

2021

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Marnae Mawdsley, *A Losing Mentality: An Analysis of the Duty Owed By Universities to Provide Their Student-Athletes with Mental Health Services*, 31 Marq. Sports L. Rev. 243 (2021)

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A LOSING MENTALITY: AN ANALYSIS OF THE DUTY OWED BY UNIVERSITIES TO PROVIDE THEIR STUDENT-ATHLETES WITH MENTAL HEALTH SERVICES

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INTRODUCTION

When you think about the hallmarks of collegiate athletics, what comes to mind? One might imagine a stadium filled with fans rallying to support their school's team. Others may picture a star athlete with masterful skills and physical prowess. While these are well-recognized parts of collegiate athletics, there is another important aspect that is not as readily apparent to spectators—the mental health of student-athletes. At the 2020 National Collegiate Athletic Association (NCAA) Convention, the NCAA's chief medical officer, Brian Hainline, said that “[m]ental health is the single most important health and safety issue facing our student-athletes today.”¹ This comment was made in January 2020, before the COVID-19 pandemic altered the lives of people around the world and thrust collegiate athletics into a state of uncertainty.² Despite shifting focus towards mitigating the impact of COVID-19, the concern for student-athletes' mental health has not diminished.³ In fact, effects of the

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1. Charlie Henry, *Mental Health Is Key Focus at NCAA Convention*, NCAA (Jan. 28, 2020), <http://www.ncaa.org/about/resources/media-center/news/mental-health-key-focus-ncaa-convention>.

2. *Id.*; NCAA, *The New Normal*, NCAA, https://spark.adobe.com/page/SY_N7j4Jc0WjDx/ (last visited July 6, 2020).

3. *See* Greg Johnson, *Survey Show Student-Athletes Grappling with Mental Health Issues*, NCAA (May 20, 2020), <http://www.ncaa.org/about/resources/media-center/news/survey-shows-student-athletes-grappling>

pandemic—such as social isolation and a loss of sports-related identity—have furthered conversations surrounding student-athlete mental health.⁴

Research by the NCAA emphasizes that student-athlete mental health has become a serious issue in recent years; in 2015, thirty percent of student-athletes stated that, over the past month, they felt “intractably overwhelmed,” and nearly one-quarter reported feeling “exhausted from the mental demands of their sport.”⁵ These trends coincide with a growing concern for the mental health of all college students fueled by campus counseling centers reporting higher levels of distress, underdeveloped coping skills, and a greater demand for mental health services.⁶ However, student-athletes evoke concerns that are unique from the general student-population; they not only encounter the same mental health “risk factors” as their non-athlete peers, but also face the pressures associated with collegiate athletics.⁷ Despite the prevalence of mental health issues among student-athletes and throughout college campuses, some institutions are struggling to provide mental health services to their students.⁸ The impact of athletics on mental health, coupled with the relationship that universities have with their student-athletes, raises the question of whether a legal duty can be imposed on institutions to provide their student-athletes with mental health services.

This Article begins with an overview of the mental health crisis impacting student-athletes. Next, it examines the background and potential sources of a university’s duty of care to its general student population. Then, it examines the duty of care that a university owes to its student-athletes based on their special relationship. Further, it discusses instances where a university may have a duty relating to its students’ mental health. Lastly, it concludes that a university’s special relationship with a student-athlete may create a duty to provide them with mental health services.

g-mental-health-issues; see also *COVID-19 and Mental Health*, NCAA, <http://www.ncaa.org/sport-science-institute/to-pics/covid-19-and-mental-health> (last visited July 6, 2020).

4. *COVID-19 and Mental Health*, supra note 3; Dan Wolken, *College Football Programs Fighting Another Opponent in Pandemic: Mental Health*, USA TODAY (July 25, 2020), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2020/07/25/college-football-programs-fighting-another-foe-mental-health/5505241002/>.

5. NCAA, NCAA GOALS STUDY OF THE STUDENT-ATHLETE EXPERIENCE (Jan. 2016), https://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf.

6. Ken Chew & Ron Thompson, *Mind, Body and Sport: Potential Barriers to Accessing Mental Health Services*, NCAA, <http://www.ncaa.org/sport-science-institute/mind-body-and-sport-potential-barriers-accessing-mental-health-services> (last visited May 22, 2020).

7. *Id.*

8. Mark Hay, *Colleges Say They Don't Have Money for Mental Health. Here's What They Should Do*, VICE (May 8, 2019), https://www.vice.com/en_us/article/a3xeqj/c-colleges-say-they-dont-have-money-for-mental-health-heres-what-they-should-do-triage.

I. THE PREVALENCE OF MENTAL HEALTH ISSUES AMONG STUDENT-ATHLETES

Data demonstrating the widespread impact of mental health issues on student-athletes has captured the attention of institutions, the NCAA, and other organizations around the country.⁹ However, changes combatting these issues have not come as quickly as some would like.¹⁰ Although research shows that “having access to mental health services has a number of positive benefits” for student-athletes, some still face barriers that prevent them from accessing treatment.¹¹ While the NCAA has issued recommendations for providing these services and some institutions have taken steps in the right direction, not all have followed their lead.¹² A failure by institutions to prioritize mental health could allow student-athletes with dangerous mental health issues to slip through the cracks.¹³

A. Data

On August 22, 2017, Trey Moses, a former Ball State University men’s basketball player, lost his best friend and teammate, Zach Hollywood, to suicide.¹⁴ The pair were “inseparable” and bonded over their shared struggle with mental illness.¹⁵ Moses converted the tragedy of losing his friend into a passion for helping those in need, in part, by “openly battling depression and helping others to do the same.”¹⁶ Moses’ story was shared with the world when he received the 2020 NCAA Inspiration Award, which honors coaches, administrators, and former student-athletes who overcame a life-altering event and now serve as role models for those in similar situations.¹⁷

9. Andrew Wolanin et al., *Prevalence of Clinically Elevated Depressive Symptoms in College Athletes and Differences by Gender and Sport*, 50 BR. J. SPORTS MED. 167, 167 (2016); see Patrick Rische, *The Mental Health of Student-Athletes: A Necessary Operational Investment in Contemporary Collegiate Athletics*, FORBES (Dec. 12, 2019), <https://www.forbes.com/sites/prische/2019/12/12/the-mental-health-of-student-athletes-a-necessary-operational-investment-in-contemporary-collegiate-athletics/#203ef7d77ebb>.

