described by his fellow students and those faculty members who did not become his victims as “obnoxious and loud” in class.¹¹ Mr. Flores was a veteran with emotional, family, and stress challenges that were common knowledge among the nursing school faculty. But, he was not registered with the University of Arizona student disability officer for any diagnosed or disclosed disabilities. His in-class behavior was, however, a signal, one that proved to be fatal in its oversight. Perhaps the oversight stemmed from a lack of clarity on what can and should be done with the disruptive student.

James Kelley, a graduate student in English at the University of Arkansas at Fayetteville, shot and killed his professor who, just a week earlier, had failed Kelley on his comparative literature exam. He too was described as a disruptive student, but, again, there was no ADA filing and, as a result, no accommodation procedures in place. Again, as in the Flores situation, there were signals in his behavior that were also ignored or dismissed because of the difficulty of understanding what should have been done and what legal rights faculty had in their treatment of this student.¹²

While the outcome in these two cases is extreme, they give us pause as we reflect on the increasing amount of disruptive behavior in college classrooms.¹³ Coping with such behaviors in a practical and legal fashion is not just a challenge. This area of the disruptive student presents a legal void that requires exploration and discussion. Key questions that arise in these types of situations and in dealing with these types of students are: (1)

¹¹Scott Smallwood, *The Deadly Risk of Giving an F*, CHRON. HIGHER EDUC., Nov. 15, 2002, at A12.

¹²Piper Fogg, *Are Professors Protected?*, CHRON. HIGHER EDUC., Nov. 15, 2002, at A13. Again, a faculty member and department chair at Virginia Tech described her concerns about Cho as follows: “The threats seemed to be underneath the surface. My argument was that he seemed so disturbed that we needed to do something about this. I just felt I was between a rock and a hard place.” CNN Report, *supra* note 10.

¹³*See, e.g.*, Elaine Showalter, *Taming the Rampant Incivility in Academe*, CHRON. HIGHER EDUC., Jan. 15, 1999, at B4; Jeffrey R. Young, *Sssshhh! We’re Taking Notes Here*, CHRON. HIGHER EDUC., Aug. 8, 2003, at A29. While these two cases of murder may seem extreme, there are others that did not receive similar press coverage. Campus violence, particularly murders on campus, has increased at a shocking rate. For more information on campus crime, types and rate, go to www.ope.ed.gov/security (last visited Apr. 8, 2006) for a summary of the latest campus crime statistics. There appears to be an anger/violence tempest in the campus teapot.

whether the student is indeed entitled to ADA protections and what those protections must be, (2) what the rights of the faculty member and students in a class with a disruptive student are, (3) what liability a college might have for its failure to take appropriate steps to manage the disruptive student, and (4) what steps colleges and their faculty members can take, legally, to minimize disruption and risk. As is generally the case in a discussion designed for a journal of applied knowledge, these questions emerged as part of a classroom experience. The purpose of this article is to use that experience as the backdrop for discussion of these emerging issues that will serve to bring together issues of federal civil rights protection under the ADA as well as premises and tort liability of colleges for their actions or inactions related to the disruptive or expressive student.¹⁴ Section II covers the factual issues that led to this exploration. Section III discusses the legal rights of the disruptive student under both state and federal law. Section IV covers the college's liability for student conduct, including the issue of foreseeability. Finally, Section V offers a discussion of managing the disruptive student, including practical tips and suggestions.

II. THE FACTUAL BACKDROP: THE CLASSROOM EXPERIENCE THAT RAISED THE KEY ISSUES

During a recent semester, a particular male student became problematic because of his penchant for blurting out inappropriate things at key points during lectures or class discussions. Adding to the complexity of the situation was the student's marked speech impediment that necessarily resulted in higher levels of tolerance for the remarks because of an unwillingness to dismiss too readily his thoughts and ideas.¹⁵ While the

¹⁴The term "expressive student" is a term of convenience used hereinafter as a means of referring to those students whose contributions, whether oral or written, give faculty members pause, for either their violent or bizarre nature.

¹⁵It may seem easy in hindsight to read of this student's behavior and suggest that the instructor should have banished the student from the classroom. However, the focus of this piece is not on the disruptive frat member who serves as class clown. This piece focuses on those situations in which physical, developmental, and other mental conditions are present but not necessarily documented via the appropriate jurisdictional offices at a college. This discussion does not focus on students who lack emotional intelligence or maturity. This piece focuses on situations and students in which there are factors at play beyond just inappropriate behavior. "Are you a virgin?" from a fraternity member warrants direction to the door. The

constant and inappropriate interjections did not reach the level of Tourette's Syndrome, and hence ADA protections, the prattle became almost a blockade of sorts to serious intellectual exploration and interaction.

The student's behavior began innocuously enough with lengthy quotations from the writings of humorist Dave Barry. Of course, the quotations had nothing to do with the lecture or the material being covered in the course. The student's behavior deteriorated with comments such as "Are you a virgin?" He also had nonverbal types of distracting conduct. He played games on his Palm Pilot. He picked his nose and ate it. He fell out of his chair. He passed gas loudly, then laughed out loud. During exams, he would leave without asking permission. One day, when perhaps he crossed the line between inane behavior and behavior demanding counseling, he sat with his back to the instructor for the entire lecture and had an elaborate conversation with himself, including wild gestures. The instructor's patient tolerance of the student's continual interruptions cost her dearly in terms of class and lecture time.

As is usually the case in gray areas, there are no applicable laws to those who quote Dave Barry at inappropriate times and do not understand the meaning of manners and propriety.¹⁶ Likewise, a speech impediment is accommodated by simply allowing the student to speak, if indeed such is considered a disability. However, the overarching issue that emerges is whether the inappropriate behavior is simply annoying or represents the tip of the iceberg. As noted earlier, the murderous violence visited upon faculty members at two campuses followed what seemed to be a similar pattern of behavior—bizarre classroom interaction by the student. Does the propensity to disrupt on such a continuing basis signify deeper issues and emotional problems that are signals for future, possibly violent, behaviors? Further, what are the rights of the faculty member in the case of

same comment from a student with physical and speech disabilities presents a more complex situation. Further, there are the parameters of disability harassment issues; see <http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> (last visited Apr. 6, 2006) for more information about this issue and the interaction of peers and instructors with those who have disabilities.

¹⁶There are guidelines on the so-called "hidden disabilities," but many of the examples focus on issues, such as kidney disease, with only limited references to learning disabilities and no references to the relationship between disabilities and disruptive behavior. See <http://www.ed.gov/about/offices/list/ocr/disabilityresources.html> (last visited Apr. 6, 2006) and <http://www.ed.gov/about/offices/list/ocr/transition.html> (last visited Apr. 6, 2006) for a list of the resources available for dealing with such disabilities in postsecondary education, as well as a discussion of basic issues.

the disruptive student? What are the rights of the disruptive student's classmates? And, finally, what are our obligations, ethical and otherwise, to these students? How do we manage the student who crosses that fine line between sanctions and discipline and accommodation?

