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Liability for Student Suicide in the Wake of Eisel

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LIABILITY FOR STUDENT SUICIDE IN THE WAKE OF *EISEL*

Richard Fossey[†] & Perry A. Zirkel[‡]

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I. INTRODUCTION

Suicide among adolescents has increased dramatically in the United States during the past half century. Specifically, over the past thirty-five years, the teen suicide rate has tripled.¹ Some commentators have described the youth suicide rate as growing at an “epidemic” pace.² Indeed, it is now the second leading cause of death for teenagers,³ with adolescent boys about four times more likely to kill themselves than adolescent girls.⁴

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1. Rebecca Jones, *Suicide Watch*, 188 AM. SCH. BOARD. J., May 2001 at 16, 17.

2. See Vernon Lee Sheeley & Barbara Herlihy, *Counseling Suicidal Teens: A Duty to Warn and Protect*, SCH. COUNS., Nov. 1989, at 89.

3. Eugene C. Bjorklun, *School Liability for Student Suicides*, 106 Educ. L. Rep. (West) 21, 22 (1996).

4. U.S. SURGEON GENERAL, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999), available at <http://mentalhealth.org/features/surgeongeneralreport/chapter3/sec5.asp#conditions>.

Every suicide is a tragedy, and a young person's suicide is particularly unfortunate. Nevertheless, the teen suicide picture in the United States may not be as bad as it is sometimes portrayed. For example, the suicide rate for young people ages fifteen through twenty-four dropped significantly over the past decade.⁵ Moreover, although suicide is the second leading cause of death for teenagers, the suicide rate for young people is lower than the suicide rate for older groups of people.⁶ Suicide ranks high as a cause of death for teenagers because young people are at a low risk of death from causes that afflict older Americans, such as heart disease, cancer, and Alzheimer's disease.⁷

Among young people, a suicide sometimes takes place in the context of a negative school event—a suspension from school for example,⁸ or the receipt of poor grades.⁹ Moreover, few suicides take place at school, and students occasionally express that other students are contemplating suicide to a counselor or a teacher prior to the student actually committing the suicidal act.¹⁰ In circumstances such as these, families of student suicide victims have sued school districts, seeking to find them liable for these tragic deaths. However, prior to 1991, no court recognized these legal claims.¹¹

5. See John L. MacIntosh, Ph.D., *U.S.A. Suicide, 1999 Official Final Data*, AM. ASS'N OF SUICIDOLOGY, at <http://www.iusb.edu/~jmcintos/USA99Summary.htm> (Dec. 20, 2001) (on file with the Texas Wesleyan Law Review).

6. See *id.* In 1999, the suicide rate for persons ages 15 through 24 was 10.3 suicides per 100,000 population. *Id.* The rate for persons 25 through 34 years old was 13.5 suicides per 100,000 population, and the rate for persons in the 35 through 44 age group was 14.4 suicides per 100,000 population. *Id.*

7. See *id.* (listing suicide as the eleventh leading cause of death in the general American population after such causes as heart disease, accidents, influenza, pneumonia, and Alzheimer's disease).

8. See, e.g., *Fowler v. Szostek*, 905 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (involving a student who committed suicide after being suspended from school, pending expulsion proceedings, based on allegation of selling marijuana to two students).

9. See, e.g., *Brown v. Bd. of Educ. of Milford*, 681 A.2d 996, 997 (Conn. App. Ct. 1996) (indicating that a student's academic deficiencies were alleged to be a factor in death); *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 877 (Wis. Ct. App. 1999) (indicating that a student suicide victim was allegedly upset by five failing grades).

10. See, e.g., *Eisel v. Bd. of Educ.*, 597 A.2d 447, 449 (Md. 1991) (indicating that a school counselor allegedly knew of student's suicidal feelings shortly before death).

11. There are at least two published federal cases issued prior to *Eisel* involving suits against school districts for student suicides: see *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773 (5th Cir. 1984). The courts decided each of these cases on narrow federal grounds, without making a determination on the viability of a common-law cause of action against a school district or its employees for failure to notify parents or take other reasonable steps to avert a student's suicide. *Kelson*, 767 F.2d at 651, 656; *Flores*, 741 F.2d at 774, 779. In addition, at least one pre-*Eisel* state court has ruled on this issue. In *Gathright v. Lincoln Insurance Co.*, 688 S.W.2d 931, 932–33 (Ark. 1985), the Arkansas Supreme Court upheld summary judgment in favor of a school district's insurance carrier in a case involving an elementary school student who survived but was severely brain damaged after he hanged himself with the cord of a restroom pass key.

But in 1991, Maryland's highest court held that a school district could be held liable for a teenager's suicide if the district's professional employees knew the student was suicidal and failed to warn the parents or take other reasonable preventive action.¹² This decision, *Eisel v. Board of Education of Montgomery County*,¹³ marked the beginning of a line of state and federal court decisions in which parents and guardians sued school districts for failing to warn them or otherwise protect their child from committing suicide. As a result of *Eisel* and subsequent student suicide cases, many school districts have adopted formal suicide-prevention programs for their schools.¹⁴

In the wake of *Eisel*, few commentaries have been written about the legal significance of student suicide. Although providing broad practical advice and limited case law analysis, the professional literature lacks a comprehensive and systematic analysis of *Eisel's* common-law and constitutional tort effects.¹⁵

To fill this gap and address this question in terms of common law and constitutional liability, this Article is organized as follows.¹⁶ Part II provides a brief overview of the common law regarding liability for another's suicide and shows that courts have generally disfavored this cause of action. Section III examines the *Eisel* decision in detail. Part III(A) traces the post-*Eisel* decisions that took the same common-law path to possible liability. Part III(B) analyzes why public educators do not need to be overly concerned with common-law liability for student suicides. Part IV examines the post-*Eisel* decisions that proceeded down the alternate path of an alleged constitutional tort. Part V examines the *Armijo v. Wagon Mound Public School*¹⁷ decision and demonstrates that the court established the possibility of § 1983 liability on the part of school officials in the wake of student suicide. Part

Id. In a brief opinion, the Arkansas Supreme Court ruled as a matter of law that the district's lack of a detailed safety program did not breach a duty to the student and the alleged inadequacy of the district's safety program was not the proximate cause of the accident. *Id.* at 933.

12. See *Eisel*, 597 A.2d at 456.

13. 597 A.2d 447 (Md. 1991).

14. For useful advice to school officials about handling suicide issues in schools, see DANIEL L. DUKE, CREATING SAFE SCHOOLS FOR ALL CHILDREN 163-65 (2002).

15. For examples of articles addressing student suicide, but failing to mention *Eisel*, see, e.g., Bjorklun, *supra* note 3; Richard F. Daugherty, Ed. D., *Teen Suicide: School Liability and Select Interventions*, 146 Educ. L. Rep. (West) 599 (2000); Lana Larson Dean, Recent Development, *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997), 28 STETSON L. REV. 910 (1999).

16. This Article is limited to published court decisions arising from student suicide where the defendant was a school district and/or its employees. Thus, it does not discuss student suicide cases brought against private schools or higher education institutions. See, e.g., *Seidman v. Fishburne-Hudgkins Educ. Found., Inc.*, 724 F.2d 413 (4th Cir. 1984) (involving the suicide of a cadet at a private military school); *Klein v. Solomon*, 713 A.2d 764, 764 (R.I. 1998) (involving a suit against the university arising from suicide of college-age student); *Hoefner v. The Citadel*, 429 S.E.2d 190, 191-92 (S.C. 1993) (involving the suicide of a cadet at a private military college).

17. 159 F.3d 1253 (10th Cir. 1998).

V.A examines the pre- and post-*Armijo* cases addressing student suicide. Part V.B analyzes the unlikely probability of success under a § 1983 claim against school officials. Part VI provides a brief conclusion that educators have little to fear with regard to liability for a student's suicide.

II. THE TRADITIONAL VIEW

At common law, an individual did not have a duty to prevent another from committing suicide.¹⁸ This view was an extension of the common-law view that one has no duty to rescue another from peril.¹⁹ Some courts considered suicide to be a criminal act,²⁰ for which non-criminal parties bore no responsibility.

However, in modern society "there has been an increasing unwillingness to classify suicide as a crime, stemming, at least in part, from the growing realization that suicidal acts are often the products of mental illness."²¹ As one court pointed out, this shift in focus about the nature of suicide has had an impact on the issue of civil liability for another's suicide: "Although courts continue to bar such liability in the great majority of cases, the analysis has shifted from a focus on suicide as a criminal act to one of suicide as a separate, voluntary, and intentional act."²²

Thus, when conducting a tort analysis, many courts now consider suicide to be an intervening cause, negating liability on the part of other negligent parties.²³ As the Seventh Circuit put it in a college counselor case, "[a] plaintiff may not recover for a decedent's suicide following a tortious act because suicide is an independent intervening event that the tortfeasor cannot be expected to foresee."²⁴

However, a defendant may be liable for another's suicide when the defendant possesses a special relationship with the decedent such that

18. See *Logarta v. Gustafson*, 998 F. Supp. 998, 1001–05 (E.D. Wis. 1998) (reviewing authorities on the topic of liability for another's suicide and concluding that courts have been reluctant to impose liability in such cases).

19. See RESTATEMENT (SECOND) OF TORTS § 314 (1965).

20. For a discussion of the criminality of suicide under the English common law, see Kate E. Bloch, Note, *The Role of Law in Suicide Prevention: Beyond Civil Commitment—A Bystander Duty to Report Suicide Threats*, 39 STAN. L. REV. 929, 930–32 (1987).

21. *Logarta*, 998 F. Supp. at 1003 (citing Bloch, *supra* note 20).

22. *Id.*

23. See, e.g., *Bogust v. Iverson*, 102 N.W.2d 228, 232 (Wis. 1960) ("[S]uicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death and therefore wrongful act does not render the defendant civilly liable." (quoting C.T. Drechsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R.2d 751 (1950))).

24. *Cleveland v. Rotman*, 297 F.3d 569, 572 (7th Cir. 2002) (pertaining to suicide of tax attorney's client and interpreting Illinois law).

the defendant assumed responsibility for the decedent's well being.²⁵ Most of these cases have been limited to the therapeutic and/or custodial contexts of hospitals and prisons.²⁶ For example, in a 1960 case, Wisconsin's highest court held that a college counselor had no legal duty to warn parents or take other steps to prevent the suicide of a student, at least when the counselor lacked notice of the student's suicidal tendencies.²⁷ Likewise, in 1988 the California Supreme Court ruled that a pastor and church counselors were not liable for the suicide of an individual who had received counseling from church-sponsored, non-therapeutic counselors.²⁸

As explained below, the *Eisel* court recognized a cause of action against school authorities for failing to prevent a student's suicide based on the special-relationship exception. Essentially, the decision imposed a duty on school officials that other courts had imposed on mental health professionals.

III. THE *EISEL* DECISION

Although the American teen suicide rate rose steadily from the 1960s to the 1990s,²⁹ no court ruled that a school district could be held liable for a student's suicide until 1991. In that year, Maryland's highest court ruled that the Montgomery County Board of Education and its counselors could be held liable for failing to notify the father of thirteen-year-old Nicole Eisel that Nicole had expressed the desire to kill herself.³⁰ In essence, the court determined that school officials came within the special-relationship exception to the general rule of no liability for another's suicide.³¹

According to her father's complaint, Nicole had threatened suicide in front of classmates who passed the information on to school counselors.³² Again, according to the father's complaint, the counselors questioned Nicole about her classmates' reports, but Nicole denied

25. See, e.g., *Logarta*, 998 F. Supp. at 1004 (citing cases and noting an exception to the general rule of no civil liability for another's suicide "where a special relationship exists between the defendant and deceased justifying the creation of a duty to prevent suicide . . ."); Patricia C. Kussman, J.D., Annotation, *Liability of Doctor, Psychiatrist, or Psychologist for Failure to Take Steps to Prevent Patient's Suicide*, 81 A.L.R. 5th 167, 184-86 (2000); C.T. Drechsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R.2d 751 (1958 & Supp. 1985).