10. Chris Carr & Jamie Davidson, *Mind, Body and Sport: The Psychologist Perspective*, NCAA, <http://www.ncaa.org/sport-science-institute/mind-body-and-sport-psychologist-perspective> (last visited May 22, 2020).

11. Chew & Thompson, *supra* note 6.

12. Rische, *supra* note 9; NCAA, INTERASSOCIATION CONSENSUS DOCUMENT: MENTAL HEALTH BEST PRACTICES UNDERSTANDING AND SUPPORTING STUDENT-ATHLETE MENTAL WELLNESS (Jan. 2020) https://ncaaorg.s3.amazonaws.com/ssi/mental/SSI_MentalHealthBestPractices.pdf.

13. Rische, *supra* note 9.

14. Alexis Bussey, *2020 Inspiration Award: Trey Moses*, NCAA (Dec. 17, 2019), <http://www.ncaa.org/about/resources/media-center/news/2020-ncaa-inspiration-award-trey-moses>.

15. *Id.*

16. *Trey Moses Presented with NCAA Inspiration Award*, BALLSTATESPORTS (Jan. 23, 2020), <https://ballstatesports.com/news/2020/1/23/mens-basketball-trey-moses-presented-with-ncaa-inspiration-award.aspx>.

17. Bussey, *supra* note 14.

Like the story of Moses and Hollywood, stories of student-athletes struggling with mental health issues have received greater attention in recent years.¹⁸ However, these stories only shed light on a portion of the widespread mental health crisis plaguing institutions.¹⁹ To begin, the term “mental health issues” encompasses a broad range of symptoms and conditions, including mental illnesses such as depression, anxiety, and eating disorders.²⁰ Although these issues are present across all demographics, college students may be more likely to struggle with them.²¹ For example, college-aged individuals fall into an age bracket that experiences higher rates of depression than other groups, and in one study, nearly one-third of students reported being so depressed that it was difficult to function.²² But depression is not the only concern—universities around the country have noticed an uptick in the number of students experiencing a variety of mental health issues.²³ According to a study by Daniel Eisenberg, an associate professor at the University of Michigan School of Public Health, “33 [%] of all college students experience significant symptoms of depression, anxiety or other mental health conditions.”²⁴ Moreover, data shows that the number of college students with mental health issues has increased throughout 2020 as a result of the COVID-19 pandemic and traumatic events related to social injustice throughout the United States.²⁵ Beyond the prevalence of mental health issues, the serious impact of these conditions is demonstrated by the fact that suicide is one of the leading causes of death among college students in the United States.²⁶

18. See *For Student-Athletes' Mental Health: A More Educated Approach*, N.Y. TIMES, <https://www.nytimes.com/paidpost/ncaa/for-student-athletes-mental-health.htm> 1 (last visited May 22, 2020).

19. See *id.*

20. *Types of Mental Health Issues and Illnesses*, BETTER HEALTH CHANNEL, <https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/types-of-mental-health-issues-and-illnesses> (last visited May 22, 2020).

21. See Wolanin et al., *supra* note 9.

22. *Id.*; Megan Schellong, *How College Athletes are Fighting the Stigma of Mental Illness*, USA TODAY (July 19, 2017), <https://www.usatoday.com/story/college/2017/07/19/how-college-athletes-are-fighting-the-stigma-of-mental-illness/37433673/>.

23. Schellong, *supra* note 22.

24. Haley Velasco, *Few Student-Athletes with Mental Illness Seek Help*, USA TODAY (July 21, 2017), <https://www.usatoday.com/story/college/2017/07/21/few-student-athletes-with-mental-illness-seek-help/37433787/>.

25. Andrea Peterson, *Colleges Brace for Potential Increased Need for Mental Health Services*, WALL ST. J. (June 29, 2020), <https://www.wsj.com/articles/college-counseling-centers-brace-to-help-shaken-students-11593444702>; Bethany Ao, *What Mental-Health Services Will Look Like at Philly Colleges in the Fall: 'We Have a Plan A, a Plan B and a Plan C'*, INQUIRER (July 24, 2020), <https://www.inquirer.com/health/coronavirus-college-mental-health-teletherapy-services-swarthmore-dmax-20200724.html> (“a survey in April by Active Minds, a national nonprofit focused on raising mental-health awareness among college students, found that 80% of respondents said COVID-19 had negatively affected their mental health, and 20% said their mental health has significantly worsened during the pandemic”).

26. *Suicide Second Highest Cause of Death Among College Students*, SAFE COLLEGES, <https://www.safecolleges.com/suicide-second-highest-cause-of-death-among-college-students/> (last visited July 6, 2020).

Despite an overall concern for college students' mental health, there is a common misconception that student-athletes are at a lower risk for mental health issues than their peers due to the psychological benefits of exercise.²⁷ To the contrary, data from a 2016 study showed that nearly a quarter of student-athletes—23.7%—suffered from clinically relevant depressive symptoms, while 6.3% of student-athletes said that their symptoms were “moderate to severe.”²⁸ These results are consistent with adult averages, suggesting that student-athletes are just as likely to experience depressive symptoms as other individuals.²⁹ The same can be said about a number of mental health issues, and just as the prevalence of mental health issues has increased among college students due to the COVID-19 pandemic, it has also caused student-athletes to report mental health concerns at rates 150% to 250% higher than before.³⁰ Additional research suggests that student-athletes may actually be *more* likely to experience mental health issues than the general student population, and that they have “more acute mental health needs.”³¹ In other words, not only do student-athletes have a potentially higher risk of experiencing mental health issues, but they may also be more likely to require psychological treatment for their conditions.³²

Student-athletes' potentially heightened risk of experiencing mental health issues is likely “because they have the same risk factors as non-athletes,” while also dealing with risk factors related to athletics.³³ Specifically, mental health issues are thought to stem from the pressures, demands, and criticism faced by student-athletes.³⁴ For example, the time commitments of playing a collegiate sport can often cause “[s]ocial interactions and relationships” to take a back seat.³⁵ Additionally, because mental and physical health is “inextricably linked,” a student-athlete's psychological response to injury may “exacerbate existing vulnerabilities” to anxiety, depression, and other issues.³⁶ Relatedly, when a student-athlete can no longer participate in their sport, it can cause them to feel like they have lost an integral piece of their identity.³⁷ Team specific factors,

27. Katherine Schreiber, *College Athletes May Be More Depressed than You Think*, PSYCHOL. TODAY (Jan. 30, 2016), <https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201601/college-athletes-may-be-more-depressed-you-think>.