III. MANAGING THE DISRUPTIVE STUDENT: A RIGHTS PERSPECTIVE

A. The Institution's Administrative Law

Because of the administrative agency microcosm that is a college, the first step in managing the disruptive student is checking and applying college policy. Policies on managing disruptive students vary significantly from college to college. Because the disruptive student illustration here occurred within the Iowa system of higher education, the two policies of the University of Northern Iowa (UNI) and the University of Iowa are highlighted here. However, there are varying policies and trends from other colleges. One trend that emerges quite easily from the anecdotal look at such policies is their fairly typical trait of offering little definitive guidance for faculty members. Two examples of faculty policies appear here, but the policies for any college can be obtained by going to the college Web site and, using the search device, plugging in the term "disruptive."¹⁷

The first example, from the UNI's policy regarding disruptive students is an example of one of the more detailed disruptive student policies. Section 2(a) of the UNI's Uniform Rules provides:

Any person—student, member of the faculty or staff, or visitor—who intentionally commits, attempts to commit, or incites or aids others in committing any of the following acts of misconduct shall be subject to disciplinary procedures by the university as hereinafter provided:

1. Obstruction or disruption of teaching, research, administration, disciplinary procedures, or other University or University-authorized function or event.¹⁸

The regulation does not provide a definition for what constitutes an "obstruction" or "disruption." This definition omission is fairly typical of

¹⁷The term is the common language of both the courts and colleges and universities.

¹⁸See <http://www.uni.edu/pres/policies/303.shtml> (last visited Apr. 6, 2006).

such policies.¹⁹ The definition of disruptive is largely left to the discretion of the instructor. Some policies offer solutions to disruptive behavior. The published policy of the University of Iowa, found in its “Policies Affecting Students” Section II(A)(4), provides:

In a classroom or other instructional setting, willful failure to comply with a reasonable directive of the classroom instructor or other intentional conduct that has the effect of disrupting University classroom instruction or interfering with the instructor’s ability to manage the classroom.[sic] When disruptive activity occurs, a University instructor has the authority to determine classroom seating patterns and request that a student exit the classroom, laboratory, or other area used for instruction immediately for the remainder of the period. Instructors who impose a one-day suspension are asked to report the incident to appropriate departmental, collegiate, and Student Services personnel.²⁰

¹⁹It is also consistent with the field of ADA—neither disability nor accommodation is defined as part of the statutory scheme with reliance on case-by-case agency and judicial interpretations and applications. The statutory definition is:

- (2) Disability.—The term “disability” means, with respect to an individual—
 (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 (B) a record of such an impairment; or
 (C) being regarded as having such an impairment.

Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2005).

EEOC regulations do provide more specifics. 29 C.F.R. § 1630.2(h)–(j)(1)(ii) provides:

(h) Physical or mental impairment means:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
 (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
 (i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
 (j) Substantially limits—
 (1) The term substantially limits means:
 (i) Unable to perform a major life activity that the average person in the general population can perform; or
 (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

²⁰University of Iowa, Division of Student Services, Policies Affecting Students, at <http://www.uiowa.edu/~vpss/policies/ii.html> (last visited Apr. 8, 2006).

Again, there is no definition of “disruptive activity.” Other policies are even briefer in definition and guidance. The policy from Arizona State University (ASU) on “disruptive students” is stunningly curt:

An instructor may withdraw a student from a course with a mark of “W” or “E” when the student’s behavior disrupts the educational process. Disruptive classroom behavior for this purpose is defined by the instructor.²¹

However, ASU has state statutory backing for its policies in that disrupting campus activities is a specific crime.²² In addition, ASU offers substantial procedural guidance for instructors on how to react to, document, and proceed with a disruptive student.²³ That discretionary element for defining “disruptive” appears to draw on the substantial body of case law that entrusts colleges with the administrative agency role of making findings, so long as those findings are encased in due process and are not arbitrary and capricious.²⁴ The due process rights stem from students’ contractual rights on campuses.

B. The Student’s Contractual Rights

Clear judicial authority establishes that students have contract rights in their education and standing in the campus community.²⁵ The contract

²¹STA 104–01, at <http://www.asu.edu/aad/manuals/ses/ses201-10.html> (last visited Apr. 6, 2006). The disruptive standard is also part of the Student Code of Conduct. ARIZONA BOARD OF REGENTS, STUDENT CODE OF CONDUCT (2004). Policies 5-301 through 5-308, at http://www.abor.asu.edu/1_the_regents/policymanual/index.html#5 (last visited Mar. 10, 2006).

²²ARIZ. REV. STAT. §§ 13–1502, 13–2911 (2007). The instructor must write a memo to the Department of Public Safety detailing the disruptive behavior, and an investigation begins, which may or may not yield criminal charges.

²³There are two memos from legal counsel for the university with step-by-step guidelines on handling disruptive students. See <http://www.asu.edu/aad/manuals/sta/sta104-02.html>; <http://www.asu.edu/aad/manuals/ses/ses201-10.html> (last visited Apr. 8, 2006). There are also guidelines from the campus Department of Public Safety and often individual college guidelines for instructors that offer numbered steps on how to proceed with a disruptive student, as well as suggestions for putting behavior standards in the course syllabus. See <http://www.asu.edu/aad/manuals/sta/sta104-02.html>; http://www.asu.edu/provost/asenate/documents/disruptive_students.htm (last visited Mar. 10, 2006).

²⁴See *infra* notes 28–32 and accompanying text.

²⁵See, e.g., *Merrow v. Goldberg*, 672 F. Supp. 766, 774 (D. Vt. 1987). “[B]etween a student and a college there is a relationship that is contractual in nature” (citing *Wilson v. Illinois Benedictine Coll.*, 445 N.E.2d 901, 906 (Ill. 1983)).

relationship between student and college is not one of a strict commercial nature but one that offers students rights while recognizing the rights of the institution to establish standards of behavior in order for those rights to continue.²⁶ Part of those contractual rights includes the right of procedural due process prior to the loss of standing, such as the imposition of a penalty, suspension, or expulsion.²⁷ One of those rights is the requirement of affording due process prior to the loss of standing. In honoring that commitment to factual basis and due process, there is a somewhat standardized procedure for handling disruptive students that emerges across college policies, even those that are unwritten. The key elements of the presence of witnesses and documentation are important in establishing the legal justification for removal of a disruptive student. Documentation comes through the testimonials of more than just an irritated instructor. The key to withstanding a challenge by a disruptive student is establishing that the disruption was a common experience. The other students in the class can be used as witnesses and can also be used as a means for raising the

²⁶In *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975), the court reversed a finding of a nearly \$90,000 award to a graduate student for his expulsion and denial of a degree on the grounds that the trial court had held too firmly to the notion that there is a commercial context contract between the student and the college. However, the court indicated that contract law is but a starting point and can be artfully interwoven with other legal rights and obligations imposed by other than contractual relationships.

It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past *parens patriae*, and now include private associations such as church membership, union membership, professional societies; elements drawn from "status" theory, and others The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.

Id. at 514 F.2d 626.

²⁷See *Goss v. Lopez*, 419 U.S. 565 (1975). For more background on this issue, see Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 291 (1999); Edward J. Golden, *College Student Dismissals and the Eldridge Factors: What Process is Due?*, 8 J.C. & U.L. 495 (1991); Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 837 (1997); Scott R. Sinson, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195, 196 (1997).

concern if they are asked to talk with department chairs or deans about the behavior. They can also sign statements or even send letters or e-mails to serve as documentation that the instructor's definition of "disruptive" is not a hypersensitive one. Perhaps more importantly, the instructor can create factual foundation by involving administrators as part of building the due process case. In the factual pattern presented here, the instructor took her concerns to both the associate dean and department head, who were both helpful and certainly sympathetic. The department head's presence in the instructor's class for one session was an appropriate first step in handling the situation, but, much like a temperamental car taken into a mechanic for assessment, the student was unusually calm that day and offered only some of his typical behaviors that the department head also found to be disruptive.

