

Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now

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**Some quirk in human nature allows even the most
unspeakable acts of evil to become banal within minutes,
provided that they occur far enough away
to pose no personal threat.**

**—IRIS CHANG (1968–2004),
AMERICAN HISTORIAN AND JOURNALIST**

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Abstract: After the tragic shootings at Virginia Tech in 2007, many colleges and universities recognized that having threat assessment and management (TAM) teams in place to address potentially threatening behavior and situations among faculty, staff, and students on campus was a best practice. This article focuses on three main aspects of TAM teams on college campuses and what risk managers can do to encourage the success and effectiveness of those teams. The article discusses the legal duties that colleges and universities have in connection with violent incidents on campus. It also focuses on the development of a TAM process, the common challenges facing TAM team members, and how risk managers can help mitigate and minimize campus risks by assisting TAM teams.

Introduction

Many institutions of higher education recognized after the April 2007 tragedy at Virginia Tech that having a threat assessment and management (TAM) team is a best practice, and many have recently created teams or enhanced the operations of existing teams. Simply having a TAM team is not enough, though. Institutions must educate the campus community about the team, follow best practices as to the staffing and operation of the team, adopt appropriate related policies, and create and handle team-related documents well. Further, institutions must do more to educate their communities about the proper balance between community safety and the rights of persons of concern, so that misunderstandings about privacy and disability laws, for instance, do not unduly restrict the ability of institutions to take the steps necessary to promote campus safety. Failing to follow best and promising practices in this sensitive area can increase the serious risks of harm and legal liability.

This article is divided into three sections. The first section outlines the legal duties that colleges and universities have in connection with violent incidents on campus and discusses how related standards of care for TAM processes are likely to be developed in the litigation context.

The second section provides a primer on the TAM process, with an emphasis on the identification of resources that TAM teams can rely upon in seeking to comply with current best practices. The third section identifies common challenges faced by TAM teams and makes recommendations about how risk managers can promote campus safety and minimize risk by helping TAM teams to overcome those challenges.

I. Legal Duties and Standards of Care a. Legal Duties

Colleges and universities undoubtedly strive to do what they can, within the bounds of reason and limited resources, to keep their campuses safe for students, employees, and visitors. Enhancing campus safety is, without doubt, the most important goal of the TAM

process. While legal liability considerations are, of course, secondary to safety concerns, legal issues are important, and risk managers can better assist campus TAM teams if they understand the legal issues implicated by campus violence and the work of TAM teams.

It will come as no surprise to risk managers that colleges and universities are generally held to have various duties to exercise due care to provide a campus environment that is reasonably safe from foreseeable acts of violence. The most universal source of such duties is the common law, i.e., the legal principles developed and expressed over time by state court judges in the form of case law, rather than by legislators in the form of statutes. The specific details of common law necessarily vary

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from state to state, and an analysis of every state's laws would be well beyond the scope of this article. A resource known as the Restatement of Torts does, however, provide a valuable starting point for understanding the principles that are likely to be applied, in general, in many states. Through several editions of the Restatement, a body known as the American Law Institute (ALI) has endeavored to summarize what it considers to be the most cogent principles of common law that are being applied by judges in the United States. In turn, judges often rely upon Restatement sections and analysis when deciding what the law *should* be, and many formally adopt Restatement sections as the law in particular states. Thus, while some states may reject certain Restatement duties and analyses from time to time, it is fair to view the Restatement as summarizing well where the law generally is, and where it is likely to go, in most states.

The most current version of the Restatement of Torts is the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. Many of the Third Restatement's sections have been in essentially final form since the mid-2000s, and the bulk of the work as a whole was officially adopted by the ALI in May 2011. Many courts cited and relied upon Third Restatement sections even before they were in official, final form, so we will focus on the Third Restatement's provisions in the remainder of this discussion.

Obviously, if an institution of higher education itself causes harm to a student or campus visitor through the acts or omissions of an institutional employee, then the institution is liable for negligence if the employee failed to exercise reasonable care and created a risk of physical harm.² The underlying duty can be thought of as a relatively passive duty to avoid doing harm. When thinking about campus violence, however, we ordinarily do not think about acts perpetrated by institutional employees. Instead, we usually think about violence perpetrated by third parties such as students or outsiders. This begs the question: does an institution of higher education have an *affirmative* duty to prevent physical harm to students or visitors that is caused by third parties?³

The Third Restatement answers this question by stating a facially comforting general rule, but it then goes on for pages about all the "exceptional" circumstances

in which liability may attach. The Restatement provides that "[a]n actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable."⁴ The duties of most importance to the campus TAM context are those described in sections 40–43 of the Third Restatement. This article will discuss each in turn.

i. Duties Based on a Special Relationship with the Injured Person

Section 40 provides in part that "an actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship," and, most significantly for this discussion, provides that one of the "special relationships" giving rise to such a duty is the relationship of "a school with its students."⁵ While the word "school" could be read as not including institutions of higher education, a comment to section 40 makes clear that the ALI intended the section to be applicable to colleges and universities. Fortunately, the comment at least recognizes that "because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students." Further analysis of the section also recognizes that "[c]ourts are split on whether a college owes a duty to its students," and that those courts which do find a duty do so based on a broad variety of sometimes questionable rationales.⁶ Thus, while the ALI might want to suggest that the context variable "special relationship"-based duty it envisions *should* always apply to the relationship between institutions of higher education and their students, it recognizes fairly, and fortunately, that the law is far from settled on this point. Nonetheless, given trends in the law and the fact that it is better to be safe than sorry, institutions should plan and conduct themselves as if courts would recognize *some* level of duty to protect students from other students or third parties and leave legal arguments about the issue to counsel in the event of litigation.

Third Restatement section 40 also states that businesses and other possessors of land that hold their premises open to the public have a “special relationship” with, and duty to reasonably protect, those who are lawfully on the premises.⁷ Colleges and universities that maintain open campuses would often fit within this category of businesses. Further, the Restatement recognizes that landlords have a duty to exercise reasonable care to protect their tenants from foreseeable criminal activity.⁸ These duties have been recognized often by courts for many years. This is one reason why courts which are hesitant to find a “special relationship” based on the student-university relationship alone but which want to find some basis for liability in a particular case, essentially shoehorn hazing and criminal assault cases into a “business invitee” or “landlord-tenant” framework.⁹ In sum, risk managers should recognize that business owner and landlord-tenant-based theories continue to provide fertile ground for those claiming that institutions owe a duty to exercise reasonable care to prevent foreseeable attacks on campus.

ii. Duties Based on a Special Relationship with the Person Posing the Risk

Third Restatement section 41 focuses on circumstances when an entity may have a “special relationship” with the person who is posing the risk and a corresponding duty to exercise reasonable care to prevent that person from harming others. One example of relevance to this discussion focuses on the special relationship that employers have with employees. Most commonly, employers are liable for the acts of employees if those acts are within the scope of employment, i.e., the acts are motivated at least in part by a desire to serve the employer.¹⁰

Acts of targeted violence are, obviously, outside the scope of most jobs.¹¹ Section 41 of the Third Restatement recognizes, however, that employers can still be on the hook for acts outside the scope of an employee’s employment “when the employment facilitates the employee’s causing harm to third parties.”¹² “Facilitation” in this sense can be as simple as providing access to physical locations, such as, for example, where an employee can gain access to dormitories, classrooms, or other campus spaces by virtue of his or her employment.¹³ Given how easy it would be to satisfy this standard, institutions should assume that they would generally be deemed to have a duty to exercise reasonable care in the hiring, training, supervision, and retention of employees.¹⁴ For purposes of this discussion, this means that institutions should recognize that they will likely be held to have a duty to use reasonable care by, for example, engaging their threat assessment team when an employee’s statements or conduct raises questions as to whether he or she may pose a threat to others.