28. Wolanin et al., *supra* note 9, at 168.

29. *Id.*

30. Greg Johnson, *Survey Shows Student-Athletes Grappling with Mental Health Issues*, NCAA (May 22, 2020), <http://www.ncaa.org/about/resources/media-center/new-s/survey-shows-student-athletes-grappling-mental-health-issues>.

31. NCAA, *supra* note 12; Rische, *supra* note 9.

32. *Id.*

33. Chew & Thompson, *supra* note 6.

34. Carr & Davidson, *supra* note 10.

35. *Id.*

36. NCAA, *supra* note 12.

37. Wolken, *supra* note 4 (“[Student-athletes are] just as affected by the uncertainty around coronavirus and college starting or if they’re going to be on campus or online as anybody else, but you’ve also got for many college athletes the threat of losing that important piece of identity and social contact . . .”).

such as the culture of a team or a coach's personality, are also believed to have an impact on student-athletes' mental health.³⁸ This is not to say that participation in collegiate athletics offers no mental health benefits or that the risks outweigh those benefits.³⁹ Rather, the risk factors related to athletics, combined with the exhaustion student-athletes report from the mental demands of their sport, suggest a correlation between participation in collegiate athletics and mental health issues.⁴⁰

B. Barriers to Receiving Treatment

Although it is recognized that participation in athletics may lead to or exacerbate mental health issues, student-athletes still face barriers that impede their access to treatment.⁴¹ As of late, barriers have arisen as a result of the COVID-19 pandemic and the closure of institutions across the country.⁴² Some students have encountered overbooked counselors attempting to provide online "tele-counseling" sessions, while others lack knowledge about any of their schools' online mental health resources.⁴³ Beyond the challenges of remote learning, student-athletes face a number of barriers to receiving mental health treatment on their own campuses.⁴⁴ These barriers stem from the culture and nature of collegiate athletics, as well as a lack of services.⁴⁵ The impact of these barriers was also evinced by Eisenberg's study, which found that thirty percent of college students experiencing mental health issues sought help.⁴⁶ However, when looking at student-athletes, the number that sought help dropped to ten percent.⁴⁷

One cause of this disparity is the stigma surrounding student-athletes seeking psychological help.⁴⁸ This stigma is likely the result of "sports culture," which brings with it "expectations of strength, stability and 'mental toughness,'" that can cause coaches, staff, and student-athletes to dismiss warning signs of mental health issues.⁴⁹ Although this stigma has lessened over time, testimonials from student-athletes in recent years affirm that the stigma surrounding mental

38. Wolanin et al., *supra* note 9, at 170.

39. Robin Kuik & Suzanne Potts, *Mental Health and Athletes*, ATHLETES FOR HOPE, <http://www.athletesforhope.org/2019/05/mental-health-and-athletes/> (last visited July 6, 2020).

40. Carr & Davidson, *supra* note 10; NCAA, *supra* note 5.

41. Chew & Thompson, *supra* note 6.

42. Ao, *supra* note 25.

43. *Id.*; American College Health Association, *The Impact of COVID-19 on College Student Well-Being*, AM. COLL. HEALTH ASS'N, https://www.acha.org/documents/ncha/Healthy_Minds_NCHA_COVID_Survey_Report_FINAL.pdf (last visited July 6, 2020).

44. Chew & Thompson, *supra* note 6.

45. *Id.*; Carr & Davidson, *supra* note 10.

46. Velasco, *supra* note 24.

47. *Id.*

48. Carr & Davidson, *supra* note 10.

49. *Id.*

health caused them to avoid disclosing their concerns or seeking treatment.⁵⁰ According to Victoria Garrick, a former women’s volleyball player at the University of Southern California, student-athletes “don’t want to come forward because they feel they’re not allowed to show weakness.”⁵¹

Another barrier to seeking mental health treatment is time.⁵² Not only do student-athletes have full course loads, but they also have “daily practices, competitions that may involve travel (some across time zones) . . . strength and conditioning programs, and sports medicine/rehab appointments”⁵³ Given the number of commitments taken on by student-athletes, it can be challenging to make time for mental health care.⁵⁴ This is especially true for student-athletes utilizing university counseling centers, which often have limited hours of availability and long wait times that make seeking help even more unworkable with student-athletes’ busy schedules.⁵⁵ For example, in 2017 studies showed that the average wait time at most university counseling centers was between two and three weeks, while the wait at some schools was up to two months.⁵⁶ In spite of the scheduling challenges, university counseling centers are the most common source of mental health services for all students—including student-athletes.⁵⁷

Relatedly, a lack of services specific to student-athletes’ mental health needs can also discourage them from getting treatment.⁵⁸ University counseling centers typically lack professionals trained to work with student-athletes, and many institutions have yet to integrate mental health services into their athletic departments.⁵⁹ This is problematic because helping student-athletes requires an understanding of the unique culture of an athletics environment.⁶⁰ Recognizing this, student-athletes may be discouraged from reaching out to counseling services for fear of not being understood.⁶¹ And, even if a student-athlete overcomes barriers to seeking treatment, they may not receive the treatment they need if there are no professionals trained to address student-athletes’ unique psychological needs.⁶²

50. See Schellong, *supra* note 22.

51. *Id.*

52. Carr & Davidson, *supra* note 10.

53. *Id.*

54. Lauren M. Sander, *Understanding the Help-Seeking Behaviors of Student-Athletes: Effect of a Multidisciplinary Healthcare Team and the Perception of Barriers and Facilitators for Seeking Help* (2019) (M.S. thesis, James Madison University) (on file with the JMU Scholarly Commons).

55. Justin Ching, *Mental Health Issues a Huge Challenge for NCAA in Regard to Student-Athletes*, FOX SPORTS (Oct. 8, 2018), <https://www.foxsports.com/stories/other/mental-health-issues-a-huge-challenge-for-ncaa-in-regard-to-student-athletes>; Rische, *supra* note 9; Chew & Thompson, *supra* note 6.