However, another component of due process in the student/college relationship, the substantive portion, is that the campus rules must be stated clearly, including adequate definitions, so that students are able to gauge their standards and behaviors according to definitive rules. In *Soglin v. Kauffman*, the court held that the suspension of a group of students was invalid, because the campus rules on both demonstrations and what constituted disruption of campus activities were not made clear prior to the time of the students' activities and the resulting charges and ultimate disciplinary actions.²⁸ The students had engaged in an antiwar protest that centered on interfering with Dow Chemical's recruitment of graduating seniors for employment. They were charged for their door blockages and other interferences with the interviews processes by the administration alleging violations of campus policies relating to speakers.²⁹ The case

²⁸*Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969).

²⁹*Id.*

We must return to the Vietnam War era on the campus to find cases related to "disruptive" student behavior. The students were charged with disruption based on the following description and tie-in to one campus rule on speakers. The litany of charges is astonishing in length, particularly when one considers the charges did not hold up:

'I. Intentionally, denied to others their right to interview for jobs with the Dow Chemical Corporation and to carry out that purpose did: 'a. Intentionally, physically obstruct and block the hall and doorways of the first floor of the Commerce Building; 'b. Intentionally deny to persons who desired to interview with Dow Chemical Corporation their right to do so; 'c. Intentionally deny to others their right of ingress and egress through the hallway; 'd. Intentionally deny to other University students and other members of the University community their right to attend and conduct classes;

appears to be one in which the violations alleged did not fit the crimes committed by the students. While there is some judicial authority to support the notion that a college may discipline “disruptive” students, the definition of what constitutes disruptive conduct must be a campus rule that is clear and known to the students.³⁰ Without clear and definitive rules

‘e. Intentionally deny to other University students and other members of the University community their right to carry on University operations in offices of the Commerce Building.

‘II. Intentionally incited and counselled others to deny to others their right to interview for jobs with the Dow Chemical Corporation and to carry out that purpose did intentionally incite and counsel others to: ‘a. Physically obstruct and block the hall and doorways of the first floor of the Commerce Building; ‘b. Intentionally deny persons who desired to interview with Dow Chemical Corporation their right to do so; ‘c. Intentionally deny to others their right of ingress and egress through the hallway; ‘d. Intentionally deny to other University students and other members of the University community their right to attend and conduct classes; ‘e. Intentionally deny to other University students and other members of the University community their right to carry on University operations in Administrative offices of the Commerce Building.

‘III. Intentionally refused repeated requests to move and to unblock the hall and doorways of the first floor of the Commerce Building for the purpose of denying to others their right to interview for jobs with the Dow Chemical Corporation with the result that: ‘a. Other University students were denied their right to interview with Dow Chemical Corporation; ‘b. Other University students and members of the University community were denied their right to ingress and egress through the hallway; ‘c. Other University students and members of the University community were denied their right to attend and conduct classes; ‘d. Other University students and members of the University community were denied their right to carry on University operations in the offices of the Commerce Building. ‘All of the foregoing constituting: ‘1. Misconduct, as well as ‘2. A violation of Chapter 11.02, and 11.15 of the University Policies on Use of Facilities and Outside Speakers.’

Id. at 981–82. Chapter 11.15 of the Laws and Regulations of the University of Wisconsin provides:

Those who attend a speech or program sponsored by student organizations, University departments, or other authorized groups, have the duty not to obstruct it, and the University has the obligation to protect the right to listen or participate.

Id. at 982 n.1.

Detail was not the issue, nor was documentation. The key was whether the students should or would have known from the campus rules that they applied to the interview process and not public speech events.

³⁰Fellheimer v. Middlebury Coll., 869 F. Supp. 238 (D. Vt. 1994) (holding that the university rule forbidding “disrespect of persons” was not vague). However, the disrespect (translate disruptive) conduct engaged in here was a sexual assault by a male student against a female student. There were criminal charges filed in the case, but the case was declined for criminal

on “disruptive conduct” and its implications, the college is left to follow due process in a procedural sense only. The result is that the instructor finds herself in search of some definitive authority on campus who can state unequivocally, meaning that they too will back up the instructor, that the behavior is disruptive.³¹

The next step in due process in this particular situation involved the more centralized offices on the campus, such as the office for student resources, student judicial affairs, student conduct, student counseling, or disability offices. In this case, the campus mental health center’s reaction, when notified of the student’s presence and behavior and the instructor’s concerns, was that while his presence would raise an “orange flag,” his actions did not yet rise to the level of “red flag” in terms of violent behavior.³²

The instructor was left with behavior that was clearly disruptive in a classroom sense, but did not enjoy definitive support from the campus administration in terms of legal support for removal. Those in the central administration, as in any college, are coping with legitimate concerns regarding both definitional and disciplinary due process issues as well as ADA rights. Those additional rights of the students further complicated the situation.

C. Student Rights Under the ADA

If a student displays erratic behavior that an instructor suspects is a form of mental illness, is the necessity for “reasonable accommodation” under the ADA triggered?³³ With a mentally ill disruptive student of the magnitude

prosecution under Vermont law because of the issue of alleged consent. In short, the conduct was something more than “Are you a virgin?” The conduct went on to provide an answer to that question in a *fait accompli* mode.

³¹It is important also to note that there are the contract rights of other students in the classroom. Those contract rights include an atmosphere that is conducive to learning. For a complete discussion of those rights and the overall contractual relationship between college and students, see ROBERT BICKEL & PETER LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999).

³²The “orange flag” behavior indicated was that he had stalked an instructor on campus but had not physically assaulted her. He had been approached by public safety and had stopped stalking that individual. In hindsight, had any harm resulted from the student’s presence, these contacts and inactions would be damning. Again, at Virginia Tech, students and faculty said Cho “unnerved” them. CNN, *supra* note 10.

³³Students are not required to disclose their disabilities under ADA. They must do so only to obtain accommodations for a disability. Students can elect to simply blend into campus life and

presented in this fact pattern, the most prudent accommodation would be a separate classroom, with a video simulcast of the lectures. The student's disruption would not necessarily prompt the removal of the educational opportunity, and the issue of the other students' educational experience is resolved. Instructor accommodation could be made for the student for his legitimate questions after the close of class each day. However, colleges are not required to make accommodations for students who are not registered with the appropriate office as having a disability.³⁴ In this case, the instructor is left with accommodating a disruptive student and, perhaps, allowing a potentially dangerous student to remain on campus, and all with full knowledge of campus administrators regarding the student's behavior as well as the instructor's concerns. The case represents a confluence of rights, safety, instructor discretion, and liability as rules on disruption collide with ADA protections even as procedural requirements hit both areas head on. What results from this perfect storm of rights, accommodations, and definitional obtuseness is a type of instructor's no-man's-land for the disruptive but non-ADA student. Further, an instructor who chooses removal still carries the risks of justifying and documenting that decision and must do so all within the standards of due process outlined earlier.

IV. THE INSTITUTION'S LIABILITY FOR FORESEEABLE CONDUCT OF DISRUPTIVE STUDENTS: CURRENT CASE LAW

There is always a legitimate risk that, in any given population of thousands of students, statistically there are one or two who are very capable of extremely violent behavior. There are frequently no stated official safety

abide by the same rules and policies as other students. *See* U.S. DEPARTMENT OF EDUCATION, *supra* note 6.