Another “special relationship” recognized by Third Restatement section 41 is that which a mental health professional has with patients.¹⁵ The corresponding duty follows from state statutes and court decisions that implement the concept outlined in the California Supreme Court’s

well-known decision in Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal.1976). In general, Tarasoff-like principles either require or permit mental health professionals to breach the professional-patient privilege¹⁶ where such professionals obtain information indicating that a patient may pose an imminent risk of harm to an identified individual or individuals. The broadly worded comments to Restatement section 41 suggest that professionals should use “reasonable care” to warn identified victims and/or take other steps

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within their power to prevent specific, imminent harm. Institutions must recognize, though, that there is significant variation from state to state as to whether and how such duties are codified in statute or described by courts. One important thing for risk managers to take away from this discussion is that they should determine what the mental health professional-patient rules are in their state and ensure that mental health professionals on their TAM teams and on their campus have a sound and common understanding of those rules. Risk managers can also help the TAM team craft strategies to allow mental health providers on campus—such as counseling center staff—to assist the team in a more general advisory capacity in situations where they cannot disclose case-specific information.

iii. Duties Based on Undertakings

Sections 42 and 43 of the Third Restatement describe duties that could have substantial relevance in the TAM team context. These sections provide that a person who undertakes to provide services to another that the person knows or should know reduce the risk of physical harm to the other or to a third person (e.g., a TAM team that involves itself in assessing and managing potentially threatening behavior) has a duty to use reasonable care in providing those services if: (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking to provide those services, or (b) the person to whom the services are provided or another relies on the actor's exercising reasonable care in the undertaking. These "gratuitous undertaking" duties are adapted from sections of the Second Restatement of Torts that have been relied upon by many courts over the years, specifically sections 323 and 324A. Section 323 in particular has been applied, significantly, in cases involving colleges

and universities.¹⁷ It is therefore fair to conclude that these duties will continue to be accepted widely by courts in the form presented in the Third Restatement.

In the TAM team context, it could (and undoubtedly will) be argued that a team's undertaking to assess risks posed by persons of concern could fall within the scope of these duties. To fit squarely within these duties, the team's activities

would have to either *increase* the risk of harm or *be relied upon* to the detriment of an injured person. However, it is possible to imagine that an injured person could claim that statements made or actions taken by the TAM team in dealing with a threat management scenario gave the injured person a "false sense of security" that made the person, arguably, more vulnerable to an attack and/or that the injured person relied upon the TAM team for protection and, as a result, did not take independent protective action. Every case would be argued based on its facts, and there are many elements that would have to be satisfied before liability would actually attach, but risk managers should be aware of these potential duties when working with their campus TAM teams. If this sounds like a "no good deed goes unpunished" scenario, that is because it is to some extent; nonetheless, colleges

and universities have no choice but to undertake threat assessment activities and to perform them well, as discussed below.

b. Standards of Care

This section will focus on how TAM-related standards of care are likely to be developed in the litigation context. Risk managers in those states in which a campus TAM team is required by law¹⁸ will have no trouble explaining to administrators why they should create and support TAM teams. Those in other states might wish to cite the following discussion.

Risk managers can help the TAM team craft strategies to allow campus mental health providers to assist the team in a general advisory capacity in situations where they cannot disclose case-specific information.

The Restatement of Torts duties described in the previous section maintain that where an affirmative duty to avoid a risk is imposed by a special relationship, an actor has an obligation to exercise due care. But what does “due care” mean in the context of campus threat assessment and management? There is no nationwide, federal statute, and only the Virginia statute lists, in general terms, activities that TAM teams should perform in that state. Thus, the TAM team “standard of care” issue is relatively wide open. Whether a TAM team’s activities in a particular case met a broadly defined standard of care will, therefore, be subject to debate. In the context of litigation, that debate is likely to be played out by the competing opinions of expert witnesses. Thus, risk managers should be familiar with the resources that experts would likely cite as defining the standard of care.

On the threshold question of whether colleges and universities should *have* threat assessment teams, there is not much room for debate. Many of the investigative reports that were conducted in the wake of the 2007 Virginia Tech shootings contained recommendations to the effect that campuses should create and/or support campus TAM teams. These reports are summarized well in “The IACLEA Blueprint for Safer Campuses” (IACLEA Special Review Task Force, April 18, 2008) (Blueprint), a document published by the International Association of Campus Law Enforcement Administrators (IACLEA).¹⁹ The Blueprint was designed as a synthesis of the various reports done regarding the Virginia Tech shootings, and it contains numerous recommendations for campus safety from IACLEA. The Blueprint contains 20 campus safety-related recommendations, which should be consulted generally by risk managers who are assessing whether their campus safety operations are consistent with best and promising practices. On the specific topic of TAM teams, the Blueprint recommends that “[i]nstitutions of higher education should have a behavioral threat assessment team that includes representatives from law enforcement,

human resources, student and academic affairs, legal counsel, and mental health functions. Specifically, campus public safety should be included on the team.” It is safe to assume that in the litigation context, many competent experts would be likely to testify that this recommendation, based as it is on consideration of numerous post-Virginia Tech reports, represents a consensus as to what higher education institutions should be doing, in part, to prevent violence on campus.

Similarly, a June 2011 US Department of Education Family Policy Compliance (i.e., FERPA) Office publication titled “Addressing Emergencies on Campus” notes that the “Department encourages... postsecondary institutions to implement a threat assessment program, including the establishment of a threat assessment team that utilizes the expertise of representatives from law enforcement agencies in the community and that complies with applicable civil rights and other Federal and State laws.” This publication also articulates the Department’s view that “[u]nder a properly-implemented threat assessment program, schools can respond to student behavior that raises concerns about a student’s mental health and the safety of the student and others that is chronic or escalating, by using a threat assessment team.” This publication does not itself go into greater detail on why a TAM team should be established or how it should

function (though it does contain a link to a Department resource page of interest), but it is fair to assume, given its source and wide distribution, that it would be cited in support of an argument that having a properly functioning campus TAM team is currently a best and expected practice.²⁰

Further, as more institutions create TAM teams, the presence of such teams on campus becomes a part of the custom in the industry, which can itself be used as evidence of the standard of care. While the “reasonable care under the circumstances” standard usually remains the technical standard in most cases, evidence of customs to help inform what that means can be persuasive.²¹ These

What does “due care” mean in the context of campus threat assessment?

There is no nationwide, federal statute. Thus, the TAM team “standard of care” issue is relatively wide open.

theories would go a long way toward establishing that the applicable standard of care requires colleges and universities to have TAM teams.

Such a case would be supported further by the publication, “A Risk Analysis Standard for Natural and Man-Made Hazards to Higher Education Institutions,” published by the ASME Innovative Technologies Institute, LLC (ASME-ITI), and approved by the American National Standards Institute (ANSI) in 2010 (ASME-ITI Risk Analysis Standard). URMIA members are likely familiar with this document, as it outlines a “methodology to identify, analyze, quantify, and communicate asset characteristics, vulnerabilities to natural and man-made hazards, and consequences of these hazards on the campuses of colleges and universities.”²²

On the topic of TAM teams, the Standard recommends “that Threat Assessment Teams be put into place on campus to help identify potential persons of concern and gather and analyze information regarding the potential threat posed by an individual(s).”²³

In light of this ASME-ITI/ANSI recommendation, risk managers should recognize that courts have often allowed expert witnesses to testify to the effect that standards prepared by voluntary standards organizations such as ANSI represent the standard of care on a topic and/or have otherwise allowed such standards into evidence.²⁴ While voluntary standards do not have the force of law like statutes do, they can be persuasive evidence of the standard of care, given the deliberative, consensus driven process by which many are created. There is ample case law to this effect,²⁵ so it is fair to assume that some courts would similarly permit reference to the ASME-ITI/ANSI TAM team recommendation in the event of TAM-related litigation.