56. Hay, *supra* note 8.

57. Chew & Thompson, *supra* note 6.

58. *Id.*

59. *Id.*

60. Carr & Davidson, *supra* note 10.

61. Chew & Thompson, *supra* note 6.

62. *Id.*

C. Recommendations & Resources

As concern about student-athletes' mental health and the barriers impeding their treatment has grown, so has the number of institutions providing their student-athletes with specialized mental health services.⁶³ At the 2019 NCAA Convention, the autonomy conferences—the Atlantic Coast, Big Ten, Big 12, Pac-12 and Southeastern conferences—adopted legislation that requires their member institutions to provide mental health services to their student-athletes “through the athletics department or the school’s health services or counseling services department.”⁶⁴ The same legislation was later adopted by the America East Conference, and several conferences have since created committees and initiatives focused on promoting student-athlete mental health.⁶⁵ Later that year at the 2019 Learfield IMG College Intercollegiate Athletics Forum, athletic directors and administrators emphasized the “critical need” for universities to invest in mental health resources for their student-athletes, in part, by hiring professionals to address student-athletes' mental health needs.⁶⁶ One of these individuals was Bill Scholl, Marquette University's Vice President and Director of Athletics, who noted that the athletic department was in the process of hiring its first full-time mental health specialist.⁶⁷

The decision to hire mental health professionals to work directly with student-athletes is in line with the NCAA's recommendations for addressing student-athlete mental health concerns.⁶⁸ These recommendations come from the NCAA Sport Science Institute's *Mental Health Best Practices* publication, which is designed “to support and promote student-athlete mental wellness in partnership with campus stakeholders.”⁶⁹ This publication supports catering to the specific needs of student-athletes by providing “student-athlete mental health services,” such as sports psychologists.⁷⁰ Providing these services could combat some of the aforementioned problems associated with typical university

63. Rishe, *supra* note 9.

64. Michelle Brutlag Hosick, *Access to Mental Health Services Guaranteed by Autonomy Conferences*, NCAA (Jan. 24, 2019), <http://www.ncaa.org/about/resources/media-center/news/access-mental-health-services-guaranteed-autonomy-conferences>.

65. *America East Strengthens its Commitment to Mental Health*, AMERICA EAST (Feb. 20, 2019), https://americaeast.com/news/2019/2/20/AE_mental_health.aspx?path=Leadership; *ACC Mental Health & Wellness Summit Set for May 21-22*, ATL. COAST CONF. (May 16, 2019), <https://theacc.com/news/2019/5/16/general-acc-mental-health-summit-set-for-may-21-22.aspx>; *American Athletic Conference SAAC Looks to Continue to Raise Awareness on Mental Health with its #Pow6rfulminds Campaign*, AM. ATHLETIC CONF. (Feb. 22, 2019), <http://theamerican.org/news/2019/2/22/general-american-athletic-conference-saac-looks-to-continue-to-raise-awareness-on-mental-health-with-its-pow6rfulminds-campaign.aspx>.

66. Rishe, *supra* note 9.

67. *Id.*

68. Carr & Davidson, *supra* note 10.

69. *Mental Health Best Practices*, NCAA, <http://www.ncaa.org/sport-science-institute/mental-health-best-practices> (last visited May 22, 2020).

70. Carr & Davidson, *supra* note 10.

counseling centers and allow student-athletes to receive proper treatment.⁷¹ It could also have long-term benefits such as helping to fight the stigma of seeking mental health treatment by increasing players' and coaches' interactions with a trained psychologist, and increasing training opportunities for individuals pursuing similar careers.⁷² Where institutions have integrated student-athlete mental health services into their athletic departments, the most common services are a full-time athletic department sports psychologist, a part-time consultant, or a referral model.⁷³

The *Mental Health Best Practices* publication focuses on providing workable recommendations for athletics and sports medicine departments of all sizes.⁷⁴ Other groups have also provided recommendations related to student-athlete mental health; for instance, researchers from one study suggest implementing depression screening and assessment of depressive symptoms across all sports to identify at-risk athletes.⁷⁵ Similarly, the National Athletic Training Association (NATA) gives athletic-trainers recommendations for recognizing and referring student-athletes with psychological concerns.⁷⁶ In addition to recommendations, some organizations also provide educational resources to help student-athletes and institutions better understand mental health issues.⁷⁷ Recently, the NCAA has provided student-athletes with mental health and well-being strategies specifically related to COVID-19.⁷⁸ Further, several conferences have focused on promoting student-athlete mental health initiatives throughout the pandemic.⁷⁹

D. Reluctance to Provide Mental Health Services

Despite recommendations, educational resources, and an increase in the services provided by a number of institutions, the role of mental health services

71. *Id.*

72. *Id.*

73. *Id.*

74. NCAA, *supra* note 12.

75. Wolanin et al., *supra* note 9, at 170; *see Student Mental Health and the Law*, THE JED FOUND., <http://www.jedfoundation.org/wp-content/uploads/2016/07/student-mental-health-and-the-law-jed-NEW.pdf> (last visited May 22, 2020).

76. Timothy L. Neal et al., *Interassociation Recommendations for Developing a Plan to Recognize and Refer Student-Athletes with Psychological Concerns at the Collegiate Level: An Executive Summary of a Consensus Statement*, 48 J. OF ATHLETIC TRAINING 716, 716 (2013).

77. *See Mental Health Educational Resources*, NCAA, <http://www.ncaa.org/sport-science-institute/mental-health-educational-resources> (last visited May 22, 2020); *Student Mental Health and the Law*, *supra* note 75.

78. *COVID-19 and Mental Health*, NCAA, <http://www.ncaa.org/sport-science-institute/topics/covid-19-and-mental-health> (last visited July 25, 2020).

79. *Big Ten Conference Announces Mental Health Initiatives*, BIG TEN (May 4, 2020), <https://bigten.org/news/2020/5/4/general-big-ten-conference-announces-mental-health-initiatives.aspx>; *Health & Safety Summit & Mental Health Workshop to Focus on Student-Athlete Well-Being*, AM. E. (May 21, 2020), https://americacast.com/new/s/2020/5/21/2020_health-safety.aspx.

in collegiate athletics has developed more slowly than student-athletes' needs.⁸⁰ In fact, it is estimated that most schools' mental health services are understaffed and do not provide student-athlete-specific services.⁸¹ The NCAA acknowledges that institutions' hesitation to implement these services likely stems from a lack of financial resources or understanding of the mental health crisis.⁸² With the spike in mental health issues seen on college campuses in recent years, even "well-resourced schools" have struggled to keep up with the rising demand.⁸³