³⁴There is a significant amount of struggle in employment law about the rights of employers with regard to employees with mental disabilities. *See* PRESIDENT'S COMMITTEE FOR PEOPLE WITH INTELLECTUAL DISABILITIES, A CHARGE WE HAVE TO KEEP: A ROAD MAY TO PERSONAL AND ECONOMIC FREEDOM FOR PERSONS WITH INTELLECTUAL DISABILITIES IN THE 21ST CENTURY (2004), available at www.acf.hhs.gov/programs/pcpid/index.html; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS FOR EMPLOYERS ABOUT EMPLOYEES WITH INTELLECTUAL DISABILITIES (INCLUDING ADHD), available at http://www.eeoc.gov/facts/intellectual_disabilities.html (last visited Apr. 8, 2006).

measures in place should a student's removal disturb him to the point of retaliation. In this example, the instructor feared a return of "armed and angry" if the disruptive student were removed. Further, the college did not have safety measures for classroom violence.³⁵ There was no way to alert law enforcement if the student should choose such an action. Within this classroom, the instructor had no means of emergency outreach, no panic button, no phone, and as was later noted, no windows in the room that could be used for observation, rescue, or even negotiation. Given this situation, is there liability for inaction should harm result from the student who began simply as a disruption?

Existing case law offers great clarity in the issue of institutional liability for the failure to take action when there is a reasonable foreseeability of harm to others. In *Peterson v. San Francisco Community College*, a student was raped on campus in an area known to the college as one where many prior assaults had occurred.³⁶ The court concluded that the college should have taken extra precautions, because it was on notice of the dangerous nature of the area and the propensity for criminal activity:

In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.³⁷

The court also noted that warning signs for students to exercise caution are not sufficient, because they are not aware of the types of dangers. Those who administer the campus have the knowledge base for management and prevention. Students on campuses are considered "invitees" for purposes of determining the level of responsibility and liability of the college. They pay tuition, and, in effect, have been invited by the college as customers to do business. Money is exchanged for the service of education. When an entity is a business, it must provide safe premises for its

³⁵Some campuses, union rules, and statutory or regulatory provisions may require colleges to take safety precautions upon instructor complaint. Such a detailed analysis of individual state and local rights is beyond the scope of this article. This article presumes no existing state, institutional, or union rule that the instructor is permitted to invoke in situations such as the one presented here.

³⁶*Peterson v. San Francisco Cmty. Coll.*, 685 P.2d 1193 (Cal. 1984).

³⁷*Id.* at 1201.

customers.³⁸ If the business becomes aware of a dangerous situation, it must correct it.³⁹ Discussion of general premises liability for injury to patrons or invitees by other patrons or invitees, such as other guests, event ticket holders, patrons, etc., is beyond the scope of this article, but liability does exist and the standard is best summarized by a general rule and exceptions. The general rule is that business owners are not responsible for the criminal act of third parties. The exceptions include a special relationship (*parens patriae* being an example), knowledge on the part of the owner of dangerous issues or circumstances, failure to warn of dangers, and contractual assumption of a duty to protect.⁴⁰

Courts are likely to split on whether there is a contractual or special relationship between colleges and universities and their students. However, the exception categories of knowledge and duty to warn appear to fit the liability standards. If the professor with a potentially dangerous student in his or her class has reason to believe or is aware that a student may cause harm to himself or others, the college, through its agent the instructor, should correct the situation.⁴¹ This type of case, in which there is

³⁸Linda A. Sharp, Annotation, *Employer's Liability to Employee or Agent for Injury or Death Resulting From Assault or Criminal Attack by Third Person*, 40 A.L.R. 5th 1, 1(2004). It is clear that colleges have possible liability under any of the exceptions. See also PROSSER AND KEETON ON TORTS § 56 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 302(B) cmts. e & j, 314(A) 324(A), 344 cmts. f (1965).

³⁹There are three levels of care owed a person entering land. The duty to a trespasser is the lowest. One must simply not intentionally harm the trespasser. The second is to a licensee. One should give a licensee at least verbal warning of hidden dangers. The highest level of the standard of the level of care is to invitees on one's property. To an invitee, who is invited on the premises to conduct business, one must find and correct dangers that are not "open and obvious." It seems certain that a student, who is paying tuition to attend a university, would be considered an "invitee" for purposes of tort.

⁴⁰Sharp, *supra* note 38, at 1.

⁴¹See RESTATEMENT (SECOND) OF TORTS § 314A (1965) (covering the special relationships that create a duty on the parts of common carriers, innkeepers, possessors of land who hold their premises open to the public, and persons who have custody or responsibility for other persons in a manner that deprives them of the means or opportunity for self-protection); PROSSER AND KEETON, *supra* note 38, § 56, at 376–77 (stating that courts recognize special relationships between jailers and prisoners, schools and students, husbands and wives, and parents and children). For more detailed discussion of this liability, again, a discussion beyond the scope of this article, see Shanda K. Pearson, *Lack of Special Relationships Not Special Enough To Relieve Landowners From Duty in Premises Liability Actions*, 29 WM. MITCHELL L. REV. 1029 (2003). A new evolving theory in the post-9/11 era is "negligent security." Jeffrey A. Newman, *Negligent Security*, MASSACHUSETTS CONTINUING LEGAL EDUC. (2004).

knowledge or belief of harm, imposes liabilities on colleges for their failure to act on the basis of past experience and information, that is, the knowledge that an area needs additional lighting, security, or other protections because of the history of crime in that area.

The *Restatement (Second) of Torts* Section 344 addresses business premises liability when those premises are open to the public, including the presence and acts of third persons, and imposes liability for the failure to act as a reasonable person would when presented with the believed propensity of harm.⁴²

However, the definition begs the question: How does a reasonable business behave when it becomes aware that an individual with the propensity or ability to cause harm is on the premises on a regular basis? Knowledge regarding property conditions and previous crimes is different from knowledge regarding a disruptive student. However, there is some authority for the failure to take action regarding notice about the nature of a student and his or her propensities toward violence. In *Stevens v. Des Moines Independent Community School District*, Danny Stevens, a middle school student, was assaulted by another student, Shawn Harris.⁴³ Stevens and his parents sued the school district for “failure to warn potential victims of [the defendant] Shawn Harris’s violent nature, failure to control Harris, and failure to properly supervise the students.”⁴⁴ The school district’s argument was that of supervening cause. In the hypothetical case above, the supervening cause of potential injury to students would be the

⁴²RESTATEMENT (SECOND) OF TORTS §344 (1965).

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability for members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

- (a) discover that such acts are being done or are likely to be done, or give warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.

⁴³*Stevens v. Des Moines Indep. Cmty. Sch. Dist.*, 528 N.W.2d 117 (Iowa 1995).

⁴⁴*Id.* at 118. The case has its intricacies. Stevens had called Harris a “nigger” earlier in the day, and school officials had been warned of that exchange. However, Danny Stevens had been spotted beating his own head against the wall of the restroom just one week prior to the Harris/Stevens altercation. This middle school in Des Moines sounded a bit out of control in general. *Id.*

action of the tortfeasor himself.”⁴⁵ The court found that the school district could not be found a “proximate cause” of the injuries.⁴⁶ The Iowa Supreme Court reversed and remanded the case:

The fact that another student’s misconduct was the precipitating cause of the injury does not compel a conclusion that negligent supervision was not the proximate cause of [the student’s] death. Neither the mere involvement of a third party nor that party’s wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown. Nor is this a case in which the intervening conduct of the other student is so bizarre or unpredictable as to warrant a limitation of liability through the expedient of concluding, as a matter of law, that a negligent failure to supervise was not the proximate cause of the injury. . . . The events which occurred in the instant case are precisely what one would expect from unsupervised adolescents. The very risk which constituted the district’s negligence was the probability that such actions might occur. It is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.⁴⁷

Relying on the school’s experience in dealing with adolescence and its typical behaviors and reactions, the court refused to grant immunity, because such a grant was a means of removing the school and the district from their roles of providing both supervision and safety. Drawing the parallel to the college and university level is not a legalistic leap. Colleges and universities now have a series of cases of violence by students who had exhibited behaviors that were noted by faculty and classmates. These cases, from various schools across the country, highlight the need for action when disruptive behavior occurs. The decision in this Iowa case addresses the policy question. To not hold the college or university responsible because of the doctrine of intervening causation is to permit abrogation of the basic responsibility of safety for campus attendees. Further, colleges and universities are charged with some level of knowledge of the behaviors and responses of college-age young people. The disruptive behavior becomes the signal for what is now known was a typical response. If courts were

⁴⁵The hypothetical case illustrates the very crux of the matter. *Redpondeat superior* has typically been tailored to the “course and scope” of employment, but in the hypothetical case, all of the elements are met. Colleges and universities must be cognizant of the potential for liability under like circumstances.