26. See, e.g., *supra* note 25.

27. See *Bogust*, 102 N.W.2d at 229-30.

28. See *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 960-61 (Cal. 1988). See also *Bellah v. Greenon*, 146 Cal. Rptr. 535, 539-40 (1978) (refusing to create a duty to breach doctor-patient relationship by disclosing to parents their daughter's confidential statements about taking her own life).

29. See *Jones*, *supra* note 1, at 16, 17.

30. See *Eisel v. Bd. of Educ.*, 597 A.2d 447, 456 (Md. 1991).

31. See *id.* at 451-52.

32. *Id.* at 449.

making any statement that she intended to commit suicide.³³ Not long after these conversations supposedly took place, a classmate fatally shot Nicole in an apparent murder-suicide pact.³⁴ The counselors denied receiving any communications regarding Nicole's suicidal ideations.³⁵

The trial court granted the summary judgment motion of the school board and counselors, concluding that, as a matter of public policy, defendants had no duty to intervene in an attempt to avert Nicole from taking her own life.³⁶

On appeal, Maryland's highest court reversed, thus preserving the case for a trial on the merits.³⁷ Acknowledging that the case was one of first impression, the court considered whether a special relationship existed between Nicole Eisel and school authorities, such that the defendants had a duty to warn Nicole's parents of Nicole's suicidal intent or otherwise take action to prevent her suicide.³⁸ The court identified six factors for determining whether plaintiffs had a viable cause of action: (1) foreseeability of harm, (2) public policy of preventing future harm, (3) closeness of the connection between the defendants' conduct and the injury, (4) moral blame, (5) burden on the defendant, and (6) insurability.³⁹

The Maryland Supreme Court noted: "Foreseeability is the most important variable in the duty calculus."⁴⁰ The court made it clear that without foreseeability, school authorities have no duty to prevent a student from committing suicide.⁴¹ The court concluded that Nicole's suicide was foreseeable because school counselors allegedly had actual knowledge of Nicole's intent to end her life.⁴² In response to the counselors' claim that Nicole denied any such intent, the court first pointed to a state social service agency view that educators should be able to recognize the higher value of peer reports, as compared to denials to counselors.⁴³ Ultimately, the court warned that "when the facts of this case are fully developed, the [trial judge] may conclude that the duty did not arise, or jurors may conclude that it had not been negligently breached."⁴⁴

33. *Id.*

34. *See id.* at 449-50.

35. *See id.* at 449 n.2.

36. *See id.* at 448-49.

37. *See id.* at 456.

38. *See id.* at 450.

39. *See id.* at 450-56. Antecedent to these factors, the court distinguished prior cases that had limited the special, custodial relationship exception in terms of the *in loco parentis* status of schools and the therapeutic overtones of their counselors. *See id.* at 450-52.

40. *Id.* at 452.

41. *See id.*

42. *Id.*

43. *Id.* at 453.

44. *Id.*

Second, the *Eisel* court determined that the state's clear policy of preventing future harm supported the imposition of a duty on schools to prevent student suicides.⁴⁵ Specifically, the court pointed to: (1) Maryland's "Suicide Prevention School Programs Act," which authorized the state education department to provide a statewide suicide prevention program in cooperation with local school districts,⁴⁶ and (2) the resulting suicide prevention program at Nicole's school, which included this advice to staff members: "Tell others—as quickly as possible, share your knowledge with parents, friends, teachers or other people who might be able to help. Don't worry about breaking a confidence if someone reveals suicidal plans to you. You may have to betray a secret to save a life."⁴⁷ Although not finding sufficient basis for a statutory duty, the *Eisel* court reasoned: "Holding counselors to a common-law duty of reasonable care to prevent suicides when they have evidence of a suicidal intent comports with the policy underlying this Act."⁴⁸

As for proximate cause, the court rejected the school district's argument that Nicole's suicide was "a deliberate, intentional and intervening act which precludes a finding that a given defendant is responsible for the harm."⁴⁹ The court pointed again to the state's suicide prevention program act, which "does not view these troubled children as standing independently, to live or die on their own."⁵⁰ Yet, the court also reiterated a caution against over-generalization by specifically stating that "when the factual skeleton . . . has been fleshed out with evidence at trial, causation may be a question for the jury, or it may develop that, as a matter of law, any causal connection has been severed by some fact, other than that death was essentially self-inflicted."⁵¹

Finally, the court applied the three remaining factors: moral blame, burden on the defendant, and insurability. Regarding moral blame, the court concluded that Maryland's suicide prevention law evidenced a community sense that counselors should intervene when they see indications that a student may be contemplating suicide.⁵² As to the burden of imposing an intervention duty, the court quickly concluded: "Certainly the physical component of the burden on the counselors was slight. [Nicole's father] claims only that a telephone call, communicating information known to the counselors, would have discharged

45. *See id.* at 453–54.

46. *See id.* at 453.

47. *Id.* at 454. The court noted the related reminders to staff members that "[o]ur counselors are trained to counsel with a youngster who is contemplating suicide" and that "[c]onfidentiality is not an issue" *Id.* at 453–54 & n.5.

48. *Id.* at 454.

49. *Id.* (citation omitted).

50. *Id.*

51. *Id.* at 454–55.

52. *Id.* at 455.

that duty here. We agree.”⁵³ As to insurability, the court pointed to Maryland legislation providing school districts and their employees with governmental immunity beyond an insurance limit.⁵⁴ Thus, the court concluded by imposing a duty of suicide prevention in cases such as the one before it would not cause any particular adverse impact on the schools.⁵⁵

As a result of the court's conclusion, the *Eisel* court held that “school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent.”⁵⁶ *Eisel* is the first decision to recognize such a duty in a school setting. However, the potential limits of this duty include the reliance on the state suicide prevention act specific to the schools; the state's, at least partial, governmental immunity defense; and the caveats about duty, breach of duty, and causation. Moreover, the opinion is not clear regarding whether the duty applies only to school counselors, as the stated holding seems to suggest, or more generally to the school's professional staff as key parts of the court's reasoning seem to imply.

The court failed to clarify what “reasonable means”⁵⁷ school authorities are required to utilize to prevent a student from committing suicide beyond simply warning the student's parents. For example, do schools have a duty to restrain a potentially suicidal student or to provide specialized counseling? The *Eisel* court failed to answer this question.

The first and limited indication of the application of *Eisel* is the trial court's decision upon remand. While not officially published and thus having no precedential value, this decision illustrates the actual application of the potential duty in this case.⁵⁸ Specifically, the jury returned a verdict for the school defendants.⁵⁹ Although the jury did not issue a special verdict, it may be conjectured that the very element of duty was missing, for the counselor reportedly testified that Nicole was very upset but never mentioned suicide.⁶⁰

In the aftermath of *Eisel*, other cases have been decided concerning the liability of school authorities for a student's suicide. One group of cases considered the common-law claims arising from a student's suicide, particularly negligence. Another group of cases analyzed the constitutional claims for failing to prevent a student from committing

53. *Id.*

54. *See id.* at 455–56.

55. *See id.* at 456.

56. *Id.*

57. *See supra* text accompanying note 11.

58. *See* Perry A. Zirkel, *Another Case of Student Suicide*, 77 PHI DELTA KAPPAN 91, 92 (1995) (citing Veronica T. Jennings, *Montgomery Schools Win Suicide Pact Lawsuit*, WASH. POST, Mar. 19, 1994, at B5).

59. *Id.*

60. *See id.*

suicide. As the discussion that follows will show, *Eisel* has not been particularly influential in either the common law or the constitutional arena. In the years that followed the *Eisel* decision, few courts have mentioned, much less relied upon, *Eisel* in analyzing the liability of school officials for the suicide death of a student.

A. *Post-Eisel Common-Law Cases*

Student suicide cases in the common-law wake of *Eisel* help to clarify the various applicable elements of a negligence cause of action against school authorities for failing to prevent a student's suicide, including the scope of the defendants' duty and the viability of their defenses. The jurisdictions have used varied analyses, but none of the pertinent decisions have even mentioned, much less relied on *Eisel*.

In *Nalepa v. Plymouth-Canton Community School District*,⁶¹ a 1994 Michigan case, Stephen Nalepa, a second-grade-child, hanged himself in his bedroom the night after seeing the movie *Nobody's Useless* at school.⁶² This film told the story of a young amputee who became so depressed that he twice tried to kill himself, one of the times by hanging.⁶³ However, at the conclusion of the film, an older boy showed him how to successfully cope with his disability.⁶⁴ The parents filed a negligence suit, claiming that the school officials breached their duty to refrain from using improper instructional materials with impressionable primary school children.⁶⁵

Michigan's intermediate appellate court dismissed the suit on two grounds. First, the court ruled that the school board members, the superintendent, and the district were entitled to absolute governmental immunity under Michigan's statutes.⁶⁶ Interestingly, Michigan legislation authorizing districts to deal with mental health issues helped the defendants in this case by showing, in the appellate court's view, that these high district officials were acting within the scope of their authority by showing such a film.⁶⁷ Second, the court dismissed the claim against the remaining defendants—the principal, teachers, counselors, and other school-based staff members—on the basis that the alleged breach of duty amounted to educational malpractice, a cause of action that the judiciary had soundly rejected.⁶⁸ In doing so, the court acknowledged that Michigan recognizes an educator's common-law liability for negligence but warned that public policy must be considered in determining the scope of the duty.⁶⁹

61. 525 N.W.2d 897 (Mich. Ct. App. 1994).

62. *Id.* at 899.

63. *Id.*

64. *Id.*

65. *Id.* at 904.

66. *See id.* at 900–02.

67. *Id.* at 902.

68. *See id.* at 904–05.

69. *Id.*

Thus, the Michigan case illustrates both the robustness of governmental immunity in some jurisdictions and the limitations on the educator's duty. Nevertheless, the factual boundaries of the case do not include notice of the child's suicidal intentions or any purported corresponding duties, such as warning the parents. Instead, the plaintiffs seemed to have argued that the defendants caused the student's suicide, not that they negligently failed to prevent it.⁷⁰

Next, in *Fowler v. Szostek*,⁷¹ a 1995 Texas Court of Appeals case, school officials suspended Brandi Nelson, a thirteen-year-old junior high student, pending expulsion proceedings, based on accusations that she had sold marijuana to two students.⁷² On the first evening of her suspension, after assuring her parents of her innocence, Brandi fatally shot herself with her stepfather's gun.⁷³ She left a note saying, "I lied[,] I love you."⁷⁴

Brandi's mother and stepfather sued the school principal and two vice-principals.⁷⁵ Their common-law claim was negligence,⁷⁶ apparently predicated on the school's failure to postpone disciplinary action pending further investigation or at least preparations.⁷⁷ Brandi's mother had urged the administrators to wait until after the impending Christmas holidays because the removal would devastate Brandi.⁷⁸ However, the appellate court never reached the details of the negligence claim, concluding instead that the school officials were protected by governmental immunity under Texas statutes.⁷⁹ The situation did not fit into either of Texas's statutory exceptions to this immunity: (1) excessive force in the discipline of students or (2) negligence resulting in bodily injury to students.⁸⁰ In discussing the second exception, the court concluded that under the facts in this case, which included an investigation, corroboration, and parental consultation, "the defendants did not owe . . . a legal duty to Brandi, once she left

70. *Id.* at 903.