Prior to the COVID-19 pandemic, some critics dismissed the financial justification for these deficiencies, arguing that the real issue stems from "resource allocation and prioritization" that, historically, "has rarely prioritized mental health."⁸⁴ For example, in 2019 over one billion dollars were spent by institutions across the country on athletic facility upgrades.⁸⁵ Further, it has become standard for Division I teams to have multiple athletic trainers, while some also have sports medicine physicians and sports nutritionists.⁸⁶ Yet, "not many programs employ full-time or even part-time licensed psychologists."⁸⁷ More recently, the COVID-19 pandemic has significantly heightened institutions' financial difficulties, causing fear that mental health services will be eliminated to cut costs.⁸⁸ This is especially troubling for student-athletes, a group whose mental health services were already lacking at many institutions and whose mental health has significantly worsened since the start of the pandemic.⁸⁹ Ultimately, while some have criticized the NCAA for not mandating association-wide standards for mental health services, the NCAA has stressed that individual institutions are responsible for allocating their own resources.⁹⁰

80. Carr & Davidson, *supra* note 10.

81. NCAA, *supra* note 12; Rische, *supra* note 9; Carr & Davidson, *supra* note 10.

82. Rische, *supra* note 9.

83. Hay, *supra* note 8.

84. Rische, *supra* note 9.

85. *Id.*

86. Carr & Davidson, *supra* note 10.

87. *Id.*

88. Ao, *supra* note 25.

89. *Id.*; Wolken, *supra* note 4.

90. Jayce Born, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L.J. 1221, 1223 (2016). It is worth noting that the NCAA has taken action to protect student-athlete mental health during the COVID-19 pandemic. The NCAA Division I Council Coordination Committee approved a waiver allowing student-athletes to participate in up to eight hours of virtual nonphysical countable athletically related activities per week, thus giving student-athletes who cannot return to campus an opportunity to connect with their teammates, coaches, and sport. *Division I Council Extends Waiver Allowing Virtual, Nonphysical Activities Through July*, NCAA (June 17, 2020, 6:54 PM), <http://www.ncaa.org/about/resources/media-center/news/division-i-council-extends-waiver-allowing-virtual-nonphysical-activities-through-july>.

II. UNIVERSITIES' DUTIES

Students suffer injuries on college campuses every year, leading some of them to bring negligence claims against their institutions.⁹¹ To bring a successful negligence claim, a student must first establish that the institution owed them a duty.⁹² “Duties” are obligations to “conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.”⁹³ Generally, individuals have a duty to exercise reasonable care when their conduct creates a risk of harm to others.⁹⁴ Under some circumstances, though, the existence of certain relationships may heighten the duty that is owed.⁹⁵ Specifically, “special relationships” create an affirmative duty of reasonable care with regard to risks that arise within the scope of the relationship—not just those risks created by the defendant.⁹⁶ Upon analyzing cases of students’ physical injuries, a majority of courts have clarified that, based on their distinct relationships, the duty that institutions owe to students is different from that owed to student-athletes.⁹⁷

A. *Duty of Care to Students*

The question of whether a duty exists between a university and their students requires examining the particularities of the parties’ relationship.⁹⁸ In some instances, courts have held that universities’ relationships with their students justifies a duty of reasonable care.⁹⁹ Historically, this duty was said to stem from the *in loco parentis* doctrine.¹⁰⁰ More recently, this duty has been attributed to other sources, including a special relationship between universities and students.¹⁰¹

91. *See* *Beach v. Univ. of Utah*, 726 P.2d 413, 415 (Utah 1986); *see also* *Univ. of Denver v. Whitlock*, 744 P.2d 54, 55 (Colo. 1987) (en banc).

92. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 6 cmt. b (AM. LAW. INST. 2010).

93. *Stearney v. U.S.*, 392 F. Supp. 3d 1037, 1046 (D. Ariz. 2019).

94. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (AM. LAW. INST. 2010).

95. *See id.* § 40.

96. *Id.*; *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 139 (Mass. 2018).

97. *See Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1368 (3d Cir. 1993); *see also* *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 928 (N.C. Ct. App. 2001).

98. *Regents of Univ. of Cal. v. Super. Ct.*, 240 Cal. Rptr. 3d 675, 684 (2018); *Nguyen*, 96 N.E.3d at 140.

99. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983); *Regents of Univ. of Cal.*, 240 Cal. Rptr. 3d at 680.

100. Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L. J. 329, 332 (1996).

101. *Id.* at 332–35.

1. *In Loco Parentis*

The doctrine of *in loco parentis*, which translates to ‘in the place of a parent,’ was first applied to academic institutions in the 1800s.¹⁰² This doctrine was predicated upon the special relationship between colleges and students in which colleges maintained control over both the academic and non-academic lives of their students; essentially, students were “under their custody and institutional control.”¹⁰³ Under *in loco parentis*, colleges had a duty to “exercise control over student conduct” which, simultaneously, “gave the students certain rights of protection”¹⁰⁴

In loco parentis was consistently applied until the 1960s, when social changes within modern universities led courts to deem the doctrine outdated.¹⁰⁵ “Campus revolutions” attacking the rigid controls of colleges, coupled with policy shifts throughout society, meant that students started to be viewed as adults deserving of increased autonomy and decreased regulation.¹⁰⁶ The relationship between students and their institutions transitioned from custodial to educational, leading *in loco parentis* to become incompatible with the “reality of contemporary collegiate life.”¹⁰⁷ Overall, the resulting principle from the doctrine’s downfall is echoed throughout judicial opinions: colleges are not insurers of their students’ safety.¹⁰⁸

2. The University-Student Relationship May Still be “Special”

Special relationships often exist where “one party is dependent on the other party or the parties are mutually dependent.”¹⁰⁹ According to the Third Restatement of Torts, “a school with its students” is a type of special relationship that warrants an affirmative duty of reasonable care with regard to the risks associated with school activities.¹¹⁰ Yet, since the demise of the *in loco parentis* doctrine, courts have been hesitant to find that the university-student

102. *Id.* at 332.

103. *Id.*; *Regents of Univ. of Cal. v. Super. Ct.*, 413 P.3d 656, 665 (Cal. 2018).

104. *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979).

105. *Regents of Univ. of Cal.*, 413 P.3d at 666; Rhim, *supra* note 100, at 333.

106. *Bradshaw*, 612 F.2d at 139 (justifying the shift towards autonomy for college-aged students, in part, with their right to marry, vote, and write a will); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 61 (Colo. 1987).

107. *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993); *Whitlock*, 744 P.2d at 60.

108. *Bradshaw*, 612 F.2d at 138 (holding that a student who was severely injured in an automobile accident after the driver was drinking at a college-sponsored activity could not recover from the college because “modern college students are viewed as adults” and the college’s regulation prohibiting the possession or consumption of alcohol did not create a custodial relationship); *Nero*, 861 P.2d at 780.