⁴⁶*Stevens*, 528 N.W.2d at 118.

⁴⁷*Id.*, citing *Doe v. Durtschi*, 716 P.2d 1238 (Iowa 1986).

to continue granting immunity, public policy would be defeated, and the inaction mode, particularly toward disruptive students, could continue.

In fact, there is some crossover of this doctrine of liability for inaction under an assumed role into higher education. *Mullins v. Pine Manor College* follows this line of reasoning and applies it to a case in a university setting.⁴⁸ In *Mullins*, another campus rape case, “the plaintiff was raped by an unidentified assailant who was never apprehended.”⁴⁹ The court found in favor of the plaintiff by utilizing the negligence concept of due care:

We think it can be said with confidence that colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties.⁵⁰

In the case, the college had provided an expert witness who discussed the nature of safety precautions on college campuses. The security expert for the college defendant testified that he had visited eighteen area colleges and that all had taken steps to provide an adequate level of security on their campus. The expert, oddly, worked against the defendant university in the case, as he documented the extent of activities of campuses in undertaking the role of protection for students from the criminal acts of third parties. *Mullins* also suggests that, if an unbalanced student had actually caused harm, the college would be liable.

Vicarious liability theory is also another means whereby parties are held liable for the criminal and intentional acts of others. Vicarious liability has applicability to the experience with the disruptive student. Both existing and evolving case law points to increasing liability for the failure to take action when behavior points to the potential for physical eruption and criminal or intentional harm. In *Sandman v. Hagan*, a seminal case, the court grappled with vicarious liability of an employer for the failure to intervene to halt a potentially dangerous and evolving situation in the workplace.⁵¹ In the case, two coworkers were engaged in a heated exchange that a supervisor overheard but in which he did not intervene. The lack of intervention in the verbal battle of profanities turned out to be an incorrect managerial action, inasmuch as one employee took a shovel and hit the other employee

⁴⁸*Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983).

⁴⁹*Id.* at 333.

⁵⁰*Id.* at 335.

⁵¹*Sandman v. Hagan*, 154 N.W.2d 113 (Iowa 1967).

on the back of his head.⁵² What seemed to exacerbate judicial wrath in the case, and hence resulting liability, was that the shovel-swinging employee and his victim had engaged in another verbal altercation in the supervisor's presence only two weeks earlier, but no action was taken to remedy work schedules or tempers.⁵³ Knowledge coupled with inaction results in liability in a setting in which the criminal wrong is committed by a member of the community, whether at the employer's place of business or, as in the case of the disruptive student, the campus community. In the case, the failure to timely intervene in the employee dispute was the key element in the court's imposition of liability. Knowledge plus inaction are the common elements in both the education and the employer/vicarious liability cases.

In the higher education setting, the instructor would, in all likelihood, be liable if she were acting in the "course and scope" of her employment and encountered information of a developing danger. The instructor in the instant case knew, given her unique position of having represented mentally ill people before, that the student could pose a threat to others.⁵⁴ It may be her duty to rectify the situation prior to any harm occurring. Undeniably, she was acting in the course and scope of her employment, because she was motivated at least in part by a desire to serve the employer, she was acting within working hours and in a work location, and the act in question was of the type she was hired to do.⁵⁵ That action would

⁵²Referring to the shovel-swinging employee as an "s.o.b." (paraphrased for this publication) appeared to result in the assault, which left a dull impression on the other employee's mind. *Id.* at 116.

⁵³Also, we are convinced that the follow-up by the supervisor was not of a type that engenders warm feelings on the part of jury or judge. With head bleeding, the shoveled victim asked his supervisor for assistance. Said supervisor told said employee to trot down the street and use the phone booth to call for help. The court is not clear as to whether the supervisor offered a dime (the cost of phones in those days gone by of shovel-wielding employees) to the employee or whether he had to walk to the booth and pay for the call. *Id.*

⁵⁴The instructor had represented mentally ill persons in commitment hearings for two years. She has represented approximately twenty-five people, a process that included intake interviews and reviews of medical charts.

⁵⁵See *Sandman*, 154 N.W.2d at 118. The case provides that "[the] employment must be something more than the mere occasion for the fracas." In other words, simply because actor and victim were serendipitous in their placement, there must be a nexus between the employment and the tortuous act. In the instant case, it would appear that the instructor had superior knowledge and the university had an affirmative obligation to ensure the safety of its student population. They both would have been in a position to have prevented an incident in its entirety.

be teaching. The instructor had superior skill or knowledge in at least identifying the potential for harm and should have acted on it.

In *Brueckner v. Norwich University*, a court addressed liability of a higher education entity in a more nuanced situation. The question of liability focused on the administration's more limited involvement of understanding the nature of campus activity and its failure to intervene knowing the risks of those activities.⁵⁶ In the case, a military school freshman, or "rook," was the victim of several violent and harassing incidences of hazing. The court found the university liable for the actions of their upper classmen, the "cadre," because everyone on the campus was aware and understood the nature of the indoctrination that was occurring.

Here, the cadre were authorized by Norwich to indoctrinate and orient rooks through activities performed at various times of the day and night. A jury could reasonably find members of the cadre were acting in furtherance of their general duties to indoctrinate the rooks and thus within their "scope of employment" at the time of the hazing incidents of which plaintiff complains.⁵⁷

The passive continuation of current policies and activities, with an understanding of the risk, resulted in liability. In dealing with the disruptive student, many campuses have resorted to a similar type of passive involvement, a hope that no harm comes from inaction toward a student who has exhibited bizarre but not illegal or code-violating behaviors.

There is one more issue in the disruptive student liability scenario that is often the justification for inaction by campus administrators. That issue is grounded in due process and finds a hesitation to take action when a student has been accused but done nothing or, as in the case of a disruptive student, has done nothing but is viewed, based on the experience of running an institution with college-age students, as a risk or danger. Such inaction has resulted in liability even when that inaction is grounded in due process. In *Nero v. Kansas State University*, the court imposed liability on the university with relative ease for its failure to take action when university officials had knowledge about a particular individual's propensity to commit crimes or harm other students. Once there is knowledge, and the knowledge in this case is actual knowledge about a particular student and not a series of practices, inaction defines the liability.⁵⁸ In the case, an

⁵⁶*Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999).

⁵⁷*Id.* at 1091.