71. 905 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1995, no pet.). *Fowler* is not the first published decision pertaining to a Texas school district's liability for a student's suicide. In *Flores v. Edinburg Consolidated Independent School District*, 741 F.2d 773, 779 (5th Cir. 1984), a Fifth Circuit panel ordered the dismissal of a constitutional tort suit based on a Texas public school student's suicide. A Texas state court had dismissed an earlier lawsuit filed on the same matter, ruling that the school district was entitled to governmental immunity; the Fifth Circuit dismissed the subsequent § 1983 suit under the doctrine of *res judicata*. See *id.* at 774.

72. *Fowler*, 905 S.W.2d at 338.

73. *Id.* at 340.

74. *Id.*

75. *Id.* at 338.

76. *Id.* The parents asserted a constitutional claim based on the suspension proceedings, which is discussed later in this article. See *infra* notes 225–29 and accompanying text.

77. See *Fowler*, 905 S.W.2d at 341.

78. *Id.* at 339.

79. *Id.* at 343.

80. *Id.* at 341.

the campus.”⁸¹ Thus, this case, like its Michigan predecessor, illustrates the effect of governmental immunity and indirectly indicates limitations on an asserted duty to prevent a student’s suicide in a context only marginally similar in facts to *Eisel*.

In a 1996 Minnesota case, *Killen v. Independent School District No. 706*,⁸² Jill Dibley, a ninth-grade student, killed herself at home with a loaded gun stored in her parents’ basement. Jill’s school did not have a formal suicide prevention policy in place.⁸³ Although a school counselor warned Jill’s parents that she had expressed suicidal thoughts and recommended counseling, he allegedly received but did not share information that Jill had made subsequent and more specific suicidal statements.⁸⁴

Jill’s parents sued, claiming that the district was negligent for failing to develop and implement a suicide prevention policy and that the counselors were negligent for failing to notify them of her subsequent suicidal statements.⁸⁵ The appellate court upheld the dismissal of both claims: the first based on Minnesota’s governmental immunity for discretionary functions, and the second based on its common-law immunity for public officials’ discretionary acts that are not willful or malicious.⁸⁶

One of the three appellate judges dissented with regard to the second ruling, reasoning that the counselor’s formulation of criteria for determining when parental notification was necessary constituted a discretionary act, but that his implementation of these criteria was a ministerial act, and thus, not protected by official immunity.⁸⁷ Citing *Eisel*, the dissenting judge concluded that “public policy warrants finding that some duty was owed at least to notify Jill Dibley’s parents of her suicidal thoughts and ideations.”⁸⁸ Thus, this Minnesota case approximates the factual contours of *Eisel*, but only the dissenting judge found the same sort of duty.

Later in 1996, *Brown v. Board of Education of Milford*,⁸⁹ a Connecticut case, also ended favorably for school district defendants even though the district apparently enjoyed no applicable governmental immunity.⁹⁰ The father of Gregory Brown sued the school board, principal, acting principal, and one of Gregory’s teachers, claiming

81. *Id.*

82. 547 N.W.2d 113 (Minn. Ct. App. 1996).

83. *See id.* at 116.

84. *See id.* at 115.

85. *See id.* at 116–17.

86. *See id.*

87. *See id.* at 117–18.

88. *Id.* at 119 (Mansur, J., concurring in part, dissenting in part). The factors that he relied on for his special-relationship conclusion were: (1) the district’s substantial control and custody over its students, and (2) the counselor’s specialized training and experience. *See id.* at 118 (Mansur, J., concurring in part, dissenting in part).

89. 681 A.2d 996 (Conn. App. Ct. 1996).

90. *See id.*

that they had negligently failed to address his academic deficiencies, causing him emotional distress that culminated in his suicide.⁹¹ On the day Gregory shot himself at home, the local police department responded to an emergency telephone call reporting that someone at Gregory's address was in danger of committing suicide.⁹² After questioning Gregory and making a perfunctory, unsuccessful search for weapons, the police instructed him to tell his parents to telephone the police department when they returned and then left him alone on the premises.⁹³ The appellate court upheld the jury verdict for the district defendants, concluding that the trial judge had properly instructed the jury on the police department's intervening negligence.⁹⁴

This case is factually distinguishable from *Eisel*. Unlike *Eisel*, where school officials were accused of failing to warn a suicidal student's parents,⁹⁵ this case basically alleges that school authorities caused the student's death by failing to address his academic deficiencies. Thus, the facts in *Brown* are somewhat similar to the factual allegations raised in the Texas case previously discussed.⁹⁶ As discussed earlier, courts have traditionally been hostile to such claims, often finding that the injury complained of is not the proximate cause of a person's decision to commit suicide.⁹⁷ Therefore, it is not surprising that the defendants prevailed.

Next, in early 1997, the Illinois decision of *Grant v. Board of Trustees of Valley View School District*⁹⁸ provided another illustration of the effect of governmental immunity in teen suicide cases. Jason Grant, a high school senior, told other students that he was going to kill himself, and he wrote suicidal notes.⁹⁹ Several students reported their concerns to the school counselor, who called Jason's mother and advised her to take Jason to a hospital for drug overdose treatment but did not mention Jason's suicide threats.¹⁰⁰ En route to the hospital, Jason jumped from the car, and later that day he leaped to his death from a highway overpass.¹⁰¹ Jason's mother sued the district and the counselor, claiming that they breached their duties to: (1) inform her of Jason's suicidal intentions, (2) call an ambulance or other medical personnel, and (3) implement a suicide prevention program,

91. *Id.* at 997.

92. *Id.*

93. *See id.*

94. *Id.* at 998.

95. *See supra* text accompanying notes 29-60.

96. *See Fowler v. Szostek*, 905 S.W.2d 336, 341 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

97. *See supra* text accompanying notes 18-28.

98. 676 N.E.2d 705 (Ill. App. Ct. 1997).

99. *See id.* at 706.

100. *See id.*

101. *See id.*

thus constituting either negligence or willful and wanton misconduct.¹⁰²

The state's intermediate appellate court upheld the dismissal of all the claims.¹⁰³ More specifically, the court rejected the first two negligence claims based on the state statute that confers *in loco parentis* status on the defendants and correlative immunity from liability for negligence arising therefrom.¹⁰⁴ While willful and wanton misconduct is not covered by governmental immunity, the court concluded that the plaintiff failed to provide a *prima facie* factual foundation for such a claim.¹⁰⁵ In so ruling, the court seemed to implicitly accept the alleged *Eisel*-type duty in the following dictum:

While the nondisclosure of Jason's suicide threats, if proven, could well constitute negligence, the plaintiff has failed to allege sufficient facts that would support a finding that either [the counselor] or any other school official acted with conscious disregard or indifference for Jason's safety or had knowledge that their conduct posed a high probability of serious physical harm¹⁰⁶

Moreover, in discussing by way of further dictum, the counselor's partial disclosure and hospital recommendation, the court seemed to point the way for plaintiffs to overcome the governmental immunity defense to school negligence claims: "If [the counselor] had failed to take any action upon learning of Jason's statements, her inaction could constitute willful and wanton conduct."¹⁰⁷ The court arguably added to both possibilities with the following broad dictum, which conceivably could extend a duty to prevent a suicide beyond counselors: "The suicide death of a teenager is tragic. School counselors and other school personnel should take every suicide threat seriously and take every precaution to protect the child."¹⁰⁸

Finally, the court disposed of the third negligence claim, which was based on a purported duty to implement a suicide prevention program.¹⁰⁹ The court pointed out that state law authorized, but did not

102. *See id.* at 707.

103. *See id.* at 709.

104. *See id.* at 708. Alternatively, the court concluded that even if the more general governmental immunity statute had applied, this claim did not fit within the special-duty exception because there is no authority for extending this exception to the public school context, and, in any event, this exception only applies to injuries occurring "while the plaintiff was under the direct and immediate control" of the defendants. *See id.* at 707.

105. *See id.* at 708-09.

106. *Id.* at 709.

107. *Id.* Moreover, one of the three judges dissented, reasoning that a jury could reasonably "find that the counselor acted with a conscious disregard for Jason's life by failing to take aggressive steps to prevent Jason from committing suicide or failing to place [his mother] on [specific] notice that she should take steps to prevent Jason from committing suicide." *Id.* (Breslin, J., dissenting).

108. *Id.* However, the counter-argument is that such statements not only constitute mere dicta but also are carefully couched in tentative terms such as "should."

109. *Id.* at 707.

mandate, school boards to establish in-service programs, including programs on the topic of suicide prevention.¹¹⁰ Thus, school authorities breached no duty by failing to implement a suicide prevention program. This Illinois decision, like the earlier Minnesota case,¹¹¹ had facts somewhat similar to those in *Eisel*. In both cases, a counselor allegedly had some information about a student's risk for committing suicide that the counselor failed to share with the student's parents. In the Minnesota case, only a dissenting judge suggested that these factual allegations were sufficient to make out a cause of action. In the Illinois decision, the court suggested in dictum that a fact pattern more egregious might lead to liability.¹¹² Neither decision, however, joined *Eisel* in recognizing a cause of action against a school counselor for failing to warn parents that their child was at risk of committing suicide.

In a mid-1997 decision, *Scott v. Montgomery County Board of Education*,¹¹³ the Fourth Circuit ruled on various state and federal claims pertaining to a special-education student's suicide by hanging while at home. The court upheld summary judgment on behalf of the same Maryland school district that was the defendant in *Eisel*.¹¹⁴ In this case, the district's multi-disciplinary evaluation team determined that Aaron Scott, after evidencing behavioral difficulties in the seventh grade, qualified under the Individuals with Disabilities Education Act (IDEA) as seriously emotionally disturbed (SED).¹¹⁵ District representatives on the team allegedly recommended to the parents, who were divorced, that they obtain psychiatric evaluations and counseling services at their own expense, which was beyond their financial means.¹¹⁶ During the eighth grade, when the district changed his placement from self-contained to partial mainstreaming, Aaron allegedly remarked to his math teacher that he did not want to do his work because he would be dead before he was twenty years old.¹¹⁷ Furthermore, Aaron allegedly remarked that if he was not dead at that point, he would kill himself.¹¹⁸ The teacher referred Aaron to the school psychologist, who met with him the next day and after determining that Aaron was not in any imminent danger of harming himself, the psychologist decided not to notify Aaron's parents.¹¹⁹ However, two

110. *See id.*

111. *See supra* notes 82-88 and accompanying text.

112. *Grant*, 676 N.E.2d at 709.

113. No. 96-2455, 1997 U.S. App. LEXIS 21258 (4th Cir. Aug. 12, 1997) (per curiam) (not designated for publication).

114. *See id.* at *1-2.

115. *See id.* at *2-3. As a result of the 1997 amendments to the IDEA, the term is now "emotionally disturbed" but the definition is the same. *See, e.g.*, 34 C.F.R. § 300.7(c)(4) (2003).

116. *Scott*, 1997 U.S. App. LEXIS 21258, at *3.

117. *Id.* at *4-5.

118. *Id.* at *5.