In addition to recommending that colleges and universities have a campus TAM team, the ASME-ITI/ANSI Risk Assessment Standard “provides resources for implementing Threat Assessment Teams on campus.”²⁶ While such resources would not, again, define the standard of care exclusively or conclusively, it is likely

that they would be cited as persuasive in the event of TAM-related litigation, because they are relied upon and recommended in the ASME-ITI/ANSI standard. Therefore, risk managers should determine whether their threat assessment teams are in fact following practices similar to those described in the cited resources. TAM teams should follow practices that are most responsive to the needs of their particular campuses, but if a team’s practices differ substantially from the general approaches outlined in the resources cited in the ASME-ITI/ANSI Standard, the team should be able to articulate why its following a different approach is more appropriate given the unique needs of its campus.

The remaining sections will outline some best and promising practices in more detail, highlight common areas of concern, and offer suggestions about how risk managers can work with TAM teams to address any gaps between where the teams are right now and where they should be.

II. Best Practices in Campus Threat Assessment

The resources that are referenced in the ASME-ITI/ANSI standard provide guidance on what the authors consider to be current best practices for campus threat assessment and threat management.²⁷ These resources

cover both the processes and procedures that TAM teams should follow in handling reports of threats or other concerning behavior, as well as the campus and community systems and resources that support and facilitate TAM team operations.

a. Threat Assessment Processes and Procedures

There are several steps to the campus threat assessment and management process, beginning from the point where the TAM team first learns about a threat or other disturbing behavior through to the closure of the case. The steps in the best practices for campus threat assessment and management are as follows.²⁸

When a person or situation is reported, the team must first determine whether there is any imminent danger or an emergency situation.

i. Screen Initial Reports

When a person or situation is reported to the TAM team, the first thing the team should do is determine whether there is any imminent danger or an emergency situation. Determining whether there is an imminent danger will generally be based solely or primarily on the information that is reported to the TAM team and any other information the team already possesses. If the TAM team feels the situation is an emergency, the team should call law enforcement or security to take immediate steps to contain the person, make an arrest, or possibly get the person to an emergency psychiatric evaluation if the circumstances allow. The team will eventually need to conduct a full threat assessment inquiry to take appropriate measures in the event the person in question is released and returns to campus; but in the event of an emergency or imminent situation, the team's primary course of action is to notify law enforcement to ensure the situation is contained.

If the TAM team determines that there is *not* an emergency or imminent concern, the next thing the team should do is conduct a full threat assessment inquiry to determine whether the person or situation of concern poses a threat of violence or self-harm.²⁹

ii. Conduct a Full Threat Assessment Inquiry

To conduct a full threat assessment inquiry or investigation, the TAM team should seek out information from all persons and other sources that may have some information about the person or situation of concern. This information seeking mandate is an important role that distinguishes TAM teams from CARE teams and other student assistance teams, which typically respond to the information provided to them and do not seek out additional information from multiple sources.

The sources that the TAM team can contact for information should include persons who interact with the person of concern, as well as those who may be in a position to observe the person even if they typically do not interact with the person. The TAM team should gather information from people inside the institution, such as professors, resident advisors, and specialty service offices, such as disability services

or veterans services. Where possible, the team should also gather information from outside the institution, such as from an employer, previous school, community league coach, Internet activity, and family members where advisable.

iii. Evaluate Whether the Person or Situation Poses a Threat

After gathering additional information in the threat assessment inquiry, the TAM team will evaluate the information to determine whether the person or situation in question poses a threat of violence or self-harm. To do this, the team can first organize the case information using a series of investigative questions, detailed in the resources recommended by the ASME-ITI/ANSI-approved risk assessment standard. The team should then use the information it has collected to determine whether the person of concern poses a threat—that is, to determine if the person has developed an idea or plan to do harm and is taking steps to carry it out.

If the TAM team determines that the person *does* pose a threat, it will then develop, implement, and monitor a case management plan to intervene and reduce the threat posed. If the team determines that the person *does not* pose a threat, the team can close the case or can opt to monitor the person or situation for a period of time and re-evaluate the case to assess whether the person still does not pose a threat.

iv. Develop, Implement, and Monitor a Threat Management Plan

If the TAM team determines that the person in question poses a threat of violence or suicide, the team should then develop, implement, monitor, and document a plan to intervene and reduce the threat.³⁰ The plan should be customized to best address the person of concern and situation with the resources that the team and institution have available or could access or coordinate. The goal of a threat management plan is to help move the person of concern away from thoughts and plans of violence or suicide and get assistance to address problems.

Threat management/case management plans can include any of the following as the situation and resources dictate:

- ✦ Monitor the situation for further developments
- ✦ Engage with the person of concern to de-escalate the situation
- ✦ Involve an ally or trusted person to monitor the person of concern
- ✦ Family/parental notification
- ✦ Law enforcement intervention
- ✦ Disciplinary review and action
- ✦ Implement a behavioral contract
- ✦ Voluntary referral for mental health evaluation and/or treatment
- ✦ Mandated psychological assessment
- ✦ Involuntary hospitalization for evaluation and/or treatment
- ✦ Leave or separation from the institution
 - ✦ Voluntary leave
 - ✦ Interim suspension
 - ✦ Involuntary leave
- ✦ Modification of the environment to mitigate impact of contributory factors
- ✦ Collaborate with identified target/victim to decrease vulnerability
- ✦ Monitor and prepare for impact of likely precipitating events

Once the TAM team has created a threat management plan, it is just as important that the team document the plan, implement the plan, and then monitor how well the plan is working to make sure it is having the intended effect and not inadvertently making the situation worse.

It is important to note that a person can continue to pose a threat even after he/she is no longer a member of the campus community. The TAM team should continue to monitor the plan and modify it as needed for as long as the person/situation may still reasonably pose a threat. It may be necessary for the TAM team to continue to refer the person of concern to necessary resources or take other follow-up steps as the situation and level of concern dictate. As the TAM team considers what may affect the person's behavior in the short-, mid-, and long-term, the team

should anticipate the impact of future precipitating events—including important dates or events such as anniversaries, failing a course, termination of benefits, the ending of a relationship, or the occurrence of mass attacks elsewhere—that could prompt the person to become an increased threat. The team should develop contingency plans and take necessary steps to reduce or mitigate the anticipated threats.

v. Close and Document the Case

Cases handled by a TAM team generally remain open until the person of concern no longer appears to pose a threat. This may be well beyond when criminal cases are closed or mental health services are completed. Whether the case remains open or is closed, the TAM team should document how they handled the case, including the report that first came to the team's attention, the information the team gathered, the evaluation it made, the case management plan it developed and implemented (if necessary), and any re-evaluations or monitoring that the team conducted after the initial evaluation and case management efforts where relevant.

The level of detail in the case documentation—as well as where and how case records are maintained and stored—are critical issues for an institution's legal counsel to help a TAM team determine. The case documentation can also include the team's appraisal of whether there was sufficient concern regarding public safety that the Family Educational Rights and Privacy Act (FERPA)³¹ health and safety exception would apply, in the event information sharing in the case is ever questioned or challenged. Legal counsel should be consulted on documentation issues, which are discussed further below.

b. Resources and Activities that Support TAM Team Operations

While there is a tendency to think of the TAM team as involving only those individuals directly involved in staffing cases, we view the TAM team differently. Certainly, the identified members of the official team are critical to the process. However, just as important are all the members of the community that support and facilitate the work of the TAM team. Just as a sports team has first

string players on the field, the effective team also has back-ups to those players: specialty units, coaches, managers, scouts, marketing agents, fans, and, yes, even critics. So, too, does an effective TAM team. Furthermore, an effective TAM team recognizes and maximizes the value and contribution of all those elements to achieve the desired goal—the improved safety and well-being of the campus community.