⁵⁸*Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993).

accused rapist was allowed to continue to reside in the dormitory pending trial. During the pendency of his trial, he raped another woman who sued for damages, claiming negligence on the part of Kansas State University.⁵⁹ Following a summary judgment for the university at the trial court level, the Kansas Supreme Court reversed and remanded the case for trial. The court concluded:

We conclude that KSU exercised its discretion to build, maintain, and operate housing units. Once that discretionary decision was made, KSU had a legal duty to use reasonable care under the circumstances in protecting the occupants of the *coed* housing unit from foreseeable criminal conduct while in a common area.⁶⁰

While the case focuses on a residence hall situation, it is not unreasonable to combine the findings on nonresidential hall activities in other cases with the heightened level of knowledge about a particular student and extend the liability of colleges from residence hall situations to more generalized campus events and classes. The *Nero* case also deals with the notion of “common area.” The assault and rape occurred in the common area of the residence halls, something considered a common area for the campus as well. Common areas include classrooms, hallways, and faculty offices (as occurred in the cases noted in Arkansas and Arizona). The *Nero* case involved a student who was in the midst of the criminal justice system and due process there. The student had been charged with rape but not yet convicted. The *Nero* court’s holding is instructive in that it imposes liability for a suspicion of propensity for harm, not an actual, factual, and due process–established danger to commit harm. The case thus provides some insight into the duty of colleges and universities with respect to members of the community under suspicion. The court held that the university was obligated to take some measures to ensure the safety of students while the accused student’s trial was pending. Under this ruling, even without a conclusive finding of guilt or propensity, an accusation is a sufficient basis for college liability in the event of a tragedy pending outcome. Given this standard, colleges and universities are liable for inaction even in uncertainty.

⁵⁹*Id.* at 770.

⁶⁰*Id.* at 780.

V. MANAGING THE DISRUPTIVE STUDENT FROM A PRACTICAL PERSPECTIVE: FACULTY'S AFFIRMATIVE LEGAL AND ETHICAL OBLIGATIONS

Given the potential for vicarious liability of colleges and universities, as well as the need for action upon suspicion, instructors need guidance on the disruptive student, those students who perhaps have the potential for inflicting harm despite, perhaps, inconclusive evidence. Even apart from the propensity for violence and the liability, there remain the contractual, ethical, and professional responsibilities of instructors to provide an atmosphere conducive to learning, one in which students can be fully engaged.⁶¹ Presently, it appears that colleges are largely relying on the judgment of instructors to not only define “disruption” or “disruptive activity,” but to decide when to take action or inaction as the appropriate response to such behaviors.

If an instructor is assigned this duty of taking appropriate steps, then those steps cannot cross the rights lines afforded under the ADA even as they seek to afford both self- and fellow student protection. Colleges have left too much liability, responsibility, and danger in the hands of instructors. The disruptive student and his or her fellow students are entitled to often conflicting rights that are further complicated by the lack of procedures, definitions, and fears, mostly related to litigation surrounding those rights. Policies and processes can remove the instructor from a position of sole adjudicator to that of initial gatekeeper for those rights and protections. In order to develop a new approach to the disruptive student that acknowledges all of the legal rights and liabilities, each college should adopt a three-prong approach for handling the disruptive student. The first prong is at the instructor level with guidance, policies, and procedures. The second prong is at the institutional level in terms of assistance through offices designated to handle students with disabilities, student misconduct, and professional counseling for students. The third prong is the public safety aspect of dealing with the disruptive student, both while in the classroom and, if expelled, safety precautions should the student decide to take action. The third prong is a type of safety plan for classrooms and violent behaviors.

⁶¹For complete information on the contractual responsibilities of colleges, see ROBERT BICKEL & PETER LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* (1999).

A. Prong One: The Instructor and the Disruptive Student

The key to helping the instructor with the nebulous definition of “disruptive student” and with the development of due-process-proof procedures for students is the development of detailed instructions. The focus on the definition of “disruptive” is futile, because no rule could possibly list the types of behaviors students could conjure up in a classroom setting. However, the processes and procedures to be followed for handling the disruptive student can be stated with great clarity. Even when colleges and universities have cut too wide a swath in their disciplinary processes and sanctions, clarity and consistency in process have proved to be protections. Erring on the side of taking action appears to be justified on the basis of the case law. Taking action within clearly defined and gradually increasing step-by-step processes affords immunity for any liability for action. If these instructor-level processes are in place, it is possible that the college may not be required to get involved, because there is the hope of self-correction on the part of the student. In this regard, instructors are able to follow one of the tenets of ethical confrontation: go first to the parties involved and seek resolution.

A great deal has been written about the disruptive student, complete with instructions for instructors on how to proceed. In fact, the problem of disruptive students or fearful professors is centuries old; the demonstrations of disruptive students have, however, changed to make us more fearful.⁶² The key to effective management of the disruptive student is to act before the disruptive student acts. Step one is putting guidelines in one’s syllabus about appropriate behaviors. In eras gone by, such discussion, standards, and detailed explanations were not necessary. However, these

⁶²One expert on student behavior offers the following historic perspective:

In the 13th century, professors at the University of Bologna were so terrorized by their students—who beat them up if they didn’t like their grades—that they formed guilds to protect themselves.

In the United States, in the 1820s, there was the “Bread and Butter” rebellion at Yale University. Students, distressed by demanding classes, started throwing food at professors in the dining hall and beaming them with plates and silverware that they tossed out of windows. They also took a fancy to cannonballs, which they rolled—in the dead of night—through the dormitories, where their professors were sleeping.

Alison Schneider, *Insubordination and Intimidation Signal the End of Decorum in Many Classrooms*, CHRON. HIGHER EDUC., Mar. 27, 1998, at <http://chronicle.com/prm/che-data/articles.dir/art-44.dir/issue-29.dir/29a01201.htm>.

are different times and the incident that sparked this writing is an example of the degradation of classroom decorum. Self-correction is possible but not without detailed rules and discussion. For example, a memo from legal counsel at ASU outlines specifics that should go into the syllabus, including references to all policies on disruptive behavior:

Whenever possible (i.e., early and often), outline and discuss what is acceptable and what is not.

- You can ask students not to interrupt in class
- You can designate the instructor as leading the discussion (deciding who can speak, and when)
- You can limit the topic of discussion to matters you deem relevant to the class

Include a notice about the campus policies on the syllabus. For example:

Students are required to read and act in accordance with university and Arizona Board of Regents policies, including:

The Academic Integrity Policy: <http://www.asu.edu/studentlife/judicial/integrity.html>

The Student Code of Conduct: Arizona Board of Regents Policies 5-301 through 5-308: http://www.abor.asu.edu/1_the_regents/policymanual/index.html#5

The Computer, Internet and Electronic Communications Policy <http://www.asu.edu/aad/manuals/acd/acd125.html>.⁶³

A university official responsible for handling student misconduct charges offered the following guidance for instructors. What is striking is the very basic nature of the rules and instructions for appropriate classroom behavior. However, the rules were developed by a university official responsible for handling disciplinary cases and who was offering the rules as a means of avoiding the misconduct cases she must handle. Her message, as reflected in the following list is clear: establish the rules and expectations up front and never assume something is too basic to state.

Set Behavioral Standards and Clear Expectations

- 1) Establish clear academic and behavioral standards.

⁶³See www.asu.edu/vpsa/safety/disruptivestudents.doc (last visited Apr. 8, 2006).

1. Publish the academic standards for your course in the syllabus. Include grading procedures, tests and assignment schedules, attendance requirements, etc.
2. Indicate that academic integrity is of primary importance and advise students to avoid situations that may compromise their performance and grade.
3. Clarify expectations for class conduct, e.g., raising of hand by student for recognition by instructor before speaking, avoiding inappropriate language or gestures, remaining reasonable during discussion of contemporary issues, etc.
4. Allow reasonable time at an initial class session to communicate class standards and to respond to questions.