119. *See id.* at *5-6.

months later, the school suspended Aaron for five days after he threatened and twice shoved his math teacher.¹²⁰ That night, Aaron hanged himself at the home of his mother, who had legal custody of him.¹²¹

Aaron's mother filed suit against the district and several staff members, including the math teacher and the school psychologist, alleging state common-law claims, including negligence, and § 1983 claims, including an action under IDEA and the Fourteenth Amendment.¹²² Central to her case was an expert's report opining that the school district's failure to obtain psychological counseling for Aaron directly contributed to his suicide.¹²³

A federal district court dismissed all of the claims, and the Fourth Circuit affirmed.¹²⁴ The fatal problem, according to the Fourth Circuit, was the mother's inability to prove causation.¹²⁵ With regard to the state claims, the appellate court believed that the sources and the focus of the expert's report were skewed.¹²⁶ Moreover, the court concluded: "[F]rom the record, which contains evidence of numerous stressors in Aaron's life, it is impossible to discern why Aaron tragically took his own life, and to conclude that the Board's failures were causally related to Aaron's suicide is conjecture."¹²⁷ Alternatively, the court noted that even if Aaron's mother had produced sufficient evidence of a causal connection, her negligent-programming claim would have failed to support educational malpractice, which Maryland's highest court had rejected in an early case that had been brought against the same defendant district.¹²⁸

As for the negligent-warning claim, the Fourth Circuit distinguished *Eisel* in two overlapping respects. First, the court wrote that there was no evidence of a causal relationship between the Board's failure to inform Aaron's mother of his suicidal threat and his suicide. Second, Aaron's threat was not like the threat in *Eisel* because it was not an imminent threat.¹²⁹

Finally, the Fourth Circuit disposed of the various federal claims for the same lack of causal connection.¹³⁰ Thus, in the very jurisdiction in which *Eisel* was decided, the court interpreted *Eisel's* boundaries narrowly and rejected an invitation to expand *Eisel's* ruling to different factual circumstances. Moreover, the federal court declined to recog-

120. *Id.* at *7.

121. *See id.* at *7-8.

122. *Id.* at *1, *9.

123. *See id.* at *10.

124. *Id.* at *18.

125. *Id.*

126. *See id.* at *14-17.

127. *Id.* at *17.

128. *Id.* at *17 n.2 (citing *Hunter v. Bd. of Educ.*, 439 A.2d 582, 584-85 (Md. 1982)).

129. *Id.* at *17.

130. *Id.* at *18.

nize a federal cause of action relating to Aaron's suicide despite Aaron's special-education status.

In *Brooks v. Logan*,¹³¹ also a 1997 case, the Idaho Supreme Court ruled that the state's governmental immunity statute protected an Idaho school district and a high school English teacher from a suit arising from a student's suicide.¹³² High school student Jeffrey Brooks took his own life at home after writing about depression and death in a daily journal he kept for his English composition class.¹³³ The parents asserted that: (1) the district had a duty to train, investigate, and assist students who suffer from depression or suicidal ideation, and (2) the district and the teacher had a duty to seek help for a student who displayed suicidal tendencies at school.¹³⁴ The allegations disputed whether the teacher had read the passages before his suicide and whether the passages suggested suicidal intent.¹³⁵ The court concluded that resolution of these disputes was not necessary because the district and the teacher fit under the broad umbrella of statutory immunity, as interpreted by previous Idaho cases involving negligent-supervision claims in the public school context.¹³⁶ The parents did not allege a duty to warn, and the court did not mention *Eisel*.

In a subsequent 1997 decision, *Wyke v. Polk County School Board*,¹³⁷ the Eleventh Circuit applied Florida law to a case somewhat similar to *Eisel*. In that case, Shawn Wyke, a thirteen-year-old boy, committed suicide at home, but there was evidence at trial that he had made two attempts to hang himself while at school.¹³⁸ Although the facts were sharply disputed, there was also testimony that another student's parent had informed the Dean of Students about Shawn's first suicide attempt.¹³⁹ Apparently, the Dean had failed to contact Shawn's mother.¹⁴⁰ Other evidence indicated that a school

131. 944 P.2d 709 (Idaho 1997) [hereinafter *Brooks II*].

132. See *id.* at 712. In an earlier decision in the same case, this court reached mixed results in applying the companion, discretionary-function provision in the same governmental immunity statute. See *Brooks v. Logan*, 903 P.2d 73 (Idaho 1995) [hereinafter *Brooks I*]. More specifically, the court in *Brooks I* ruled that the claims of investigation, training and affirmative steps, which the court subsumed under suicide-prevention program, were covered by this discretionary-function immunity but that the failure-to-warn claim was not. See *id.* at 76-78. The majority also rejected the defendant's argument that Jeff's intentional taking of his own life was an intervening, superseding cause. *Id.* at 80. Yet, interestingly, it was the dissent that mentioned *Eisel* and distinguished it based on the lack of specialized training for the teacher as compared to a counselor. *Id.* at 81-83 (Young, J., concurring in part, dissenting in part).

133. See *Brooks II*, 944 P.2d at 709-10.

134. *Id.* at 710.

135. See *id.*

136. See *id.* at 712.

137. 129 F.3d 560 (11th Cir. 1997).

138. *Id.* at 563.

139. See *id.* at 567.

140. See *id.* at 564.

custodian told the vice-principal about the second suicide attempt without identifying Shawn; however, the vice-principal did not respond to this information either.¹⁴¹ Shawn's mother had lived for a while with Helen Schmidt, her boyfriend's mother, but she had moved into an apartment with the goal of moving Shawn in with her after she could afford it.¹⁴² Schmidt became concerned about Shawn's emotional condition and obtained a mental health counseling appointment for him.¹⁴³ Unfortunately, Shawn hanged himself in her backyard before the appointment date.¹⁴⁴

Shawn's mother sued the school district, the principal, and the vice-principal in federal court, alleging both constitutional and common-law claims.¹⁴⁵ Specifically, she charged defendants with failure to (1) notify her of Shawn's attempted suicide, (2) hold him in protective custody, (3) procure counseling and psychiatric intervention for him, and (4) provide appropriate support and guidance for him.¹⁴⁶ At the trial level, the judge dismissed all of the constitutional claims against the school district but chose to retain jurisdiction of the Florida common-law claims.¹⁴⁷ The jury rendered a verdict for Shawn's mother, but it determined that she and Schmidt were responsible for thirty-two percent and thirty-five percent, respectively, of the total damages of \$500,000. Her award was only \$165,000.¹⁴⁸

On appeal, the Eleventh Circuit affirmed the trial court's dismissal of Wyke's constitutional claims and the jury's negligence award, finding the trial court's decision to be in accordance with Florida tort law.¹⁴⁹ The appellate court ruled that "when a child attempts suicide at school, and the school knows of the attempt, the school can be found negligent in failing to notify the child's parents or guardian."¹⁵⁰

To reach this conclusion, the appellate court first ruled that governmental immunity in Florida applies only to discretionary acts and that

141. *See id.* at 564–65.

142. *Id.* at 563 n.1.

143. *See id.* at 563 n.2.

144. *Id.*

145. *See id.* at 565.

146. *Id.*

147. *See id.* at 566.

148. *Id.*

149. *Wyke v. Polk County Sch. Bd.*, 137 F.3d 1292, 1293 (11th Cir. 1998). Although the Eleventh Circuit panel upheld the jury's award in most respects, the appellate court left one issue outstanding. At the trial court level, the judge had refused to allow the jury to apportion some of the damages for Shawn Wyke's suicide to Shawn. The Eleventh Circuit panel certified a question to the Florida Supreme Court as to whether Florida's comparative fault statute required the allocation of fault between both negligent and intentional tortfeasors. Subsequently, the Florida Supreme Court issued a decision that answered this question to the Eleventh Circuit's satisfaction, and the federal court withdrew certification of its question and affirmed the trial court's decision that a percentage of the fault for Shawn Wyke's death could not be apportioned to Shawn. *Id.*

150. *Wyke*, 129 F.3d. at 571.

the duty breached in this case was operational.¹⁵¹ In addition, the court reasoned that Florida legislation and regulatory guidelines obligated public schools to establish procedures for providing emergency health services and for contacting parents in the event of a student's health emergency.¹⁵² Although the court affirmed the jury's finding of a duty, the court emphasized the fact that Shawn had previously attempted, rather than talked about, suicide in school, which suggested a distinction from *Eisel*.¹⁵³ Moreover, based on the lack of Florida legislation mandating schools to provide suicide intervention/prevention programs, the Eleventh Circuit rejected Wyke's remaining claims that the school district had a duty to obtain counseling for Shawn, hold him in protective custody, or provide him with appropriate support and guidance.¹⁵⁴

Finally, in *McMahon v. St. Croix Falls School District*,¹⁵⁵ a 1999 decision, Wisconsin's intermediate appellate court flatly ruled that suicide is an intervening, superseding force as a matter of law—a force “which breaks the line of causation from the wrongful act and does not render the defendant civilly liable.”¹⁵⁶ In this case, Andrew McMahon, a high school freshman, skipped school one day and went to a friend's home where he gained access to the home's closed garage. He then doused himself with gasoline and died by self-immolation.¹⁵⁷ Apparently, Andrew had been upset about receiving five failing grades and his subsequent removal from the basketball team.¹⁵⁸ Although school officials disputed this testimony, one of Andrew's friends said that she had told a school counselor that Andrew was planning to cut school that day and that he had said something to the effect that he was “sick and tired of life.”¹⁵⁹ The friend allegedly suggested that someone should check on Andrew or contact his parents.¹⁶⁰ Andrew's parents claimed that no one notified them about his failing grades, his removal from the basketball team, his purported despondency, or his absence from school.¹⁶¹ They not only predicated their negligence suit on the district's policy to call parents at home or work to verify any absence, but they also predicated it on the counselor's knowledge of Andrew's emotional state.¹⁶²

151. *See id.*

152. *See id.* at 574.

153. *See id.* The court made this possible distinction in affirming the jury's finding of breach of this duty and its rejection of the intervening-cause defense, but only as a matter of dicta and without mentioning *Eisel*. *See id.*

154. *Id.* at 573.

155. 596 N.W.2d 875 (Wis. App. 1999).

156. *Id.* at 880 (quoting *Bogust v. Iverson*, 102 N.W.2d 228, 232 (Wis. 1960)).

157. *Id.*

158. *See id.*

159. *Id.* at 877–78.

160. *Id.*

161. *Id.* at 877.

162. *See id.* at 878.

In deciding the case, the court applied Wisconsin precedent (decided in a higher education context) and found that an individual's suicide is a superseding cause in a negligence action.¹⁶³ The court seemingly rejected the special-relationship, public-policy exception to liability in suicide cases. Nevertheless, the court commented in dictum that in light of the break in the causal chain created by the suicide, it did not need to decide whether "the district had a duty to notify the McMahons or follow up on the student's report to a school counselor that Andrew was despondent."¹⁶⁴ Thus, the court effectively shut the door on *Eisel*, without citing it, subject to future decisions by Wisconsin's highest court.

B. *Conclusions Regarding Common-Law Liability for a Student's Suicide*

The accompanying table summarizes, in chart form, the *Eisel* and subsequent student suicide cases. The court decisions are arranged in chronological order across the columns. The rows provide the following categories of information: case name, year, and jurisdiction; school defendants (*e.g.*, counselor); asserted duties (*e.g.*, a duty to warn or a duty to implement a suicide program, which includes the related duties to develop and implement a suicide prevention/intervention program or take other steps, such as arranging for emergency medical custody or care); asserted defenses (*e.g.*, intervening cause, public policy); and outcome.

1. Tabular Overview of *Eisel* and Post-*Eisel* Common-Law Cases

In light of the charted case law for the past decade, this 1992 advice appears to bear repeating: "School counselors and the rest of the education community need to respond reasonably to *Eisel* and to student suicide."¹⁶⁵ Responding reasonably to student suicide in terms of prevention/intervention policies and programs makes moral sense for public schools.