TAM teams handle day to day reports submitted to the team, conduct full inquiries, and implement and monitor case management activities. To be more fully effective, though, a TAM team needs support from key resources and activities on campus and in the community. These resources and activities³² include:

- Support/backing from the institution's leadership
- Administrative support
- Access to mental health services
- Involvement of law enforcement and security services
- Active outreach and training to the community
- Engagement with gatekeepers of all types, at all levels
- Clear policies and procedures for TAM team authority and operations

Risk managers can play an important role in making sure these resources are available to the TAM team, and that the activities are conducted, so that the team can focus its time on investigating and managing cases.

III. Common Challenges and Recommended Solutions

Many institutions and TAM teams face common challenges that can hinder their effectiveness.³³ Some of the more common challenges and obstacles that TAM teams encounter include misconceptions on campus about threat assessment and threat management; misunderstandings regarding FERPA, Health Insurance Portability and Accountability Act (HIPAA), state

privacy laws, and information sharing; misconceptions about how disabilities laws apply to the TAM context; problems related to institutional policies and procedures that are not integrated optimally with TAM team operations; problems with documentation; moving directly to case management efforts without evaluating the person or situation of concern; and failing to implement part or all of a case management plan.

a. Misconceptions About Threat Assessment and Management

When launching a threat assessment and management capacity of some sort, TAM team members may well encounter misconceptions and misunderstandings about what behavioral threat assessment is and what it is not. Some of these misconceptions include that threat assessment is the same thing as profiling (not true); that “reporting” someone to the TAM team is the same thing as tattling (not true, unless the person reporting is doing so maliciously); and that anyone reported to the TAM team is immediately or eventually suspended, expelled, punished, or fired (not true unless the institution has inappropriately conjoined its disciplinary process and threat assessment process).

One way that risk managers can help address these misconceptions is by working with their TAM team to develop and publicize frequently

asked questions about campus threat assessment and management. Another way is for risk managers to advocate for periodic campus-wide awareness training, such as orientation meetings for students and residential advisors and academic and operational department meetings, that would encourage reporting of concerns and promote familiarity with the TAM concept. The thrust of such training should be that the TAM team is focused on promoting campus safety and helping individuals who need it, not on punishment for disciplinary offenses. The more transparent the threat assessment process is for the

One way risk managers can help address misconceptions is by working with their TAM team to develop and publicize frequently asked questions and advocate for periodic campus-wide awareness training.

campus community—with respect to how the TAM team operates, not with respect to the particulars of a specific case—the easier it will be for the TAM team to build credibility and inspire confidence and the more likely people will be to submit reports to the team. In sum, simply having a TAM team on campus is not enough. For the team to be effective at reducing risk, the community must know about the team and be willing to report concerns when appropriate.

b. Misunderstandings about FERPA, HIPAA, and State Privacy Laws

When seeking information about a particular student in the course of its investigative work, TAM teams often encounter misunderstandings about FERPA and the extent to which it is perceived as interfering with TAM team members, professors, and others in regard to sharing information about a student of concern. Many people still believe that student records and information may not be shared under any circumstances. It is clear from the work of the Virginia Tech Review Panel and other entities that these misunderstandings are widespread and often difficult to counter.³⁴

One way that risk managers can help enhance the overall effectiveness of their TAM team is by developing resources and strategies or supporting training programs to better educate the campus community about FERPA, the exceptions under which information can be shared, and the limited remedies for inappropriate disclosure of FERPA-protected information (campus personnel are often surprised to discover, for example, that neither individuals nor institutions can be sued for violating FERPA). TAM teams and campus police and security officers should be within the institution's definition of "school officials" with whom education records and information therefrom may be shared freely,³⁵ and institutions should take steps to assure that faculty and staff members know that. Most importantly, faculty and staff must understand that a long standing "health and safety" exception that was broadened in response to the Virginia Tech shootings permits disclosure of education records to any appropriate parties (on or off campus) where necessary to protect the health or safety of the student or others.³⁶ Through resources such as periodic training, web page information, and one-page fact sheets,

risk managers can help TAM teams to educate the campus community about the truth—and correct any misconceptions—regarding FERPA.

While not as prevalent, similar issues can be presented by campus community members' misplaced concerns about the privacy provisions of HIPAA. The HIPAA Privacy Rule prohibits the disclosure of personal health information by health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. While HIPAA does apply to certain medical information on some campuses, many colleges and universities do not have operations that are covered by HIPAA, and student health records are generally covered by FERPA, not HIPAA.³⁷ Further, even if HIPAA does apply to certain records on some campuses, it permits disclosure of protected health information if a covered entity believes in good faith that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and such disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.³⁸ In sum, risk managers and TAM teams should take steps to determine whether HIPAA privacy rule restrictions actually apply to campus operations and to educate the campus community about the rule and the health and safety exception if applicable to ensure that undue concerns about HIPAA do not restrict the provision of important information to a TAM team.

As for state law privacy rules, the most commonly applicable state law rules are those pertaining to the relationship between health care providers and their patients. Those rules, and the circumstances in which disclosure of otherwise privileged information might be allowed or required, are discussed in Section I.a.ii. above. The most important thing that risk managers can do with respect to such rules is to assure that TAM teams and providers who routinely see campus community members, such as student counseling center providers or employee assistance program (EAP) providers, have a *shared* understanding of the thresholds for disclosure that the providers will apply. TAM teams should understand when they can rely upon providers to breach privileges due to a specific threat level, and when, on the other hand, they should assume that they will have to assess and

manage threats based on other information sources. Risk managers should encourage TAM teams to have frank conversations with providers about such issues.

TAM teams cannot function without information from the campus community, so it is crucial that campus community members have an accurate understanding of privacy rules and, just as importantly, the exceptions to those rules. That way, TAM teams can do their important work without being restricted unduly by concerns about privacy rules.

c. Misconceptions about Disabilities Laws

Colleges and universities are covered by the Americans with Disabilities Act of 1990 (as amended in 2008) (ADA) and Section 504 of the Rehabilitation Act, and many are covered by parallel state laws. The requirements of these laws are similar in most respects, so this article will refer to the ADA, because it is the broadest and the most broadly applicable. Undue deference to the potential ADA-related rights of persons of concern could lead a TAM team or institution to fail to take necessary threat management steps, while a failure to respect ADA-required procedures could result in liability under the ADA. TAM teams must, therefore, coordinate threat management efforts with counsel to assure that ADA-related issues are handled optimally.

A detailed treatment of these issues is beyond the scope of this article, but TAM teams should at least understand that while the coverage of the ADA is very broad,³⁹ it does not require that institutions tolerate threatening behavior that poses a “direct threat” to others⁴⁰ or that renders a student or employee not qualified to participate in the academic, residential, or work environment.⁴¹ This is true in most states and federal circuits even if the threatening behavior is caused by a disability.⁴² With this general information in mind, TAM teams can focus on inappropriate behavior instead of worrying about ADA issues specifically and work with legal counsel to take threat management actions that they deem necessary (e.g., mandatory counseling, suspension,

conditional re-entry to campus) without undue concern over the possibility that the person of concern might be covered by the ADA.