Clarify and Reinforce Standards Periodically

- 2) If inappropriate or questionable behavior occurs, initially remind the entire class of standards of conduct.⁶⁴

However, as noted in the discussion of student rights, the substantive portion of due process must still be satisfied. How does a student know what constitutes disruptive? While we may not be able to provide a complete list, we can offer examples that will not just satisfy substantive due process. The list may actually serve to curb behaviors the students may have thought were acceptable prior to seeing their prohibitions in the syllabus. Three professors at Western Illinois University require their students to sign a 1,100-word contract about the course and their behavior.⁶⁵ The contract is detailed and includes the following rules:

- Avoid conversations with people around you
- Put the newspaper away before class begins
- Turn your cell phones off
- Don't study in this class for other classes; go to the library if you must study
- Don't arrive late
- If you must leave early, sit near the door

⁶⁴See <http://www.asu.edu/provost/intergroup/resources/classconduct.html> (last visited Apr. 8, 2006).

⁶⁵Thomas Bartlett, "Taking Control of the Classroom" *CHRON. HIGHER EDUC.*, Sept. 24, 2004, at A8.

- If you cannot keep awake, don't come or leave the class
- Be courteous during discussions
- No blurting out questions; wait to be called on before speaking
- Do not zip your backpacks before class is over
- Don't ask whether the instructor is covering anything important that day—every day is important.⁶⁶

There are, however, those who disagree with the detail level and simply prefer to set a tone of professionalism in the classroom, thereby shunning the delineation of behaviors and possibly planting ideas. Caroline D. Eckhardt, a professor of comparative literature and English at Penn State follows the more generic approach:

I think it would be hard to specify in the syllabus every form of behavior that is either encouraged or discouraged. If you start to make a long list, I would think that isn't the best approach. I also like to treat students like adults. They do need clear signals from an instructor on what's expected in a course, but not down to a level of detail or fussiness about that that can demean the academic endeavor.⁶⁷

Once the syllabus outlines the general obligations, there remains the day-to-day management of the class. Again, even legal counsel offers suggestions regarding this management issue:

Try to address an individual problem after class or during a separate appointment. Develop a script to facilitate this: "I see that you are raising some issues that go beyond the scope of the class discussion. I would like to continue this discussion with you [after class/during office hours] but we need to limit the class discussion to [topic]."

If a problem continues, consider ways to restructure the learning experience to work around the problem. For example, you may choose to avoid unstructured class discussions.⁶⁸

⁶⁶For a full copy of the contract, go to www.chronicle.com/weekly/documents/v51/i04/classroom/pdf. Given the experience here, add references to Dave Barry monologues, inappropriate questions, self-monologues, and personal hygiene. Or, consider adding a caveat on this instructor's experience, "I once saw a student eat an entire rotisserie chicken, a tub of mashed potatoes with gravy, and a two-liter Pepsi in the back of my class. He did try to belch quietly." Thomas H. Benton, *No Respect*, CHRON. HIGHER EDUC., Jan. 9, 2004, at C1.

⁶⁷Jeffrey R. Young, *Sssshhh! We're Taking Notes Here*, CHRON. HIGHER EDUC., Aug. 8, 2003, at A29.

⁶⁸See www.asu.edu/vpsa/safety/disruptivestudents.doc (last visited June 7, 2007).

Even with detailed and specific policies and their noted sanctions, problems can continue. Having accomplished step one of due process with the ground rules laid out very clearly, the instructor can proceed to step two, which includes the procedural requirements at the classroom level. Those procedures can include a warning about the behavior, in a one-on-one conference in which a colleague or a department chair is present, or in the form of a letter, a written notice. Each conversation or notice serves to lay the groundwork for removal. A court may not agree with the faculty member's definition of what constitutes disruptive behavior, but it does not substitute its judgment for that of the faculty member. A court will, however, refuse to honor sanctions if the components of due process are not present.

B. Prong Two: Involvement of the College Community with the Disruptive Student

The instructor's involvement slowly crosses over into the involvement of the college community, as the disruptive student is given the warnings. Indeed, the disruption itself has involved the other students in the class who are part of the larger campus community. The instructor should provide an administrator with notice of an evolving problem. As the experience here indicates, a department chair may be able to monitor the class and/or offer suggestions if invited to evaluate the problem either from disclosure or first-hand observation. Further, a second person's input on the situation provides more than ideas and experience. Such early interaction with administrators offers the backdrop for administrative support in going forward with action against the disruptive student. Without that support, the faculty member may face hurdles in the student's removal, as well as tenure and retention.⁶⁹

⁶⁹In one case, a faculty member's conduct that was at odds with a chair's perception proved professionally fatal. Described in *The Chronicle of Higher Education* as follows, the faculty member eventually settled her suit with the university.

In 1997, Delaware State suspended Ms. McKay with pay after an in-class dispute with students in her introductory political-science course. That September, Ms. McKay removed two students from her class, allegedly because of their repeated disruptive behavior. The students were sent to counseling with a university official and were instructed to return to class. But Ms. McKay required them to apologize before letting them return. When they refused, she canceled the rest of class that day. When the two students showed up for the next class, Ms. McKay asked a campus security officer to remove them, but he did not. The chairman of the political-science department sent Ms. McKay a memorandum ordering her to hold class, but when one of the students showed up, she canceled it again.

Depending upon the concerns of the faculty member, Prong Two requires notification and activation of a host of campus units and services, because it is at this point that the legal liability issues discussed earlier become critical (see Section I). At this point, the options for the instructor are to continue with the student with perhaps safety and other forms of support, such as counseling, or proceed with the remedy permitted at most institutions for disruption—withdrawal. At ASU, there is a step-by-step policy for faculty members to follow when they are concerned enough about a disruptive student to go forward with the remedy of withdrawal. The policy is detailed and requires significant procedural hoops prior to the official withdrawal.

Procedure

| Responsibility | Action |
|---|--|
| Instructor | <ol style="list-style-type: none"> 1. Prepare a memo documenting the student's disruptive behavior and expressing a desire to withdraw the student. 2. Forward the memo to the department chair and to Judicial Affairs in the Office of Student Life. |
| Department chair or administrative equivalent | <ol style="list-style-type: none"> 3. Review the memo. <p>If not approved:</p> <ol style="list-style-type: none"> 4. Return the memo to the instructor and indicate that the student is to remain in the class. <p>If approved:</p> <ol style="list-style-type: none"> 5. Sign the memo to indicate approval and forward the memo to the dean or the dean's designee. |

In another memorandum, the chairman stated that Ms. McKay “represents a clear and present danger” to people at the university. Ms. McKay filed suit in 1999, after she had been suspended with pay. After a special panel recommended her dismissal, Delaware State stripped Ms. McKay of tenure and fired her in March 2000.

Piper Fogg, *Delaware State Settles Bias Lawsuit by White Professor It Fired*, CHRON. HIGHER EDUC., Mar. 1, 2002, at A13.

| | |
|---|---|
| Dean or designee | 6. Approve or disapprove the memo. |
| | If not approved: |
| | 7. Return the memo to the instructor and indicate that the student is to remain in the class. |
| | If approved: |
| | 8. Sign the memo to indicate approval and forward the memo to the Records Information section of the Office of the University Registrar or to Enrollment Services at the West campus. |
| | 9. Notify the student of the decision. |
| Records Information Section or Enrollment Services at the West campus | 10. Process the withdrawal. Retain the file copy. |
| Instructor | 11. Record a grade of “E” or “W” on final class list. |
| | If student wishes to appeal the withdrawal: |
| Student | 12. Contact the dean’s office to begin the appeal procedure. |

If the instructor is not inclined to go forward with withdrawal, notification requirements begin and the offices that will be notified will also necessarily be brought in on a withdrawal process, as well for purposes of determining ADA compliance. There could also be a host of campus service organizations that should be notified and include:

- Student counseling services
- ADA compliance office
- Office of student resources for students with disabilities
- Public safety (campus police)
- Judicial affairs/student life and any other organizations responsible for student misconduct or campus issues.