However, whether establishing school suicide prevention and intervention policies makes practical sense in terms of common-law liability is another matter. The *Eisel* court used the state suicide prevention legislation and resulting district policy as a contributing factor to its duty analysis. Although a suicide-prevention law and school district policy existed, it was not the *per se* basis for concluding that school authorities have a duty to warn parents of their child's suicidal intentions.¹⁶⁶ Subsequent courts, when examining state or local suicide prevention policies, have implied that such policies must be

163. *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960).

164. *McMahon*, 596 N.W.2d at 882.

165. Perry A. Zirkel, *Confident About Confidences?*, 73 PHI DELTA KAPPAN 732, 734 (1992).

166. *See supra* notes 46–48 and accompanying text.

CASE

Eisel	Nalepa	Fowler	Killen	Brown	Grant	Scott	Brooks	Wyke	McMahon
1991	1994	1995	1996	1996	1997	1997	1997	1997	1999
Md.	Mich.	Tex.	Minn.	Conn.	Ill.	Md.	Idaho	Fla.	Wis.

DEFENDANTS

Eisel	Nalepa	Fowler	Killen	Brown	Grant	Scott	Brooks	Wyke	McMahon
Counselor	Counselor		Counselor		Counselor				
[Others?]	Admin., Teacher	Admin.	Others	Admin., Teacher	Others	Others	Others	Admin.	Admin.

DUTIES

Eisel	Nalepa	Fowler	Killen	Brown	Grant	Scott	Brooks	Wyke	McMahon
Reasonable Means			Suicide Program		Suicide Program		Suicide Program	Suicide Program	Suicide Program
Warn		Warn			Warn	Warn		Warn	Warn
	Educate			Educate		Educate			
		Discipline							

DEFENSES

Eisel	Nalepa	Fowler	Killen	Brown	Grant	Scott	Brooks	Wyke	McMahon
	Immunity	Immunity	Immunity		Immunity		Immunity		
	Public Policy			Interven. Cause and Other		Cause and Public Policy		Comparative Negligence	Intervening Cause

OUTCOME

Eisel	Nalepa	Fowler	Killen	Brown	Grant	Scott	Brooks	Wyke	McMahon
Plaintiff (inclusive)	Defendant	Defendant	Defendant	Defendant	Defendant	Defendant	Defendant	Plaintiff (partial)	Defendant

mandatory and specific in order for them to give rise to a duty to warn or otherwise prevent a student from committing suicide.¹⁶⁷

More importantly, as the charted case law illustrates, courts on the whole have not ruled favorably for plaintiffs who bring student suicide cases against school authorities. For example, in *Scott*, which was brought in the same jurisdiction as *Eisel*, the Fourth Circuit interpreted Maryland law so as not to permit a claim for failure to warn parents where the student's suicide threat did not indicate immediate action was necessary. It decided this way even though the district had recognized the child's serious emotional problems based on his special-education status, had not provided him with counseling, and had delegated the parental-notification responsibility to a staff member with specialized training.¹⁶⁸

More generally, although plaintiffs have attempted to expand the "reasonable means" duty to include suicide-prevention programs and other steps, such as emergency custody or hospitalization, the courts have not been responsive. No court has expanded school officials' duty to include preventing a student's suicide beyond the duty to warn that the *Eisel* court articulated.

On the contrary, as the above table shows, courts have been more inclined to reject plaintiffs' student suicide claims altogether, based on various rationales. For example, five courts ruled for defendants on grounds of governmental immunity.¹⁶⁹ Of course, governmental immunity is not available in several states, and depending on its scope and exceptions, it may not cover the asserted claim for liability.¹⁷⁰ For

167. See *Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258 (4th Cir. Aug. 12, 1997) (per curiam) (not designated for publication); *Eisel v. Bd. of Educ.*, 597 A.2d 447 (Md. 1991). Moreover, in one case, the legislation supported the defendant's claim of governmental immunity. See *Fowler v. Szostek*, 905 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

168. See *supra* text accompanying notes 116–30.

169. See *Brooks v. Logan*, 944 P.2d 709 (Idaho 1997); *Grant v. Bd. of Trs. of Valley View Sch. Dist.* No. 365-U, 676 N.E.2d 705 (Ill. App. Ct. 1997); *Nalepa v. Plymouth-Canton Cmty. Sch. Dist.*, 525 N.W.2d 897, 900–02 (Mich. Ct. App. 1994); *Killen v. Indep. Sch. Dist.* No. 706, 547 N.W.2d 113 (Minn. Ct. App. 1996); *Fowler v. Szostek*, 905 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

170. For an overview of sovereign immunity, see for example, KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 622–55 (5th ed. 2001). For examples of state-specific commentary on this subject, see David W. Case, *From Pruett to Presley: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi*, 63 *MISS. L.J.* 537 (1994); Michael Shaunessy, *Sovereign Immunity and the Extent of the Waiver of Immunity Created by the Texas Tort Claims Act*, 53 *BAYLOR L. REV.* 87 (2001); Christopher J. Arlinghaus, Note, *Board of Education of Rockcastle County v. Kirby: A Significant Retreat from Sovereign Immunity for School Districts in Kentucky*, 24 *N. KY. L. REV.* 319 (1997); Stacy L. Nagel, Note, *Missouri's Mystifying Doctrine of Sovereign Immunity: The Imposition of Duty Under the Dangerous Condition Exception*, 64 *MO. L. REV.* 987 (1999); Shea Sullivan, Case-note, *City of Rome v. Jordan: Georgia is a Public Duty Doctrine Jurisdiction with No Waiver of Sovereign Immunity—A Good "Call" by the Supreme Court*, 45 *MERCER L. REV.* 533 (1993).

example, in *Eisel*, the insurability-exception to governmental immunity limited, rather than precluded, the potential liability.¹⁷¹ Still, governmental immunity is the reason state courts used most often when they ruled for school defendants in student suicide cases.¹⁷²

All but one of the remaining decisions listed in the table above have thrown out plaintiffs' claims on the grounds that the suicide was the result of some intervening cause, not the action or inaction of school authorities.¹⁷³ These decisions are in harmony with the traditional view that no liability attaches for another's suicide absent extraordinary circumstances.¹⁷⁴ Moreover, attempts to frame an educator's duty to prevent a student's suicide as a malpractice-type claim have not received any judicial support, even in dicta or dissent.¹⁷⁵ Again, when reviewing student suicide claims, courts have followed the traditional view that educational malpractice is not a recognized cause of action.

In fact, *Wyke* is the only post-*Eisel* common-law decision to rule in favor of the plaintiff.¹⁷⁶ Like *Eisel*, the *Wyke* court recognized a duty on the part of school authorities to warn the parents that their child was suicidal, but *Wyke* did not extend that duty further than *Eisel*. Indeed, the facts in *Wyke* were more egregious than the facts in *Eisel*. Also significant, the plaintiff's damages were reduced considerably in *Wyke* because the court found that she was contributorily negligent along with other non-school defendants.¹⁷⁷

In short, the conclusion is inescapable that, at least for the published case law,¹⁷⁸ courts have reinforced the limitations on *Eisel*'s

171. See *supra* text accompanying notes 55–56.

172. See *supra* text accompanying note 170.

173. See, e.g., *Brown v. Bd. of Educ. of Milford*, 681 A.2d 996 (Conn. App. Ct. 1996); *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 884 (Wis. Ct. App. 1999).

174. See Margot O. Knuth, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L. REV. 967, 998 (1979) (indicating that most suicides cannot be attributed to anyone other than decedent; attorneys should disclose to potential plaintiffs "the very low probability of recovery"). *Brooks I* provided a limited exception in terms of superseding cause, which *Brooks II* effectively superseded in terms of governmental immunity. See *supra* note 132 and accompanying text.

175. See, e.g., *Scott v. Montgomery County Bd. of Educ.*, No. 96-2455, 1997 U.S. App. LEXIS 21258, *17 n.2 (4th Cir. Aug. 12, 1997) (per curiam) (not designated for publication) (citing *Hunter v. Bd. of Educ.*, 439 A.2d 582, 584–85 (Md. 1982)); *Nalepa v. Plymouth-Canton Cmty. Sch. Dist.*, 525 N.W.2d 897, 904–05 (Mich. Ct. App. 1994).

176. See *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997) (holding that the school board had a duty to notify *Wyke* of her son's attempts to commit suicide).

177. *Id.* at 566.

178. Of course, the published case law is not necessarily representative. Cf. Anastasia D'Angelo, et al., *Are Published IDEA Hearing Officer Decisions Representative?*, 14 J. DISABILITY POL'Y STUD. 241 (2004). It may be that plaintiffs are pursuing parental-notification claims under *Eisel* and are succeeding in obtaining settlements or unappealed verdicts in the jurisdictions without applicable governmental immunity. In light of the unpublished trial-court outcome in *Eisel* and the subsequent, published precedents in other jurisdictions, this possibility appears to be rather remote.

holding¹⁷⁹ rather than expanding *Eisel's* rationale to broaden liability for student suicides. Thus, the common-law decisions in *Eisel's* wake have been merely sequels, not progeny. The mention of, much less reliance on, *Eisel* has been limited to an occasional reference in dicta or dissent, and typically, the thrust has been to distinguish the case rather than to expand it.¹⁸⁰ Although school counselors may not rely on a confidentiality defense,¹⁸¹ the decisions in the aftermath of the Maryland appellate decision in *Eisel* seem to suggest that neither counselors specifically, nor public educators more generally, need to be overly concerned with common-law liability. Rather, school policies and programs designed to reduce the tragedy of student suicide are more a matter of professional discretion and ethical imperative.

IV. POST-*EISEL'S* CONSTITUTIONAL-LAW CASES

In the previous Part of this Article, the Authors analyzed the *Eisel* decision and traced the post-*Eisel* common-law decisions concerning liability of school districts and their personnel for student suicide. In this Part, the Authors will provide: (1) the background, including primary theories, for § 1983 liability in the wake of student suicide, (2) an

179. Similarly, the courts in Maryland and in other jurisdictions have refused to expand or extend the *Eisel* duty in other contexts. See, e.g., *Trapnell v. United States*, No. 96-2012, 1997 U.S. App. LEXIS 35091 at *2-3 (4th Cir. Dec. 15, 1997) (per curiam) (not designated for publication) (finding that a special relationship did not exist between hospital and out-patient); *Lee v. Corregedore*, 925 P.2d 324, 341-42 (Haw. 1996) (holding that no special *in loco parentis* relationship between adult patient and veterans clinic); *Chambco v. Urban Masonry Corp.*, 647 A.2d 1284, 1290 (Md. Ct. Spec. App. 1994) (finding that no special *in loco parentis* relationship existed); *Hammond v. Bd. of Educ.*, 639 A.2d 223, 227 (Md. Ct. Spec. App. 1994) (holding no duty to warn in interscholastic athletics); *Holson v. State*, 637 A.2d 871, 879 (Md. Ct. Spec. App. 1994) (finding no special *in loco parentis* relationship between an inebriate and the police). *But cf.* *Westfarm Assocs. v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 685-87 (4th Cir. 1995) (finding no public policy exception for sewer construction).

180. See *supra* text accompanying notes 108-12. In *Wyke*, the court did not even mention *Eisel* and, quite the contrary, provided a possible factual distinction. See *supra* note 153 and accompanying text.