TAM teams do need to understand, though, that there are ADA-related due process considerations they need to respect. The US Department of Education’s Office of Civil Rights (OCR) has been clear in emphasizing that if an institution proposes to affect the status of a student covered by the ADA or Rehabilitation Act, it must provide “minimal due process” for temporary status changes, and “full due process” for longer term or permanent status changes. This means that in emergent situations, such as those that might require temporary suspensions, students should be provided with some notice of the institution’s concerns and some opportunity for the student to explain his or her side of the story. After the emergent issue has passed, if the institution decides to pursue longer term curtailment of a student’s rights, the student should receive a hearing and an opportunity for an appeal. At most institutions, a TAM team will not be responsible for administering disciplinary, involuntary withdrawal, or similar processes, but it should at least understand the due process requirements that will apply to the institution. This will allow the team’s threat management

recommendations or actions to dovetail effectively with campus procedures, and student rights can be respected without unduly compromising campus safety considerations.

d. Problems with Institutional Policies and Procedures

Risk managers should work with TAM teams and counsel to assess whether institutional policies relevant to TAM operations, such as policies regarding student misconduct, weapons, workplace violence, threatening behavior and statements, and trespassing, are phrased in such a way as to allow TAM teams to take or advocate for disciplinary or protective action as appropriate. Universities should change policies, which in many

TAM teams must coordinate threat management efforts with counsel to assure that ADA-related issues are handled optimally.

states are enforceable as contracts, so that they can serve essential institutional prerogatives, while also optimally supporting TAM operations. Further, where teams and counsel discern through a review that there are gaps in institutional policies that could make it more difficult to address threatening behavior, universities should create policies to fill those gaps.

Similarly, institutional procedures that are likely to be implicated by TAM operations should also be reviewed by TAM teams and counsel. Teams need to become familiar with how the institution's procedures function, so that they will understand any related limitations. For example, if an institution's student disciplinary procedure or involuntary withdrawal procedure places practical limitations on what the TAM team can do or recommend in a given situation, the team needs to understand that in advance, rather than getting an unpleasant surprise in the midst of an emergent situation. Advance review will also provide an opportunity for the team and counsel to advocate for the revision of any procedures that will obviously and unnecessarily limit the options available for the management of threat situations.

In sum, while colleges and universities must comply with statutes as they are written, they have some flexibility in defining the rules that they impose on themselves through institutional policies and procedures. Optimized policies and procedures can facilitate the work of TAM teams, while those that universities craft without TAM issues in mind can impair that work and complicate already risky situations. A thorough TAM-related policy and procedure review should, therefore, be on every risk manager's agenda.

e. Documentation Challenges

Risk managers know well that accurate documentation is helpful—unless it's not. Obviously, an institution would like good decision making processes to be documented well, but would regret the creation of documentation that,

if taken out of context, could shed an unflattering light on the work of a TAM team. TAM teams must understand that unless a privilege against disclosure applies, most of the documents they create, including e-mails, personal notes, and other relatively informal documentation, would be subject to disclosure in the event of litigation. Further, unless an exemption applies, public institutions may have to disclose documents in response to public record act requests, and colleges and universities may also have to turn over TAM team documents if a student of concern

demands them under FERPA.⁴³ While teams may be able to resist disclosure in specific cases if exemptions apply, teams should still be cautious and create all drafts, notes, e-mails, and final summary documents with these realities in mind.

Documentation that states the rationale for the team's decisions at various points in an assessment and management process and summarizes the factual basis for those decisions can serve to memorialize the team's thought process if its decisions are ever questioned. In final form, the documentation regarding a case should demonstrate that the team's work and decision making process was, to borrow Dr. Gene Deisinger's acronym, Fair, Objective, Reasonable, and Timely, in order to FORTify the institution's position.

Documentation should not, on the other hand, contain off-handed comments, speculation without basis in fact, ill-considered observations about sensitive mental health or disability issues, or partially formed thoughts and deliberations. While teams must "think out loud" when weighing options in a particular case, they do not need to document every passing thought and preliminary deliberation. It is very helpful to have a skilled scribe for the group who has worked with counsel to determine how to optimally document the team's deliberations and decision making.

Of course, because legal issues are often presented by the deliberations of TAM teams, those deliberations and related documentation could fall within the scope of

Documentation that states the rationale for the team's decisions and summarizes the factual bases for those decisions can memorialize the team's thinking if its decisions are ever questioned.

the attorney-client privilege, if legal counsel is involved. As discussed above, TAM-related discussions often involve balancing the privacy and/or disability law rights of persons of concern against the institution's legal duty to provide a safe campus community. Involving counsel in a TAM team's deliberations is therefore natural and appropriate. Counsel may be particularly helpful in reviewing draft documentation and minutes. If deliberations and related documents are within the scope of the attorney-client privilege under state law, they should be protected from disclosure in the event of litigation, from a FERPA request made by a student of concern, and, in some states, from a public record request.

The bottom line for risk managers is that they should assure that their campus TAM teams have consulted with counsel about the application of the attorney-client privilege to their communications and documents and about optimal documentation practices. That way, if disclosure of documents is ever necessary, the university can disclose them with confidence rather than trepidation.

f. Case Management Without Evaluation

When cases first come to the attention of a TAM team, they can be accompanied by significant fear and other emotion that leads to an action imperative, or a strong pull to do something in response to the fear expressed. Certainly in those limited cases where there is an imminent threat to the community or an individual, such as a report of a person walking into an administrative building with a weapon, then institutions must understandably act quickly, even if the report turns out to misrepresent the situation. However, most reports do not involve such exigent circumstances and instead allow for time and opportunity to gather additional information, assess the situation, and develop a reasonable and meaningful approach based on the degree of danger that the TAM team perceives there to be. Having a consensus among the team members regarding whether the person or situation poses a threat—and the corresponding priority level the team believes the case merits⁴⁴—can help guide clear, fact-based decisions regarding the most appropriate case management strategies to employ. This decreases the likelihood of reactionary interventions that may not improve the situation and can, at times, inadvertently escalate a situation unnecessarily. It also

decreases the impulse to craft case management plans based on partial or incomplete information, allowing the team to develop a full picture of the situation and corroborate the information in hand before deciding how best to intervene.

A well-developed threat assessment and management process allows for informed, assessment-led interventions that can best:

- De-escalate, control, or contain the person of concern
- Decrease the vulnerability of likely victims
- Mitigate effects of negative environmental or systemic influences
- Anticipate the effect of precipitating events that may develop

Risk managers can assist TAM teams in monitoring and reviewing team processes, challenging reactionary interventions (in the absence of exigent situations), and supporting assessment-based interventions that are proportional and responsive to the situation at hand.

g. Failing to Implement a Case Management Plan

The last common challenge facing TAM teams is that they do solid work in conducting a full inquiry, making the assessment, and developing a case management plan—but then fail to implement and monitor part or all of the case management plan. Failing to implement a case management plan can come about because an individual TAM team member fails to do what he or she was tasked with doing, someone outside the team fails to do what he or she was asked to do to assist the team, or the team as a whole fails to put into action the plan that it crafted. There are various reasons, excuses, and rationales for these occurrences, but regardless of the perceived validity of the rationale, from a legal perspective, this could result in a significant safety risk and related legal exposure in the event that a person of concern causes harm. It is fair to say that TAM teams will be accorded discretion to decide on a reasonable course of action when assessing and managing threats, within the bounds of the duties described above. However, if a team fails to follow through on a commitment it makes to itself, it will have a more difficult time justifying its approach. If the answer to the question, "Why didn't you follow through?" is that

changing circumstances required a change of course, that would be subject to the same reasonableness standard. If, however, the answer is, "I forgot or didn't get around to it," that would sound very hollow in the context of litigation over a violent incident, whether the failure to follow through would actually have prevented the harm or not.

Risk managers can help their TAM teams to become more fully effective by ensuring that the team engages in the complete threat assessment and management process to include implementing and monitoring case management plans they develop to intervene and reduce any threats posed. If a TAM team is overloaded with incoming reports and new cases to investigate, the institution's risk manager can help the team to offload implementation of case management plans or specific components to various campus personnel who would fulfill these duties responsibly. Risk managers can also advocate for the hiring of a dedicated case manager position (or two or three dedicated case managers, as needs dictate), whose primary job would be to implement, monitor, and report on case management plans developed by the TAM team.⁴⁵ Finally, risk managers can conduct or request outside assistance in conducting a review or audit of the TAM team's work to identify areas where the team's procedures may fall short of best practices and to find remedies to bridge those gaps.