109. Michelle D. McGirt, *Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury?*, 6 VILL. SPORTS & ENT. L.J. 219, 224 (1999).

110. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012).

relationship is, in and of itself, “special.”¹¹¹ This is largely due to the belief that “students are autonomous adults who are fully capable of taking care of themselves.”¹¹² In that way, they are distinct from elementary school children whose age and reliance on their school justifies an affirmative duty of care.¹¹³ Further, classifying the university-student relationship as “special” could result in institutional restrictions that would be incompatible with college students’ desired freedom.¹¹⁴ Some courts also question the practicality of finding a special relationship, noting that requiring institutions to “babysit” their students is “a task beyond the resources of any school.”¹¹⁵

In some cases, these considerations have negated a finding of duty even when the injury occurred during a school activity or the university was aware of the potential for injury.¹¹⁶ In *Beach v. University of Utah*, the court found that a university did not have a special duty-creating relationship with a student who fell into a crevice on a school trip.¹¹⁷ This remained true regardless of whether the school knew that the student had been, or likely would be drinking.¹¹⁸ According to the court, imposing a duty to protect this student—who was intoxicated at the time of her fall—would have required the university to prevent students from illegally consuming alcohol by enforcing policies that would create a “repressive and inhospitable environment.”¹¹⁹

The court in *Beach* demonstrated the principle that universities are not insurers of their students’ safety.¹²⁰ However, this principle has not foreclosed other courts from finding a duty based on the university-student relationship.¹²¹ For example, in *Mullins v. Pine Manor* a student was sexually assaulted by an intruder who broke into her dorm room.¹²² The court agreed that colleges are not insurers of their student’s safety, but stated that “[t]he fact that colleges need not police the morals of their students does not entitle them to abandon all efforts

111. *Nero*, 861 P.2d at 778 (finding that the university-student relationship was not enough to create a duty, but the student may have a claim under the landlord-invitee relationship); *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 928 (N.C. Ct. App. 2001) (“[T]he student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care”); *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986); *Whitlock*, 744 P.2d at 61.

112. Rhim, *supra* note 100, at 335.

113. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012); *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 140 (Mass. 2018) (“[t]here is a wide range of schools—from elementary to graduate school—and great differences in the scopes of student-school relationships”).

114. *Nero*, 861 P.2d at 778; *Beach*, 726 P.2d at 419.

115. *Beach*, 726 P.2d at 419.

116. *Whitlock*, 744 P.2d at 61; *Beach*, 726 P.2d at 414.

117. *Beach*, 726 P.2d at 416.

118. *Id.*

119. *Id.* at 419; *see Whitlock*, 744 P.2d at 59 (finding that the university’s authority to regulate a student’s behavior did not create a duty to do so, even when the university was aware of the potential for injury).

120. *See Beach*, 726 P.2d at 414.

121. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335–36 (Mass. 1983); *Nova Se. Univ., Inc. v. Gross*, 758 So.2d 86, 90 (Fla. 2000); *Furek v. Univ. of Del.*, 594 A.2d 506, 519 (Del. 1991).

122. *Mullins*, 449 N.E.2d at 334.

to ensure physical safety.”¹²³ Rather, the court found that colleges have a special relationship with their students, in part, because they have helped to foster the expectation that “reasonable care will be exercised to protect resident students from foreseeable harm.”¹²⁴

Further, not all courts agree that academic institutions lack control over non-academic aspects of a student’s life.¹²⁵ Although *Furek v. University of Delaware* was decided in 1991—decades after *in loco parentis* was rejected—the court still noted that every aspect of students’ lives were, to some degree, university guided and that the university had a duty to regulate foreseeably dangerous activities occurring on campus.¹²⁶ Recently, the 2018 case of *Regents of University of California v. Superior Court* also recognized a special relationship between universities and their students that extends “to activities that are tied to the school’s curriculum but not to student behavior over which the university has no significant degree of control.”¹²⁷ Because of this relationship, the court identified a “duty to protect their students from foreseeable acts of violence in the classroom or during curricular activities.”¹²⁸ However, it is important to note that many of the cases that have found a special relationship have “often rel[ie]d on other aspects of the relationship between the college and its student[s],” such as their roles as landowners and invitees, “to justify imposing a duty.”¹²⁹ In other words, the university-student relationship was not always courts’ only consideration in classifying a relationship as “special.”¹³⁰

In sum, while many courts have held that the university-student relationship is not special, others have disagreed.¹³¹ Those that have found a special relationship emphasize the importance of students’ expectations that an institution will provide protection and the amount of control an institution has over a student’s conduct.¹³² Recognizing the impact that these considerations have on courts’ analyses of relationships aids in understanding why the

123. *Id.* at 335–36.

124. *Id.* at 336; *see Nova Se. Univ.*, 758 So.2d at 90 (finding that the university was negligent for assigning a student to a dangerous internship site because students could reasonably expect their school to avoid placing them at an internship where they would likely be harmed); *see also Schaefer v. Fu*, 272 F. Supp. 3d 285, 288 (D. Mass. 2017) (stating that an institution has a duty to protect its students from harm when it was foreseeable that the institution would be expected to take action).

125. *Furek*, 594 A.2d at 516.

126. *Id.* at 522.

127. *Regents of Univ. of Cal. v. Super. Ct.*, 240 Cal. Rptr. 3d 675, 681 (2018).

128. *Id.* at 901.

129. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40, cmt. 1 (AM. LAW. INST. 2012).

130. *Id.*

131. *See Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *see also Furek*, 594 A.2d at 519.