181. See, e.g., JANET ELIZABETH FALVEY, *MANAGING CLINICAL SUPERVISION: ETHICAL PRACTICE AND LEGAL RISK MANAGEMENT* 99-100 (2002) ("All ethical codes stipulate that breaching confidentiality is necessary when clients pose a 'clear,' 'immediate,' 'serious,' and/or 'imminent' danger to themselves."); Martha M. McCarthy & Gail Paulus Sorenson, *School Counselors and Consultants: Legal Duties and Liabilities*, 72 J. COUNSELING & DEV. 159, 160 (1993) (discussing the special relationship school counselors have with counselees and that they may have a duty to disclose if counselor has knowledge of imminent danger); Sheeley & Herlihy, *supra* note 2, at 90 (indicating AACD and ASCA exceptions). *But see* Stephen R. Ripps, et al., *To Disclose or Not to Disclose: The Dilemma of the School Counselor*, 13 MISS. C. L. REV. 323, 330-34 (1993) (asserting, paradoxically, that school counselors owe no duty to warn parents if a student contemplates suicide, but acknowledging that ethical standards of two professional organizations advise that school counselors have a duty to inform appropriate authorities when student's condition "poses a serious threat or danger to another").

overview of the leading case, *Armijo v. Wagon Mound Public Schools*, which is the § 1983 counterpart to *Eisel*, (3) an analysis of the pertinent pre- and post-*Armijo* jurisprudence, and (4) a conclusion regarding constitutional liability for a student's suicide.

A. *Primary Theories for § 1983 Liability in the Wake of Student Suicide*

Where governmental immunity from common-law claims is available, its scope and exceptions vary widely depending on state law.¹⁸² This defense, based on sovereign immunity in English common law, has been adopted in some states by the legislature and in others by the judiciary.¹⁸³ In either event, the result is that state government and its delegated local units are immune from liability for certain common-law causes of action, typically negligence, with some exceptions. Moreover, in some states, this protection applies to state and local government employees, including public school personnel, who have shallow pockets.¹⁸⁴ For example, Pennsylvania provides statutory immunity from negligence liability, with exceptions (e.g., injuries caused by defects in real property), that not only apply to school districts, but also to their employees when acting within the scope of their duties.¹⁸⁵ Similarly, the recent Coverdell Teacher Protection Act,¹⁸⁶ which is part of the federal No Child Left Behind legislation, provides immunity from negligence liability to individual educators within specified circumstances.¹⁸⁷

Some plaintiffs have asserted "constitutional torts" under § 1983 of the Civil Rights Act of 1871 in order to escape the state-based barrier of governmental immunity that has been used in the majority of common-law student suicide cases to date. The § 1983 claims have also been asserted with the hope of obtaining higher damages and attorneys' fees than are generally available to prevailing plaintiffs in civil rights cases.¹⁸⁸ The principal defenses of school districts in § 1983

182. For a brief, but excellent overall discussion of governmental immunity, see ALEXANDER & ALEXANDER, *supra* note 170, at 622–40. The application of governmental immunity to state tort claims is too large a topic to be covered in detail in this Article. For examples of state-specific commentary on this subject, see for example, Case, *supra* note 170; Shaunessy, *supra* note 170; Arlinghaus, *supra* note 170; Nagel, *supra* note 170; Sullivan, *supra* note 170.

183. See ALEXANDER & ALEXANDER, *supra* note 170, at 622–40.

184. See NELDA H. CAMBRON-McCABE ET AL., PUBLIC SCHOOL LAW: TEACHERS' & STUDENTS' RIGHTS 481–84 (5th ed. 2004) (discussing law pertaining to school districts' immunity from suit).

185. 43 PA. CONS. STAT. §§ 8541, 8542, 8545 (West 1998).

186. Paul D. Coverdell Protection Act of 2001, 20 U.S.C.A. §§ 6731–6738 (West 2002).

187. See, e.g., Perry A. Zirkel, *The Coverdell Teacher Protection Act: Immunization or Illusion?*, 179 Educ. L. Rep. (West) 547 (2003).

188. For an overview, see for example, ALEXANDER & ALEXANDER, *supra* note 170, at 640–54; Jeffrey J. Horner, *The Anatomy of a Constitutional Tort*, 47 Educ. L.

cases are (1) lack of the requisite elements, such as school board policy or custom and knowledge,¹⁸⁹ and (2) in the few states, such as California, where school districts are considered part of state government,¹⁹⁰ Eleventh Amendment immunity.¹⁹¹ For school employees in their individual capacity, rather than official capacity, the principal defense is the qualified immunity that applies where the federal law violation is not clearly settled.¹⁹²

The leading theories of § 1983 liability for student suicides—both of which are derived from Fourteenth Amendment substantive due process—are special-relationship and danger-creation.¹⁹³ In 1989, the Supreme Court demarcated the boundaries of the special-relationship theory in *DeShaney v. Winnebago County Department of Social Services*.¹⁹⁴ In this non-school case, the divorced mother of a child who had suffered brain damage from child abuse at the hands of his custodial father filed a § 1983 suit against the governmental unit in charge of family services.¹⁹⁵ In rejecting the asserted liability, the Supreme Court enunciated the general rule that the government's failure to provide protective services against private violence does not constitute a denial of substantive due process. The Court also interpreted the "special-relationship" exception to apply to situations where local

Rep. (West) 1 (1988); William D. Valente, *Federal Tort Liability for Civil Rights Depressions in Public Schools*, 5 Educ. L. Rep. (West) 701 (1982).

189. See, e.g., *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986); *Monell v. Dep't of Soc. Serv. of New York*, 436 U.S. 658 (1978). The Supreme Court held that the "failure to train" employees could constitute a governmental policy or custom for purposes of such liability if the failure to train evidenced a "deliberate indifference" to the constitutional rights of those with whom government employees came in contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

190. See, e.g., *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992). Reportedly, two other such states are Delaware and Maryland, according to *Curb on Legal Immunity Affects Some States*, EDUC. WEEK, June 4, 2003, at 22. But see *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137 (9th Cir. 2002), cert. denied, 123 S. Ct. 1284 (2003) (noting that local districts in Nevada are not arms of the state for Eleventh Amendment purposes).

191. See, e.g., *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984); *Quern v. Jordan*, 440 U.S. 332 (1979) (holding that Eleventh Amendment immunity is not abrogated by § 1983). For a useful overview, see Ronald D. Wenkart, *The Eleventh Amendment, Sovereign Immunity and Its Impact on School Districts*, 147 Educ. L. Rep. (West) 15 (2000); see also William E. Thro, M.A., J.D., *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 Educ. L. Rep. (West) 951 (2000) (providing a guide to recent developments in sovereign immunity law); Lawrence Lee Oldaker, Ed. D. & David L. Dagley, Ed. D., Commentary, *The Eleventh Amendment: Its History and Current Application to Schools and Universities*, 72 Educ. L. Rep. (West) 479 (1992) (reviewing Eleventh Amendment litigation within the context of contemporary school and university operations).

192. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 813–15 (1982); *Wood v. Strickland*, 420 U.S. 308 (1975).

193. See *supra* note 189.

194. 489 U.S. 189 (1989). For a summary of this decision, see Perry A. Zirkel, *Poor Joshua*, 70 PHI DELTA KAPPAN 828, 828–29 (1989).

195. See *DeShaney*, 489 U.S. at 191, 193.

or state governments take persons into custody and hold them against their will.¹⁹⁶ Canvassing its precedents, the Court gave incarceration and institutionalization as examples of such custodial situations.¹⁹⁷ Similarly, the Court recognized the alternate and overlapping “danger” theory by reasoning that although the state may have been aware of the dangers that this child faced, “it played no part in their creation, nor did it do anything to render him any more vulnerable to them” than if it had not undertaken to protect him at all.¹⁹⁸

The alternate danger-creation theory of substantive due process liability is where state officials create the danger that causes the harm inflicted by third parties.¹⁹⁹ The courts have made clear that this theory of state-created danger ultimately rests on the criterion that the state’s reckless or intentional action “shocks the conscience” of society.²⁰⁰

As previously intimated, in a few cases, plaintiffs have asserted constitutional theories of liability as a means of holding school districts and their officials liable for student suicide deaths. *Armijo v. Wagon Mounds Public Schools*, discussed below, is perhaps the leading case in this area.

B. *The Tenth Circuit’s Armijo Decision*

Analogous to *Eisel* in the common-law context, the most prominent case in the § 1983 context is *Armijo v. Wagon Mound Public Schools*.²⁰¹ In *Armijo*, the parents of a suicide victim persuaded the Tenth Circuit, in 1998, to recognize the possibility of a constitutional claim.²⁰² Specifically, allegations that Mary Schutz, a New Mexico school principal, verbally reprimanded their son, Philadelfio Armijo, a sixteen-year-old special-education student, for harassing an elementary school child.²⁰³ Philadelfio responded by threatening physical harm to the teacher who reported him, to the teacher’s son, and to the

196. *See id.* at 197–200.

197. *See id.* at 198–200.

198. *Id.* at 201–02. The Eighth Circuit explained this alternate theory under *DeShaney* as follows:

[*DeShaney*] establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual’s danger of, or vulnerability to, such violence beyond the level it would have been at absent state action.

Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

199. *See, e.g., Uhrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

200. *See, e.g., id.* at 572. The underlying factors to this high standard are (1) the prudence of judicial restraint in substantive due process decisions, (2) the concern that § 1983 not be a substitute for tort law, and (3) the need for deference to administrative agencies. *See id.* at 573.

201. 159 F.3d 1253 (10th Cir. 1998).

202. *See id.* at 1265.

203. *Id.* at 1256.

teacher's car.²⁰⁴ Fearing that Philadelfio might become violent, Schutz suspended him from school and—without notifying his parents and in violation of school district policy²⁰⁵—directed a school counselor to drive him home.²⁰⁶ The counselor did not attempt to contact Philadelfio's parents.²⁰⁷ Although some school employees knew that Philadelfio had access to firearms at home, the counselor dropped him off without checking to see if anyone was home.²⁰⁸ Philadelfio's parents returned home later in the day and found him dead from a self-inflicted gunshot wound.²⁰⁹ As part of the police investigation, a school aide wrote a handwritten note stating that Philadelfio had been "constantly depressed and nervous" during the months prior to his death.²¹⁰ On the day of his suicide, according to her note, "Phil then told me that maybe he should just leave the school and go to Colorado. I replied, 'mi hijo relax your [sic] upset but everything will be okay.['] He then said I don't know Pam, maybe I'd be better off dead."²¹¹

Philadelfio's parents filed a § 1983 suit for damages arising from the suicide in which they alleged a violation of the Individuals with Disabilities Education Act (IDEA), a failure to train school employees in suicide intervention, and a denial of Philadelfio's substantive due process rights.²¹² The trial court granted the defendants' motion for summary judgment on the plaintiffs' IDEA and failure-to-train claims.²¹³ The court relied on both the special-relationship and danger-creation theories and denied their asserted qualified immunity to the substantive due process claim.²¹⁴

On appeal, the Tenth Circuit rejected the applicability of the special-relationship theory, concluding that suspending, confining, and releasing the student from the counselor's car "[did] not rise to the same level of involuntary restraint as arresting, incarcerating, or institution-izing an individual."²¹⁵ However, the Tenth Circuit upheld the dan-

204. *Id.* at 1256–57.

205. The district's Parent/Student Handbook provided: "If a student is placed on out-of-school suspension, but his/her parents will not be home, that student will be placed instead on in-school suspension without credit for work done." *Id.* at 1257.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1256.

211. *Id.*

212. *Id.* at 1257.