Conclusion

There is no question that engaging with individuals who may pose a threat to others on campus is a risky business. In practical terms, though, some risk in this area cannot be avoided, because the current standard of care dictates that colleges and universities must have a campus threat assessment team. Given this reality, risk managers should assure that their campus communities know about and feel comfortable reporting concerns to their TAM teams, their teams follow best and promising practices, misconceptions about privacy and disability laws will not impede their teams' work, institutional policies and procedures support rather than impede the work of their teams, their teams follow optimal documentation practices, and their institutions are positioned to balance appropriately the statutory rights of persons of concern against campus safety needs. If risk managers can address

these issues, they will have gone a long way toward minimizing legal liability in this sensitive area and, most importantly, toward reducing the risk of harm on their campuses.

About the Authors



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Endnotes

- ¹ The authors worked as subject matter experts with the team that developed the US Department of Justice Community Oriented Policing Services (COPS) Office's national curriculum, *Campus Threat Assessment Training—A Multidisciplinary Approach for Institutions of Higher Education* (see www.campusthreatassessment.org). They also served as faculty for that program, which was presented at 10 locations throughout the United States in 2009, 2010, and 2011.
- ² *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (Restatement (Third) of Torts), § 7 (American Law Institute, 2011).
- ³ This discussion will focus on duties owed to students and campus visitors, but not faculty and staff because, in most situations, workers' compensation statutes provide the exclusive remedy for employees who are injured or killed within the scope of their employment. Some sections

of the Restatement (see, e.g., Restatement (Third) of Torts, § 40(b)(4)(a) and § 40, cmt. k) and some exceptional provisions of state law do contemplate institutional liability to employees notwithstanding workers' compensation exclusivity, but such issues are limited, state-specific, and complicated enough that they are beyond the scope of this article. It should suffice to say that institutions will of course want to do what they can reasonably to keep employees safe from physical attacks on campus, even in the absence of a general legal duty to do so.

⁴ Restatement (Third) of Torts, § 37. For those risk managers and attorneys who have followed the development of case law in this area over the years, section 37 of the Third Restatement replaces sections 314 and 315 of the Restatement (Second) of Torts, upon which many courts have relied in deciding whether and/or what duties colleges and universities owe to their students.

⁵ Restatement (Third) of Torts, § 40(a), § 40(b)(5).

⁶ Restatement (Third) of Torts, § 40, cmt. I. Comment I listed and annotated as follows various cases in which courts imposed a duty of reasonable care to protect students on college or university property: "Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602 (W.D.Va.2002) (concluding that, on specific facts alleged by plaintiff, college owed affirmative duty to student who committed suicide); Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193 (Cal.1984) (duty owed to student raped in college parking ramp); Furek v. Univ. of Del., 594 A.2d 506 (Del.1991) (finding university had special relationship with student who was a fraternity pledge but also relying on its undertaking to regulate hazing and its status as possessor of land and student's status of invitee); Nova Southeastern Univ., Inc. v. Gross, 758 So. 2d 86 (Fla.2000) (duty owed to graduate student placed by university in mandatory internship); Niles v. Bd. of Regents of Univ. Sys. of Ga., 473 S.E.2d 173 (Ga.Ct.App.1996) (stating in dicta that a "university student is an invitee to whom the university owes a duty of reasonable care"); Stanton v. Univ. of Me. Sys., 773 A.2d 1045 (Me.2001) (university owed duty to student-athlete as business invitee who was residing in dormitory to provide information about appropriate precautions for personal safety); Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass.1983); Knoll v. Bd. of Regents of Univ. of Neb., 601 N.W.2d 757 (Neb.1999) (victim of fraternity hazing episode owed duty by university based on its role as landowner with student as its invitee); cf. Mintz v. State, 362 N.Y.S.2d 619 (App.Div.1975) (impliedly assuming that duty existed in deciding that university had not acted unreasonably as a matter of law in supervising overnight canoe outing by students); Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C.Ct.App.2001) (holding that university has special relationship with cheerleader based on mutual benefit to each from the activity and control exerted by the university over the activity, but denying, in dicta, that university has special relationship generally with students)." Restatement (Third) of Torts, § 40, cmt. I.

On the other hand, the ALI cited and annotated as follows cases in which courts found no duty: "Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir.1979) (applying Pennsylvania law) (college owed no duty to student injured while being transported by another underage student who had become drunk at off-campus class picnic); Booker v. Lehigh Univ., 800 F. Supp. 234 (E.D.Pa.1992) (university owed no duty to student who was injured after becoming inebriated at on-campus fraternity party); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Ct.App.1981) (university owed no duty to student by virtue of dormitory license where risks created by excessive drinking and drag racing were not foreseeable to university); Univ. of Denver v. Whitlock, 744 P.2d 54 (Colo.1987) (concluding that university

owed no duty to student injured while on trampoline at fraternity; to impose duty could result in imposing regulations on student activity that would be counterproductive to appropriate environment for student development); Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 311–312 (Idaho 1999) (college does not have special relationship with student that imposes a duty to protect student from risks involved in voluntary intoxication); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill.App. Ct.1987) (university owed no duty to student based on its landlord-tenant relationship with her for harm that resulted from prank by intoxicated fraternity member); Nero v. Kan. State Univ., 861 P.2d 768 (Kan.1993) (declining to impose duty on university solely because of its role as school but concluding university had duty of care as landlord for student living in dormitory); Boyd v. Tex. Christian Univ., Inc., 8 S.W.3d 758 (Tex.App.1999) (university had no duty to student injured while at off-campus bar); Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986) (university had no duty to protect student from consequences of voluntary intoxication while on university-sponsored field trip)." Restatement (Third) of Torts, § 40, cmt. I.

Finally, the ALI cited two general resources as follows: "Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 Mo. L. Rev. 1 (1999) (identifying a trend in tort law toward holding institutions of higher education to a tort duty with respect to the safety of students); Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College–Student Relationship*, 29 J.C. & U.L. 485 (2003) (advocating recognition of a special relationship between colleges and their students)." Restatement (Third) of Torts, § 40, cmt. I.

⁷ Restatement (Third) of Torts, § 40(b)(3).

⁸ Restatement (Third) of Torts, § 40(b)(6).

⁹ See cases cited in endnote 6 above. In addition to those cases, other cases in which institutions have been held to have a "business invitee" or "landlord-tenant"-based duty to protect on-campus visitors against acts by third parties include Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196 (Ind. 1983) (university had duty to protect bystander injured due to fight between two drunken tailgaters), Peterson v. San Francisco Comm. College Dist., 36 Cal.3d 799, 205 Cal.Rptr. 842, 685 P.2d 1193 (1984) (college owed duty to protect student from reasonably foreseeable criminal attack on campus), and Miller v. State, 62 N.Y.2d 506, 467 N.E.2d 493 (N.Y. 1984) (state university had duty, as landlord, to use reasonable security precautions to protect student from foreseeable rape in an on-campus dormitory).

¹⁰ See Restatement (Third) of Agency, § 2.04 (American Law Institute, 2006).

¹¹ See Restatement (Third) of Agency, § 7.07, cmt. c.

¹² Restatement (Third) of Torts, § 41(b)(3).

¹³ Restatement (Third) of Torts, § 41, cmt. e.

¹⁴ Ibid.

¹⁵ Restatement (Third) of Torts, § 41(b)(4).

¹⁶ The scope of the patient-mental health professional privilege varies from state to state. One national resource often looked to for general guidance is the American Psychological Association's code, which provides in pertinent part that the privilege may be breached with patient consent "where permitted by law for a valid purpose such as to . . . protect the client/patient, psychologist, or others from harm . . ." *APA Ethics Code 2002*, Sec. 4.05(b).