132. *Furek*, 594 A.2d at 522; *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000); *Regents of Univ. of Cal.*, 240 Cal. Rptr. 3d at 684.

relationships universities have with their students and student-athletes are distinct.¹³³

B. Duty of Care to Student-Athletes

Unlike the university-student relationship, courts have been more willing to classify universities' relationships with their student-athletes as "special."¹³⁴ While some courts have declined to recognize a difference between student-athletes and their non-athlete counterparts, the majority have found important distinctions.¹³⁵ As a result, those courts have clarified that student-athletes may be owed a "heightened" duty of care compared to their peers.¹³⁶

1. What Makes the University-Student-Athlete Relationship "Special?"

The unique characteristics that differentiate student-athletes from other students and increase their risk of experiencing mental health issues also support classifying their relationships with universities as "special."¹³⁷ Some of these characteristics include "unequal bargaining power in the recruitment process, the degree of influence that a school and its coaches have over a student-athlete's daily life, the pressures placed on the student to win at all costs" and the institution's monetary gain stemming from successful teams.¹³⁸ To compare, the general student population has greater autonomy in picking their academic courses, participating in extracurricular activities, and cultivating social lives.¹³⁹ By contrast, student-athletes are subject to control by athletic departments, teams, and coaches who often impose obligations that go beyond practices and games.¹⁴⁰ Additionally, the relationship between student-athletes and universities can be characterized as one of mutual dependence.¹⁴¹ Student-athletes depend on their universities for education and improvement of their athletic skills, while universities depend on their student-athletes for revenue, enhanced culture, increased media exposure, and recruitment opportunities.¹⁴²

133. See Rhim, *supra* note 100, at 338.

134. See *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001); see also *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993).

135. *Orr v. Brigham Young Univ.*, No. 96-4015, 1997 WL 143600, at *2 (10th Cir. 1997); *Davidson*, 543 S.E.2d at 927.

136. Rhim, *supra* note 100, at 338; See *Davidson*, 543 S.E.2d at 928.

137. Rhim, *supra* note 100, at 338.

138. *Kavanagh v. Trs. of Bos. Univ.*, 795 N.E.2d 1170, 1176-77 (Mass. 2003).

139. Rhim, *supra* note 100, at 338.

140. *Id.*

141. *McGirt*, *supra* note 109, at 228; *Davidson*, 543 S.E.2d at 927.

142. *McGirt*, *supra* note 109, at 228; *Kavanagh*, 795 N.E.2d at 1177 (demonstrating that a special relationship will only exist with a student-athlete's own institution).

To determine if a special relationship exists with a student-athlete, courts consider these inherent differences in conjunction with the facts of a case.¹⁴³ After a lacrosse student-athlete suffered a fatal heart attack during practice, the court in *Kleinknecht v. Gettysburg College* affirmed that a negligence action could be brought against the college on the basis of a special relationship.¹⁴⁴ In reaching this conclusion, the court noted that the student-athlete was “actively recruited” by the head coach and that, at the time of his heart attack, the student-athlete “was not engaged in his own private affairs.”¹⁴⁵ The court went on to emphasize the important “distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests.”¹⁴⁶ Without deciding the merits of the claim, the court clarified that the special relationship could impose a duty of reasonable care onto the college.¹⁴⁷

Later decisions have affirmed the important distinction between student-athletes participating in a sport and students engaged in private affairs.¹⁴⁸ This is because the argument that a special relationship will limit students’ autonomy is less compelling when “the school already exerts significant control over the student[] in question.”¹⁴⁹ Student-athletes—by virtue of participating in athletics—relinquish the behavioral autonomy that has been used to justify the incompatibility of special relationships with modern universities.¹⁵⁰ In *Davidson*, for example, the court addressed whether an injured cheerleader had a special relationship with her university.¹⁵¹ The court stated that the amount of control exerted over school-sponsored athletic activities could lead student-athletes to have higher expectations regarding the protection they receive from their school.¹⁵² This institutional control, coupled with mutual dependence between the parties, led the court to find that a special relationship could exist, giving the school “an affirmative duty to exercise that degree of care which a reasonable and prudent person would exercise under the same or similar

143. *Davidson*, 543 S.E.2d at 927; *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1362, 1372 (3d Cir. 1993).

144. *Kleinknecht*, 989 F.2d at 1367.

145. *Id.*

146. *Id.* at 1368.

147. *Id.* (“the fact that Drew’s cardiac arrest occurred during an athletic event involving an intercollegiate team of which he was a member does impose a duty of due care on a college that actively sought his participation in that sport”).

148. *Davidson*, 543 S.E.2d at 928; *Cope v. Utah Valley State Coll.*, 2012 UT App 319, ¶ 17, 290 P.3d 314, 320; *Avila v. Citrus Comm. Coll. Dist.*, 131 P.3d 383, 390 (Cal. 2006) (“[C]olleges and universities owe special duties to their athletes when conducting athletic practices and games”).

149. *Davidson*, 543 S.E.2d at 927.

150. *Cope*, 2012 UT App 319, ¶ 14 (“[t]he possibility that a special relationship can be created from the fact that ‘a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience’”) (quoting *Webb v. Univ. of Utah*, 2005 UT 80, ¶ 24).

151. *Davidson*, 543 S.E.2d at 922, 926.

152. *Id.* at 927.

circumstances.”¹⁵³ The court clarified, though, that its conclusion was based on the fact that the student-athlete was injured while practicing with her team.¹⁵⁴

Despite these holdings, some courts disagree that student-athletes have special relationships with their universities.¹⁵⁵ However, these courts tend to base their findings on a lack of precedent, rather than an analysis of the relationship.¹⁵⁶ For instance, in *Orr v. Brigham Young University*, a football student-athlete claimed that his coaching staff and athletic trainers failed to provide him with adequate medical treatment.¹⁵⁷ The court declined to recognize a special relationship because there was no Utah precedent suggesting that an institution’s duty to student-athletes goes beyond that owed to other students.¹⁵⁸ While that was true in 1997, a subsequent Utah state court decision outlined circumstances in which both students and student-athletes may have a special relationship with their university.¹⁵⁹

2. Reasonable Care in Collegiate Athletics

When a special relationship exists, schools owe their student-athletes an affirmative duty of reasonable care while they participate in collegiate athletics.¹⁶⁰ The exact obligations stemming from this duty of care turn, in part, on whether the school could have foreseen the likelihood of harm.¹⁶¹ “Foreseeability” in the context of delineating duties does not require that the exact injury was foreseeable, just that “a reasonably prudent person would foresee that injury of the same general type would be likely to happen under the circumstances.”¹⁶² If a type of harm is foreseeable, then a university is required to act with reasonable care to protect their student-athlete; what is “reasonable” requires an analysis of the circumstances.¹⁶³ For example, it is foreseeable that a student-athlete may sustain severe or life-threatening injuries while engaged in collegiate athletics, meaning that a college may have the duty to provide “prompt and adequate emergency medical services” if such an injury were to

153. *Id.* at 928.

154. *Id.* at 927.

155. *Orr v. Brigham Young Univ.*, No. 96-4015, 1997 WL 143600, at *1 (10th Cir. 1997); *Howell v. Calvert*, 1 P.3d 310, 314 (Kan. 2000).