213. *See id.* The trial court dismissed their negligence claim based on governmental immunity in New Mexico, and the Armijos did not appeal this ruling. *Id.* at 1257 n.3.

214. *See id.* at 1258.

215. *Id.* at 1261. In a case earlier in the 1990s, where a fifth grader became caught on his bandana in a school cloakroom and died by strangulation, the Tenth Circuit similarly rejected the special relationship exception in the school context, concluding that "[a]lthough the facts of this case present a truly tragic situation, the Due Process Clause 'does not transform every tort committed by a state actor into a constitutional

ger-creation theory to the principal and the counselor but not the aide.²¹⁶ Specifically, the court identified six factors it considered to determine possible liability of the principal and counselor: (1) Armijo was a member of a limited and specifically definable group—"special education students who have expressed threats of suicide"; (2) the conduct of the principal and counselor put Armijo at substantial risk of serious, immediate, and proximate harm; (3) the principal and counselor arguably knew that he was suicidal, at home alone, and with access to firearms; (4) the two defendants acted recklessly in conscious disregard of the risk of suicide; (5) such conduct, if true, possibly could be construed as conscience shocking; and (6) the principal and counselor increased the risk of harm to Armijo.²¹⁷

Nevertheless, the court pointed out that the posture of the case required drawing all inferences in favor of the Armijos. The Tenth Circuit also issued this cautionary advise: "It may be that, at trial, the plaintiffs will be unable to carry their burden of proof as to these individual defendants, and we cannot help but observe that the facts presently before us are very thin to establish a number of the six factors required for liability."²¹⁸ Thus, although it established the possibility of § 1983 liability on the part of school officials in the wake of student suicide, the *Armijo* court rejected the applicability of the special-relationship theory and established a relatively high six-factor standard for plaintiffs to succeed on the danger-creation theory.²¹⁹

1. Pre- and Post-*Armijo* Student Suicide Cases

The four student suicide cases predicated on constitutional claims before *Armijo* provided no more than distant signposts to the limited lane of liability that the Tenth Circuit established. First, in the 1985 case of *Kelson v. City of Springfield*,²²⁰ the Ninth Circuit permitted parents of a student suicide victim to pursue a constitutional cause of action against a school district, but the opinion provides little guidance about the basis for its holding. In *Kelson*, a fourteen-year-old student shot himself at school after having a confrontation with the vice-prin-

violation." *Maldonado v. Josey*, 975 F.2d 727, 733 (10th Cir. 1992) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989)).

216. The appellate court concluded that there was nothing in the record to suggest that she had participated in the actions that caused or created the danger that arguably led to his suicide. See *Armijo*, 159 F.3d at 1264.

217. *Id.* The court based these six factors on the five-part test of its earlier decision in *Uhlig* in combination with its refined interpretation of *DeShaney*. See *id.* at 1262-63.

218. *Id.* at 1264 n.9.

219. See *id.* at 1262-64. Put another way, *Armijo* illustrates using § 1983 as "an end run around obstacles to state common law claims," but it establishes a "very narrow liability lane under the Fourteenth Amendment." Perry A. Zirkel, *Fatal Suspension*, 80 PHI DELTA KAPPAN 791, 792 (1999).

220. 767 F.2d 651 (9th Cir. 1985).

cial and a police officer.²²¹ The student's parents sued the school district, the police department, the vice-principal, and the police officer under § 1983, claiming that the defendants had deprived them of a constitutionally protected interest in the companionship and society of their child.²²² The trial judge dismissed the parents' complaint and ruled that they had no such constitutional right.²²³ The Ninth Circuit reversed, finding for the plaintiffs, on "the narrow question whether parents possess a constitutionally-protected liberty interest in the companionship and society of their child is actionable under § 1983."²²⁴ However, after resolving this threshold question, the Ninth Circuit remanded the matter to allow the plaintiffs the opportunity to amend their complaint to address the policy or custom requirement of their § 1983 claim against the district.²²⁵ In doing so, the appellate court declined to express an opinion as to the viability of the parents' failure-to-train theory and the individual defendants' qualified immunity defense.²²⁶ In as much as it only dealt with the threshold issue of whether there was a cognizable "liberty" interest, not whether the defendants violated this interest, *Kelson* is not particularly useful for determining whether school defendants are liable under § 1983 in the wake of student suicide.

Second, in *Fowler v. Szostek*,²²⁷ a Texas appellate case discussed earlier in this Article, the court rejected liability based on the due process clause in the state constitution in light of the good faith immunity defense, thus paralleling the court's decision in *Wood v. Strickland*²²⁸ on immunity in § 1983 suits.²²⁹ In *Fowler*, the student had shot herself at home after school officials had suspended her, pending an expulsion hearing, for allegedly selling drugs in school.²³⁰ After rejecting the parents' negligence claim in light of official immunity under Texas law, the appellate court reversed the trial court's denial of the defendants' motion for summary judgment on the state constitutional claim because, in Texas, government employees are entitled to qualified immunity where they (1) act within their scope of authority, (2) perform discretionary duties, and (3) act in good faith.²³¹ Finding only the third condition at issue, the appellate court concluded that in disciplining the student the school officials met the applicable test of objective reasonableness in light of clearly established law at the time.²³²

221. *Id.* at 652–53.

222. *See id.* at 652.

223. *See id.* at 653.

224. *Id.* at 652.

225. *See id.* at 657.

226. *See id.* at 656–57.

227. 905 S.W.2d 336 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

228. 420 U.S. 308 (1975).

229. *See Fowler*, 905 S.W.2d at 338–40.

230. *Id.* at 338, 340.

231. *Id.* at 342–43.

232. *See id.*

Third, in *Scott v. Montgomery County Board of Education*,²³³ the Fourth Circuit, ruling on various state and federal claims, upheld summary judgment for the Maryland school district—the same district sued in *Eisel*.²³⁴ In this case, the special-education student had committed suicide by hanging himself at home.²³⁵ The student's mother filed suit and predicated her § 1983 claims on a violation of the IDEA, the overlapping disability discrimination statute, section 504 of the Rehabilitation Act, and Fourteenth Amendment substantive due process.²³⁶ The Fourth Circuit upheld the trial court's dismissal of the case, citing a lack of causation.²³⁷ Thus, despite the added feature of the student's special-education status, the *Scott* court did not reach the contours of a § 1983 claim.

Last among the four pre-*Armijo* decisions, the Eleventh Circuit, later in 1997, rejected an attempt to sue under the limited claims left available by the Supreme Court in *DeShaney*. In *Wyke v. Polk County School Board*,²³⁸ the student committed suicide at home after two unsuccessful attempts at school.²³⁹ While agreeing that the language of *DeShaney* leaves room for § 1983 liability where the state creates a danger or makes an individual more vulnerable to it, the court rejected the plaintiff's argument that the school board's failure to train its employees in suicide prevention and intervention constituted deliberate indifference to her substantive due process rights.²⁴⁰ Finding it unnecessary to reach the "failure to train" and "deliberate indifference" elements, the Eleventh Circuit ruled that the plaintiff failed to establish a violation of substantive due process.²⁴¹ First, citing precedents from various circuits that led to the same conclusion in *Armijo*, the court rejected the applicability of the special-relationship exception to the public school context.²⁴² Second, the court found that the plaintiff-mother had failed to provide a sufficiently strong and specific factual basis for her claim that school officials affirmatively prevented her from saving her son's life.²⁴³ Finally, the court followed the general judicial policy of self-restraint for substantive due process claims in rejecting the plaintiff's assertion, without identifiable precedent, that "the school had an independent constitutional duty to notify her of her son's [previous] suicide attempts."²⁴⁴

233. No. 96-2455, 1997 U.S. App. LEXIS 21258 (4th Cir. Aug. 12, 1997) (per curiam) (not designated for publication).

234. *See id.* at *2.

235. *Id.* at *8.

236. *Id.* at *1, *9.

237. *Id.* at *18.

238. 129 F.3d 560 (11th Cir. 1997).

239. *Id.* at 563.

240. *Id.* at 567-69.

241. *See id.* at 568-70.

242. *See id.* at 569.

243. *See id.* at 569-70.

244. *Id.* at 570. The court reasoned as follows:

Similarly, the three post-*Armijo* decisions make even clearer the narrow boundaries of § 1983 school liability for student suicide. First, a year after *Armijo*, the First Circuit decided *Hasenfus v. LaJeu-nesse*,²⁴⁵ in which the court upheld the dismissal of the parents' substantive due process claim against school officials in the wake of their daughter's disabling suicide attempt.²⁴⁶ In this case, a physical education teacher reprimanded Jamie Hasenfus, an eighth grader, for misconduct during class.²⁴⁷ The teacher sent Jamie to the locker room, where no one was present to supervise her.²⁴⁸ Jamie tried to hang herself, was hospitalized for several weeks, and suffered permanent disabilities.²⁴⁹ Jamie's parents described two relevant background events. First, they alleged that Jamie had been raped at age thirteen and that, based on the other students' harassment of her in class, her physical education teacher knew or should have known of the rape and her resulting despondency.²⁵⁰ Second, they claimed that seven other eighth graders at Jamie's school had attempted suicide during the three months prior to Jamie's attempt and that school officials had failed to take various preventive measures to cope with the epidemic, such as "offering special counseling and monitoring programs within the school and providing more information to parents about the outbreak."²⁵¹ The First Circuit analyzed the parents' claim in terms of the two-theory framework. First, citing *Armijo* and various other decisions that have "uniformly rejected this argument," the court disposed of the parents' special-relationship claim while at least hypothesizing that "in narrow circumstances"—not established in this case and probably not in other student suicide situations attributed to governmental inaction—school officials might have a specific duty.²⁵²

We decline to wade through the uncharted waters of substantive due process merely because Wyke's counsel "can think of no higher right to the care, management, or custody of a child than knowing about when that child faces an immediate life-threatening emergency." We have no doubt that such information is vitally important to a parent, but absent any authority, we will heed the Supreme Court's caution against expanding the concept of substantive due process.

Id.

245. 175 F.3d 68 (1st Cir. 1999).

246. *Id.* at 68.

247. *Id.* at 69–70.

248. *Id.* at 70.

249. *See id.* at 70, 73.

250. *Id.*

251. *Id.* at 70. They also argued that school officials should have taken steps to identify at-risk students and to train personnel to deal effectively with them. *Id.* at 71.

252. *See id.* at 71–72. First, the court provided very little purpose for such a claim: "Yet even if we assume *arguendo* that in narrow circumstances the Supreme Court might find a due process obligation of the school or school employees to render aid to a student in peril . . . it would require pungent facts [T]his means conduct that is truly outrageous, uncivilized, and intolerable." *Id.* at 72. Then, the court appeared to eliminate student suicide from this narrow ambit, leaving only the possibility of the danger-creation theory: "Absent a showing that the school affirmatively caused a sui-

Second, turning to the danger-creation theory, the court regarded the teacher's alleged actions—reprimanding Jamie and sending her out of class, even if he or she had known of her rape and of other students' attempted suicides—as not at all coming close to the required conscience-shocking standard.²⁵³ Distinguishing without necessarily agreeing with *Armijo*, the First Circuit concluded that “[i]f sound, the Tenth Circuit decision is at the outer limit, and does not come close to embracing [the teacher's actions in this case.]”²⁵⁴

In the 2002 opinion of *Martin v. Shawano-Gresham School District*,²⁵⁵ the Seventh Circuit extended the same stance to not only the plaintiff-parents' substantive due process claim, but also their procedural due process and equal protection claims.²⁵⁶ In this case, Timijane Martin, a thirteen-year-old middle school student, received a three-day suspension for possessing a cigarette on school grounds.²⁵⁷ According to the plaintiffs, Timijane burst into tears and, because it was the end of the school day, took the bus home.²⁵⁸ The assistant principal left a message on the family's home phone answering machine, notifying the parents that he had suspended her.²⁵⁹ When her mother arrived home at 4:00 pm, she listened to the phone message, did not discover Timijane, drove to school, and discussed Timijane's suspension with the assistant principal.²⁶⁰ She then returned home to find that Timijane had hanged herself.²⁶¹

The federal trial court granted the defendants' motion for summary judgment on the parents' various federal claims and on appeal the Seventh Circuit affirmed.²⁶² First, the court rejected the parents' procedural due process claim finding that the assistant principal had met the constitutional requirements for a short suspension—oral notice of the charge and a right to tell her side of the story.²⁶³ Further, the

cide, the primary responsibility for safeguarding children from this danger . . . is that of their parents Possibly there was school negligence here—one would need more information to make a judgment—but negligence is not a due process violation.” *See id.* at 73.