- ¹⁷ See Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass.1983) (finding that student on-campus rape victim relied upon college's providing security services, based on generalized interest by college applicants in campus security and the student victim's having visited several campuses before selecting Pine Manor); Eurek v. Univ. of Del., 594 A.2d 506 (Del.1991) (holding university subject to duty to student with regard to risks of fraternity hazing based on its undertaking to prohibit and regulate hazing activities); Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C.Ct. App.2001) (finding that university owed duty to cheerleader based on its undertaking to advise cheerleading squad on safety matters).
- ¹⁸ See 110 ILCS 12/20(b) (2009) (Illinois statute, enacted after the February, 2008 shootings at Northern Illinois University, which requires each Illinois institution of higher education to develop a campus threat assessment team); Va. Code Ann. § 23-9.2:10 (2008) (Virginia statute enacted after the April, 2007 shootings at Virginia Tech which requires public higher education institutions in Virginia to establish a threat assessment team that includes members from law enforcement, mental health professionals, representatives of student affairs and human resources, and, if available, college or university counsel, and which charges such team to provide guidance to students, faculty, and staff regarding recognition of behavior that may represent a threat to the community, to identify members of the campus community to whom threatening behavior should be reported, and to implement policies and procedures for the assessment of individuals whose behavior may present a threat, and for "appropriate means of intervention with such individuals, and sufficient means of action, including interim suspension or medical separation to resolve potential threats.").
- ¹⁹ The Blueprint is available at: http://www.iaclea.org/visitors/PDFs/VT-taskforce-report_Virginia-Tech.pdf. In preparing the Blueprint, the authors (Raymond H. Thrower, Steven J. Healy, Dr. Gary J. Margolis, Michael Lynch, Dolores Stafford and William Taylor) consulted and referenced the following documents: Mass Shootings at Virginia Tech, April 16, 2007, Report of Review Panel, Presented to Governor Kaine, Commonwealth of Virginia, August 2007; Investigation of April 16, 2007, Critical Incident At Virginia Tech Prepared by Office of the Inspector General For Mental Health, Mental Retardation & Substance Abuse Services, James W. Stewart, III. Report: # 140-07; Presidential Internal Review, Working Group Report on the Interface Between Virginia Tech Counseling Services, Academic Affairs, Judicial Affairs and Legal Systems, Submitted to President Charles Steger, August 12, 2007; Oklahoma Campus Life and Safety and Security Task Force (CLASS) Final Report, January 15, 2008; New Jersey Campus Security Task Force Report, Submitted to Governor Jon S. Corzine, October 2007; Expecting the Unexpected - Lessons from the Virginia Tech Tragedy, by American Association of State Colleges & Universities; The Report of the University of California Campus Security Task Force, University of California Office of the President, January 2008; Gubernatorial Task Force for University Campus Safety, Report on Findings and Recommendations, State of Florida, May 24, 2007; Governor's Task Force on Campus Safety, State of Wisconsin, November 15, 2007; International Association of Campus Law Enforcement Administrators Special Review Task Force on Virginia Tech; Missouri Campus Security Task Force, Report on Findings and Recommendations, August 21, 2007; Association of American Universities, August 2007; Survey on Safety on AAU Campuses after the Virginia Tech Shootings; Report of the Campus Safety Task Force Presented to North Carolina Attorney General Roy Cooper; National Association of Attorneys General, Task Force on School and Campus Safety, Report &

Recommendations, September 2007; Report to the President of the United States on Issues Raised by the Virginia Tech Tragedy, June 13, 2007; The Report of the Virginia Tech Review Panel Synopsis prepared by Charles F. Carletta, JD, Secretary of the Institute and General Counsel, Rensselaer Polytechnic Institute, October 2007.

- ²⁰ *Addressing Emergencies on Campus*, US Department of Education, Family Policy Compliance Office, at 11 (June 2011). Available at: <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>.
- ²¹ See Dobbs, *The Law of Torts*, § 164 (West Group, 2001) ("On the issue of negligence, a safety custom is often relevant because it reflects the judgment and experience of many people and thus directly suggests how a reasonable person might behave under the circumstances, on the theory that customary behavior is usually not negligent, or on the more specific ground that, under some circumstances, customary behavior tends to prove the proper balance of risks and utilities. . . . [A] safety custom in a negligence case is relevant evidence tending to show what does or does not count as reasonable care."
- ²² ASME-ITI Risk Analysis Standard at 1.
- ²³ *Ibid.*, 10.
- ²⁴ See Dobbs, *The Law of Torts*, § 164 ("As a sword, the plaintiff can show the defendant's violation of a safety custom as some evidence that defendant failed to act as a reasonable person under the circumstances. In some cases, evidence of the custom is presented by an expert, but the rule is no less applicable if the custom is institutionalized in advisory standards of the relevant industrial association." (citing, e.g., Hansen v. Abrasive Eng'g & Manufacturing, Inc., 317 Or. 378, 856 P.2d 625 (1993) (ANSI advisory standard deemed admissible but not conclusive)).
- ²⁵ The court in Getty Petroleum Marketing, Inc. v. Capital Terminal Co., 391 F.3d 312 (1st Cir. 2004), provided a fair, balanced summary of the law in this area, as follows:

Many cases involve voluntary industry standards that do not have the force of law in the relevant jurisdiction. The overwhelming majority of such cases are negligence actions where the industry standard is offered as evidence of the appropriate standard of care. See, e.g., Miller v. Yazoo Mfg. Co., 26 F.3d 81, 83 (8th Cir.1994) (in personal injury action, American National Standards Institute lawnmower safety standards were offered to establish standard of care); Matthews v. Ashland Chem., Inc., 770 F.2d 1303, 1310-11 (5th Cir.1985) (in personal injury action, NFPA, National Electric Code, and the American National Standard Specifications for Accident Prevention Signs were offered to establish standard of care); Boston & Me. R.R. v. Talbert, 360 F.2d 286, 290 (1st Cir.1966) ("certain nationally recognized standards concerning the design of highway and railroad crossings" were offered to establish standard of care, with trial judge's warning that they were "not completely authoritative"); Dickie v. Shockman, No. A3-98-137, 2000 WL 33339623, *3 (D.N.D. July 17, 2000) (in personal injury action, NFPA standards "and other codes applicable within the propane industry" were offered to establish standard of care).

These voluntary standards do not irrefutably establish the standard of care in a negligence case. Rather, they constitute "one more piece of evidence upon which the jury could decide whether the defendant acted as a reasonably prudent person in the circumstances of th[e] case." Boston & Me. R.R., 360 F.2d at 290. The defendant is free to argue that the standard is unduly demanding, either in general or in the particular instance, and that it does not reflect industry practice or the standard that a reasonably prudent person would employ. After all, voluntary standards are not law; in essence, they are simply recommendations written by

experts who may not themselves be available for cross-examination. In short, the merits of the standard are “for the jury’s consideration like any other evidence in the case.” *Ibid*.

Consequently, courts have generally treated such standards as factual evidence that the court may admit or exclude based on ordinary evidentiary principles. See, e.g., *Miller*, 26 F.3d at 83-84 (voluntary standard was properly admitted); *Matthews*, 770 F.2d at 1310-11 (voluntary standards were properly excluded); *Boston & Me. R.R.*, 360 F.2d at 290 (voluntary standards were properly admitted); *Dickie*, 2000 WL 33339623, at *3 (admitting expert testimony regarding voluntary standards).

Getty Petroleum, 391 F.3d at 326-27. See also *Kent Village Assocs. Joint Venture v. Smith*, 657 A.2d 330, 337 (Md.Ct.Spec.App. 1995) (“[S]afety standards ... may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence.” See also generally Feld, Annotation, Admissibility in Evidence, On Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association, 58 A.L.R.3d 148 (1974 & 2010 Supp.).