Often, even when the instructor is unable to cope with the disruptions, third parties can achieve some success by counseling the student or simply reviewing the options with him or her.

C. Prong Three: Campus Safety

As in the transition from Prong One to Prong Two, there is no definitive line between obnoxious disruptive and safety-concerns disruptive. The

processes outlined to this point presume some resolution reached amicably. However, as the process moves along and as the sanctions and consequences increase, behavior may escalate, attitudes change, and tension increases. The instructor may have safety concerns. Notification of appropriate law enforcement officials becomes necessary. However, Prong Three is often the breakdown in the disruptive student process, as the cases of murder noted in the beginning illustrate.⁷⁰ Those cases began as disruptive student cases in which the victim faculty members were in conversations with chairs and other faculty members about their concerns. They made it to Prong Two, but did not realize, anticipate, or imagine the consequences from their disruptive students. They did not plan for and take steps to prevent possible retaliatory action by the affected students.⁷¹ The faculty and administrators there felt that they were simply dealing with disruptive students whose violent propensities emerged only upon negative findings, such as failure on an exam, removal from programs, or, in the case here, removal from class. We now have the lessons from these cases. One must never assume in the cases of odd and disruptive behavior that retaliation is not possible.

History teaches us from these experiences that definitive action toward the disruptive student must necessarily be accompanied by a plan of safety for the instructor, as well as the students in the class and on the campus. There is reluctance on the part of many campuses to take definitive action against the disruptive student because of the confluence of so much liability from potential ADA violations, privacy concerns about the student, and safety concerns for the student's classmates. A position paper from ASU's legal counsel offers insight into the complexity of the issue:

Colleges and universities are not required to retain or readmit a student with a disability whose behavior poses a direct threat to the safety of others. A student

⁷⁰Such processes at Virginia Tech could have provided a form of sealing the cracks through which Cho fell. Without criminal charges and/or commitment, the university did not have the appropriate forms of processes and policies in place for his removal.

⁷¹There is one additional legal constraint that often finds instructors and administrators trying to keep the information about the disruptive student close to the vest. That concern is one related to the student's privacy. Their reluctance relates to that general rule on educational privacy that one does not disclose information except to those who have reason to know. However, the disruptive student who cannot conform behavior through the use of Prongs One and Two has reached a point at which campus safety and law enforcement officials have reason to know. That discussion follows.

code of conduct which prohibits disruptive or other inappropriate behaviors may be enforced. Several administrative law decisions addressing this issue have held:

- If an individual's handicap cannot be accommodated in a way that assures a safe environment when he participates in a program, the program provider is justified in excluding him from participation;
- student suspended because of observed behaviors and opinion of psychiatric professionals that student could not abide by student code of conduct, but school told her she could seek re-enrollment with appropriate medical documentation regarding emotional stability;
- college's expulsion of student upheld as it was not based on perceived mental illness but rather on the student's actions of stalking and harassing a professor—student posed a threat to the faculty and students; and
- suspension decision was not based on traumatic brain injury disability but that student had threatened the professor after she told him he was ineligible to take the specific class as he had not taken a prerequisite course.

A fear of disruptive behavior may not be sufficient to deny readmission. For example, a college was found to have improperly denied readmission to a student after it had received medical documentation that the condition, bipolar disorder, had stabilized. However, a college may be able to set conditions for readmission.⁷²

Prong Three places colleges in a bit of a legal no-man's-land, as they process nebulous concepts and incomplete information to determine what is in the best safety interests of the instructor and college community, as well as the student. However, erring on the side of safety presents a defense to allegations related to privacy, so long as the concerns about safety are documented at the time of the disclosure and the involvement of safety and law enforcement officials.

VI. CONCLUSIONS AND RECOMMENDATIONS

Colleges have not been proactive in the development of definitive processes and procedures for handling the disruptive students. Worse, few colleges have viable safety plans to provide protection when there is discipline, expulsion, or removal of a disruptive student. Colleges need to adopt the three-prong approach outlined here, along with a comprehensive safety plan that contemplates many possible scenarios. At a minimum, instructors need policies and some definitions in their syllabi. In terms of minimum safety requirements, colleges should provide all instructors with the means to call for assistance should it become necessary as they manage their classrooms.

⁷²See <http://www.asu.edu/counsel/brief/educate3.html> (last visited Apr. 8, 2006).

While the development by faculty of ad hoc procedures for the disruptive student is laudable, the issue requires the support of college administrators and refinement of the roles of the campus offices and officers in handling the disruptive students. Colleges should develop programs for instructors that train them in the issues related to disruptive students, including training to help them to recognize the signs of danger from disruptive students.⁷³ One professor has developed the following conceptual plan for dealing with disruptive students:

Once you realize that you are going down a slippery slope and must look for mechanisms to formally limit or control a student's behavior on campus, seek legal advice every step of the way.

- Document all of your interactions with the student and have all principal parties do the same. In our case, the dean of students, the assistant dean of students, the student ombudsman, faculty members, and security-staff members documented all formal and many informal exchanges with the student. Although time-consuming, such documentation will be extremely helpful if you eventually have to impose penalties—especially if no immediate, serious infraction of any regulation has occurred.
- If you or others feel that the student may be about to provoke a major incident, meet with the principals involved, including faculty members and security-staff members, to review the student's behavior and possible responses. Then, inform the student that you are concerned about the reports of his or her conduct. Tell the student that if such reports continue, you may be forced to take formal disciplinary action based on the cumulative record. Such action, in putting the student on notice that he or she is under scrutiny, may discourage violent behavior.

⁷³Several organizations provide information and insight about mental illness among college students and offer suggestions for campus programs, interventions, and help:

- The Jed Foundation, the nation's first nonprofit group dedicated solely to reducing suicide on college campuses. The group seeks to expand the mental-health "safety net" by offering online services for students.
- Campusblues.com, a for-profit company that also uses the Internet to direct students to appropriate services on or near their campuses. In a separate venture, the site's parent company is poised to introduce a mental-health-assistance plan for students.
- Active Minds on Campus, a student-run mental-health awareness group based in Washington. The organization, founded to destigmatize mental illness, is establishing chapters on campuses nationwide.

Eric Hoover, *More Help for Troubled Students*, CHRON. HIGHER EDUC., Dec. 5, 2003, at A25.

- Finally, without neglecting other students, faculty members, and administrators, spend time listening to the troubled student. Encourage him or her to seek professional help and counseling. Often, giving a mentally ill student the opportunity to vent will go a long way toward relieving the pressure that the student may be experiencing.⁷⁴

What emerges from the specific experience that spawned this work and the body of research undertaken is that more advance planning, more detailed policies, and more coordination of efforts are needed if colleges are to deal most appropriately with the disruptive student in a manner that complies with the student's rights under ADA without compromising the safety of the campus community with the resulting liability for the college itself. This article provides a small beginning with its ideas and checklists for the instructor, as well as colleges. It is clear that the tendency is to begin at the instructor level, with course documentation and procedures that will perhaps provide a deterrent for disruptive behavior. If that deterrent is ineffective, those processes and rules provide the due process standard from which the college or university can proceed in order to take the steps necessary to ensure the safety of other students. This new attention to rules, processes, and details at the instructor level is not entirely a shift of burden. Rather, we now have the opportunity to clarify for our students new standards of professionalism and interaction that will serve them beyond their times on our campuses.

⁷⁴Kevin Drumm, *When Open-Access Colleges Enroll Mentally Ill Students*, CHRON. HIGHER EDUC., July 7, 2000, at B7. Also, suggestions for handling the troubled student can be found at www.crisisprevention.com (last visited Apr. 8, 2006).