253. *See id.* Finding such an interpretation not even “remotely plausible,” the court concluded that “[i]t would be hard to wrest even a claim of negligence out of these facts.” *See id.* Moreover, reflecting the probable reason that the parents proceeded under § 1983, the court acknowledged that Maine provides rather broad governmental and official immunity. *See id.* at 74.

254. *Id.* Similarly, the court reasoned: “Whether or not one agrees with the Tenth Circuit that such behavior would be conscience-shocking and not merely seriously negligent, the assumed facts are at least very troubling, especially as to any participating official who knew both of the suicide threat and the available gun.” *Id.*

255. 295 F.3d 701 (7th Cir. 2002), *cert. denied*, 537 U.S. 1047 (2002).

256. *Id.* at 707–14.

257. *Id.* at 704.

258. *See id.* at 704–05.

259. *See id.*

260. *Id.* at 705.

261. *See id.*

262. *See id.* at 704.

263. *Id.* at 706 (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)).

Seventh Circuit concluded that even if Wisconsin's statutes and the district's formal policies required pre-suspension parental notification or hearing, failure to do so did not amount to a violation of her right to procedural due process under the United States Constitution.²⁶⁴

Next, the Seventh Circuit turned to the parents' substantive due process claim, recognizing that they were relying solely on the danger-creation theory in light of the widespread rejection of the special-relationship theory in the school context.²⁶⁵ Following the general judicial policy of restraint with regard to substantive due process claims, the Seventh Circuit concluded that "the school [officials] did not create or increase a risk to Timijane by suspending her from school, even if that action caused severe emotional distress."²⁶⁶ Similarly, the court declined to find such danger creation on the basis of the assistant principal's constructive knowledge of the risk arguably established by (1) her hysterical crying in his presence, (2) his search of her locker, which contained the book entitled *After a Suicide*, and (3) previous suicides by other students.²⁶⁷ The court reasoned as follows:

[W]hether or not that evidence should have put the defendants on notice that Timijane was at risk, the Constitution does not require the school to act affirmatively in the ways the plaintiffs claim (providing her with counseling after school hours or keeping her at school after hours until her parents could pick her up), unless the state created or increased the danger in the first instance. . . . The alleged knowledge of her fragile emotional state is irrelevant for purposes of the due process clause.²⁶⁸

Moreover, citing the First Circuit's decision with approval, the Seventh Circuit rejected the parents' attempted reliance on *Armijo*. The court concluded:

Even if we were to accept the *Armijo* standard that the school created a danger and thus could be liable under *DeShaney*, the Martins' argument would still not succeed. . . . In that case, it was not the suspension that created a risk to the child, but the school's affirmative act of taking the student home alone during the middle of the school day. No such evidence of an affirmative act was presented here.²⁶⁹

In sum, the Seventh Circuit summarily disposed of the parents' equal protection claim, which they had predicated on the allegedly

264. *Id.* at 707.

265. *See id.* at 708.

266. *Id.* at 710.

267. *See id.*

268. *Id.* Based on the lack of the school officials creating or increasing the risk, the court declined to reach the deliberate indifference standard, which would also be necessary for § 1983 liability. *See id.* at 710 n.10.

269. *Id.* at 711. Moreover, pointing to the location of the student's self-injurious behavior that the First Circuit addressed, the court concluded: "This case is even more removed than *Hasenfus*." *Id.* at 712.

preferential treatment accorded to Timijane's friend, whom the school officials had also caught with cigarettes.²⁷⁰ Finding relaxed scrutiny to apply, the court found that the school officials had a rational basis for the differential treatment of the two girls and that, in any event, the plaintiffs had failed to show the requisite deliberate indifference for said disparity.²⁷¹

Additionally, as to the parents' primary claim of substantive due process, their attempt to obtain monetary relief from the district or its officials for the suicide of their child did not come close to success.²⁷² As in *Hasenfus*, this case revealed the difficulty of reaching, much less fitting, within the narrow confines of *Armijo*.

Finally, in *Ziegler v. Eby*,²⁷³ the third post-*Armijo* federal appellate decision, the Third Circuit upheld summary judgment in favor of school officials in a suit involving the suicide death of a student after he graduated from high school. In that unpublished case, Aaron Ziegler, a high school senior, received a ten-day suspension from school based on a finding that he appeared to be under the influence of marijuana while on school grounds.²⁷⁴ About one month later, Ziegler was charged with a misdemeanor drug offense relating to this incident. Ziegler pleaded no contest to the charge after he graduated from high school. While awaiting sentencing, he took his own life.²⁷⁵ Aaron's mother filed a federal lawsuit against the arresting police officers, the school district where Aaron had attended school, the school superintendent, and the high school principal. She alleged that the defendants had violated Aaron's constitutional rights under the First, Fourth, and Sixth Amendments by planning and conspiring to "humiliate, demean, and harass" Aaron and that Aaron's suicide was a reasonably foreseeable result of this intentional misconduct.²⁷⁶

A federal trial court granted summary judgment in favor of some of the defendants and dismissed the others. On appeal, the Third Circuit affirmed. In a brief, unpublished opinion, the Third Circuit quoted the portion of the trial judge's opinion in which the judge found no cause of action against the school superintendent or the high school principal:

With respect to Plaintiff's remaining claims it is difficult to understand how [the superintendent or school principal] violated Aaron Ziegler's constitutional rights. Aaron Ziegler committed suicide 69

270. *See id.* at 712-13.

271. *Id.* at 713.

272. For example, even beyond the danger-creation circumstance, the parents still faced the hurdles of the aforementioned element of deliberate indifference and the similarly unaddressed qualified immunity and policy or custom issues. *Id.* at 714 n.14.

273. 2003 U.S. App. LEXIS 20607 (3d Cir. Oct. 7, 2003) (not designated for publication).

274. *Id.* at *1.

275. *Id.* at *1-2.

276. *Id.* at *2.

days after he graduated from high school and 145 days after the conclusion of his suspension. We are unaware of any case where a court has imposed a constitutional duty on a school official to prevent a student's suicide after the student has graduated from the school and is no longer within the school's control when the suicide occurred. Furthermore, Plaintiff has not presented any evidence suggesting that Aaron Ziegler was suicidal when he attended school, that [the superintendent or principal] were aware of his suicidal tendencies or that they failed to take appropriate action.²⁷⁷

2. Conclusions Regarding Constitutional Liability for a Student's Suicide

From a plaintiff's perspective, the trend of the student suicide liability litigation in the constitutional arena,²⁷⁸ as shown in the accompanying table, is rather daunting.²⁷⁹ Just as *Eisel* established a low likelihood of liability under the common law, *Armijo* represents a steeply adverse probability of success under § 1983 against school districts and their employees in the wake of student suicide. The court decisions previous to *Armijo* provided negligible leverage.²⁸⁰ *Armijo* established a high and narrow six-factor standard.²⁸¹ The subsequent First Circuit,²⁸² Seventh Circuit,²⁸³ and Third Circuit²⁸⁴ decisions did not come close to reaching this standard, nor did they necessarily agree with it.²⁸⁵ And the *Armijos* themselves, according to the Tenth Circuit, had a thin chance of meeting their formidable burden of proof.²⁸⁶

a. Tabular Overview of Pre- and Post-Armijo Student-Suicide Cases

277. *Id.* at *8–9.

278. The *Fowler* case is included only by way of similarity; it represents an analogous liability claim under the state constitution.

279. For example, these constitutional cases have effectively eliminated the applicability of the special-relationship theory and have left only a narrow possibility under the danger-creation theory, while the common-law cases have left at least limited possibilities under both the analogous custodial and causal exceptions to tortious non-liability.

280. See *supra* notes 218–40 and accompanying text.

281. See *supra* text accompanying note 215.

282. See *supra* notes 241–50 and accompanying text.

283. See *supra* notes 251–68 and accompanying text.

284. *Ziegler v. Eby*, 2003 U.S. App. LEXIS 20607 (3d Cir. Oct. 7, 2003) (not designated for publication).

285. See *supra* text accompanying notes 241–73.

286. See *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1264 n.9 (10th Cir. 1998).

CASE

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
1985	1995	1997	1997	1998	1999	2002	2003
Oregon	Texas	Maryland	Florida	New Mexico	Maine	Wisconsin	Pennsylvania
9th Cir.	Tex. Ct. App.	4th Cir.	11th Cir.	10th Cir.	1st Cir.	7th Cir.	3d Cir.

DEFENDANTS

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
District	District	District	District	District	District	District	District
Admin.	Admin.	Others	Admin.	Others	Others	Admin.	Admin. and Others

BASES

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
Am. XIV Due Process	State Const. Due Process	Am. XIV Due Process IDEA and 504	Am. XIV Due Process	Am. XIV Due Process IDEA	Am. XIV Due Process	Am. XIV Due Process and Equal Protection	Am. I, IV, VI

THEORIES

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
Liberty = companionship/society	Unspecified	Unspecified	Special relationship and Danger Creation (Failure to train)	Special Relationship and Danger Creation (Failure to train)	Special Relationship and Danger Creation	Danger Creation	Unspecified

DEFENSES

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
Lack of Policy/Custom plus Qual. Immun.	Lack of Causality	Lack of Causality	Lack of Special Relationship and Danger Creation	Qual. Immun.: Lack of Special Relationship and Danger Creation	Lack of Special Relationship and Danger Creation	Lack of Danger Creation	Factual Insufficiencies

OUTCOME

<i>Kelson</i>	<i>Fowler</i>	<i>Scott</i>	<i>Wyke</i>	<i>Armijo</i>	<i>Hasenfus</i>	<i>Martin</i>	<i>Ziegler</i>
Inclusive	Defendant	Defendant	Defendant	Inclusive	Defendant	Defendant	Defendant

V. OVERALL CONCLUSIONS REGARDING LIABILITY FOR A
STUDENT'S SUICIDE

As the above discussion and accompanying tables show, educators have little to fear with regard to liability for a student's suicide, whether a cause of action is brought under a common-law theory or as a constitutional tort. Although *Eisel* recognized such a cause of action in 1991, later published cases have largely been decided in favor of defendants. Likewise, *Armijo* recognized a constitutional tort arising from a student's death by suicide, but no other federal court has followed *Armijo*'s lead. The conclusion is inescapable that the courts—both state and federal—are inhospitable to plaintiffs seeking to hold educators legally responsible for a student's suicide death. This conclusion does not mean that educators should ignore suicidal behavior by students. Rather, school policies and programs to reduce the tragedy of student suicide are more a matter of professional discretion and ethical imperative than a necessary precaution against litigation.