- ²⁶ ASME-ITI Risk Assessment Standard at 10. The ASME-ITI/ANSI Standard states that “the following resources or equivalent may be helpful in conducting a risk assessment”: Randazzo and Plummer, *Implementing Behavioral Threat Assessment on Campus: A Virginia Tech Demonstration Project* (Virginia Polytechnic Institute and State University, 2009), http://www.threatassessment.vt.edu/Implementing_Behavioral_Threat_Assessment.pdf); Deisinger, Randazzo, O’Neill, and Savage, *The Handbook for Campus Threat Assessment & Management Teams* (Applied Risk Management, 2008); *The Virginia Tech Review Panel Report*, August 2007, <http://www.vtreviewpanel.org/report/index.html>.
- ²⁷ See *Implementing Behavioral Threat Assessment on Campus* (2009); *The Handbook for Campus TAM Teams* (2008).
- ²⁸ These steps are summarized from *The Handbook for Campus TAM Teams* (2008).
- ²⁹ TAM teams that are handling multiple cases can triage the initial reports received to determine which reports merit a full inquiry, and/or which reports should be handled first if all reports are to be investigated. *The Handbook for Campus TAM Teams* (2008) outlines sample screening and triage procedures for this purpose.
- ³⁰ At institutions where a separate CARE or similar team works with students who may be at risk of suicide, and/or where an EAP or outside resource works with employees who may be at such risk, proper referrals should be made if a TAM team determines that a person of concern poses a risk to him or herself, but not to others. Legal duties to prevent suicide vary substantially based on particular circumstances and state law (discussion of which is beyond the scope of this article), but TAM teams will of course recognize at least some moral duty to attempt to make a referral if that appears necessary.
- ³¹ 20 U.S.C. § 1232g et seq.
- ³² A full discussion of these resources and their usefulness for enhancing TAM team operations and effectiveness is beyond the scope of this article. More information can be found in *The Handbook for Campus TAM Teams* (2008).
- ³³ *Implementing Behavioral Threat Assessment on Campus* (2009), another resource recommended in the ASME-ITI/ANSI-approved risk assessment standard, details the specific challenges that Virginia Tech encountered in establishing its threat assessment team following its campus shooting in 2007, and the solutions that it implemented to address those challenges.

- ³⁴ See *The Virginia Tech Review Panel Report*, August 2007, <http://www.vtreviewpanel.org/report/index.html>. See also several of the resources consulted by the Blueprint for Safer Campuses (listed in endnote 19, *supra*).
- ³⁵ See 34 C.F.R. § 99.34(a)(1). See also *Addressing Emergencies on Campus*, at 11 (“schools can respond to student behavior that raises concerns about a student’s mental health and the safety of the student and others that is chronic or escalating, by using a threat assessment team, and then may make other disclosures under the health or safety emergency exception, as appropriate, when an ‘articulable and significant threat’ exists.”).
- ³⁶ See 34 C.F.R. § 99.31(a)(10) and 34 C.F.R. § 99.36.
- ³⁷ See HHS-DOE, *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Information Portability and Accountability Act of 1996 (HIPAA) to Student Health Records*, <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>.
- ³⁸ See 45 C.F.R. § 164.512(j).
- ³⁹ The ADA requires that reasonable accommodations be provided to individuals with a disability, which includes individuals who have a physical or mental impairment that substantially limits a major life activity, conditions that substantially limit the operation of a major bodily function, and mental health conditions that substantially limit an individual’s ability to learn, concentrate, think and communicate. The ADA also prohibits discrimination against individuals who have a record of a disability, or who are regarded as having a disability. See generally 42 U.S.C. § 12102.
- ⁴⁰ A “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation (in the employment context), and/or the elimination or modification of policies, practices or procedures or the provision of auxiliary services (in the student/member of the public context). In assessing whether a direct threat is present, institutions must assess the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. See 42 U.S.C. § 12111(3) (employment context); 42 U.S.C. § 12182(b)(3); 28 C.F.R. §§ 35.104, 35.159, 28 C.F.R. §§ 36.104, 36.208 (student/member of the public context).
- ⁴¹ See, e.g., *Ascani v. Hofstra University*, 173 F.3d 843 (2nd Cir. 1999) (unpublished disposition) (holding that a student who threatened and frightened her professor, and in fact pled guilty to harassment and trespass, was not “otherwise qualified” to continue as a graduate student, even if the behavior was precipitated by her mental illness (citing *Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir.1997) (reaching this conclusion in the work setting), cert. denied, 522 U.S. 1096, 118 S.Ct. 893, 139 L.Ed.2d 879 (1998); *Husowitz v. Runyon*, 942 F.Supp. 822, 834 (E.D.N.Y.1996) (same)); *Bhatt v. University of Vermont*, 184 Vt. 195, 958 A.2d 637, 2008 VT 76 (2008) (holding, under state public accommodations law patterned after the ADA, that institution could dismiss a medical student for misconduct allegedly caused by a mental disability, where the misconduct demonstrated that he was not qualified to remain in the program); *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996) (holding that the Rehabilitation Act did not prohibit termination of employee for threatening his co-workers, even if that behavior was caused by a mental disability; *Little v. FBI*, 1 F.3d 255, 259 (4th Cir.1993) (same).
- ⁴² See cases cited in endnote 41, *supra*. Even in federal circuits where courts have ruled that disciplining an individual for misconduct caused by a disability is the same thing as disciplining the individual for having a disability, see, e.g., *Hartog v. Wasatch Academy*, 129 F.3d 1076 (10th Cir.

1997) (the 10th Circuit encompasses Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah) and *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (the Ninth Circuit encompasses California, Washington, Montana, Idaho, Oregon, Nevada, Arizona, Hawaii and Alaska), institutions and employers still do not have to continue to matriculate or employ individuals who are not qualified even with reasonable accommodations, or who pose a “direct threat”. See, e.g., *Hartog*, 129 F.3d at 1087. As noted above, risk managers and TAM teams should work with legal counsel to determine how to best navigate the disability law principles that will be applied to TAM work in their jurisdiction.

⁴³ FERPA regulations provide that students generally have a right to review their “education records,” which are defined broadly as personally-identifiable information recorded in any format (subject to various qualifications and exceptions), within 45 days of making a review request. 34 C.F.R. § 99.10. Thus, unless an exception applies, a student of concern could request access to a TAM team’s records in the midst of a threat management process, which could be problematic. However, law enforcement unit records are not “education records” subject to disclosure if maintained under the strict mandates of the applicable definition, see 34 C.F.R. § 99.8, and some TAM teams maintain their records with this exemption in mind. Of course, even if documents were not subject to disclosure under FERPA, they might still be subject to disclosure in the context of litigation, a civil rights agency investigation, or under public record laws, if applicable.

⁴⁴ See *The Handbook for Campus TAM Teams* (2008) for a full discussion of case prioritization and sample priority levels.

⁴⁵ See *Implementing Behavioral Threat Assessment on Campus* (2009) for a discussion of Virginia Tech’s experience hiring several case managers and for a sample case manager position description in the Appendix.

**I could not tread these perilous paths in safety,
if I did not keep a saving sense of humor.**

—HORATIO NELSON (1758–1805),

SOLDIER IN THE ROYAL NAVY, PARTICULARLY DURING THE NAPOLEONIC WARS

The *URMIA Journal* is published annually by the University Risk Management and Insurance Association (URMIA), PO Box 1027, Bloomington, IN 47402-1027. URMIA is an incorporated non-profit professional organization.

The 2011 *URMIA Journal* was edited by Christie Wahlert, URMIA, Bloomington, Indiana; the covers were designed by Ellen Rising Morris of Eighth Day Creations, Wheaton, Illinois; and the *URMIA Journal* was printed at Indiana University Printing Services, Bloomington, Indiana.

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