156. *Orr*, 1997 WL at *2; *Howell*, 1 P.3d at 314.

157. *Orr*, 1997 WL at *1.

158. *Id.* at *2. (“[W]e are reticent to expand state law in the absence of clear guidance from Utah’s highest court, or at least a strong and well-reasoned trend among other courts which Utah might find persuasive . . .”).

159. *Cope v. Utah Valley State Coll.*, 2012 UT App 319, ¶ 17; 290 P.3d 314, 320 (finding that a special relationship exists when a directive is given to a student by a teacher or coach within the academic enterprise).

160. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012).

161. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (stating that foreseeability determines the nature of a duty and its demands on a college).

162. Barbara Bickford, *The Legal Duty of a College Athletics Department to Athletes with Eating Disorders: A Risk Management Perspective*, 10 MARQ. SPORTS L. REV. 87, 101-02 (1999).

163. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40, cmt. d (AM. LAW. INST. 2012); *Kleinknecht*, 989 F.2d at 1370.

occur.¹⁶⁴ Other institutional duties related to participation in athletics may include “giving adequate instruction in the activity, supplying proper equipment, making a reasonable selection or matching of participants, providing non-negligent supervision of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury.”¹⁶⁵ Liability may also stem from omissions, like a school’s failure to provide safety equipment or train student-athletes on safety techniques.¹⁶⁶ Even without expressly finding a special relationship, courts have imposed a “duty of college coaches and athletic trainers to exercise reasonable care for the health and safety of student athletes.”¹⁶⁷

This affirmative duty of reasonable care may seem broad, however, universities are able to assert defenses to negate the duties they would otherwise owe to student-athletes.¹⁶⁸ The doctrine of assumption of risk, for example, provides that there is no duty to protect against the inherent risks of a sport.¹⁶⁹ Inherent risks are determined by analyzing “the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.”¹⁷⁰ Schools do, however, have the duty to not increase these inherent risks.¹⁷¹ Further, public schools may be able to argue that sovereign immunity shields them from liability in negligence actions, even where they would have owed a duty to a student-athlete.¹⁷²

To summarize, while some courts reject the argument that the university-student-athlete relationship is “special,” those courts that have fully analyzed the particularities of the relationship—including the recruitment of a student-athlete, mutual dependence between the parties, and the control exercised over the student-athlete—have found a special relationship.¹⁷³ Consequently, institutions may owe an affirmative duty of reasonable care regarding the risks associated with the student-athlete’s participation in athletics.¹⁷⁴ This includes duties related to the provision of medical services, including the duty to provide prompt and adequate treatment and to take proper post-injury procedures.¹⁷⁵

164. *Kleinknecht*, 989 F.2d at 1371.

165. *Id.* (quoting *Leahy v. School Bd. of Hernando Cnty.*, 450 So.2d 883, 885 (Fla. Dist. Ct. App. 1984)).

166. *See Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 928 (N.C. Ct. App. 2001).

167. *Searles v. Trs. of St. Joseph’s Coll.*, 695 A.2d 1206, 1209 (Me. 1997).

168. *See Avila v. Citrus Comm. Coll. Dist.*, 131 P.3d 383, 392 (Cal. 2006); *see also Plancher v. UCF Athletics Ass’n, Inc.*, 175 So.3d 724, 725 (Fla. 2015).

169. *Avila*, 131 P.3d at 391, 393 (finding that getting hit by a pitch is an inherent risk of playing baseball).

170. *Id.* at 392.

171. *Id.*

172. *Plancher*, 175 So.3d at 726.

173. *See Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927-28 (N.C. Ct. App. 2001); *see also Orr v. Brigham Young Univ.*, No. 96-4015, 1997 WL 143600, at *1 (10th Cir. 1997).

174. *Davidson*, 543 S.E.2d at 928.

175. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1362, 1372 (3d Cir. 1993); *Davidson*, 543 S.E.2d at 928.

III. DUTIES TOWARDS INDIVIDUALS WITH MENTAL HEALTH ISSUES

Just as courts have been inconsistent in finding duties for students' physical injuries, the same can be said for harm relating to students' mental health.¹⁷⁶ However, a trend has emerged in which courts will find a special relationship and a corresponding duty of reasonable care where an institution was aware of a student's mental health issues.¹⁷⁷ Generally, these cases have focused on whether a university had a duty to prevent self-harm or suicide.¹⁷⁸ Outside the context of a university-student relationship, courts have also considered the question of whether a party has a duty to provide another with mental health treatment.¹⁷⁹ Despite involving emotional harm or physical harm stemming from mental health issues, the courts' analyses of the parties relationships in these cases closely resembles those performed in cases of solely physical injuries.¹⁸⁰

Much like the affirmative duties of reasonable care owed to students-athletes for athletic-related injuries, courts have only imposed duties to prevent self-harm or suicide onto a school where a special relationship exists.¹⁸¹ After a freshman at Ferrum College died by suicide in 2002, the court in *Schiezler v. Ferrum College* addressed whether the college was negligent for "failing to take adequate steps to prevent [the student] from committing suicide."¹⁸² Specifically, the college was aware of the student's emotional problems, previous counseling, recent incidents of self-harm, and statements suggesting that he intended to take his life.¹⁸³ Yet, the college left the student alone in his dorm room and "failed to obtain counseling for him."¹⁸⁴ In its analysis, the court focused on the foreseeability of the harm, stating that the relationship between institutions and their students can create a duty to protect the student from harm that the institution had knowledge of.¹⁸⁵ While the court did not recognize a special relationship between colleges and their students, generally, it found one in this case because the school knew about the student's extensive mental health issues and it was reasonably foreseeable that the school would be expected to

176. Christopher Ramos, *Adolescent Brain Development, Mental Illness, and the University-Student Relationship: Why Institutions of Higher Education Have a Special Duty-Creating Relationship with Their Students*, 24 S. CAL. REV. L. & SOC. JUST. 343, 358 (2015).

177. See *Schiezler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002); see also *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 142 (Mass. 2018).

178. *Schiezler*, 236 F. Supp. 2d at 606; *Nguyen*, 96 N.E.3d at 131.

179. *O'Meara v. New England Life Flight, Inc.*, 842 N.E.2d 953, 954 (Mass. App. Ct. 2006).

180. See *Schiezler*, 236 F. Supp. 2d at 609; see also *Nguyen*, 96 N.E.3d at 142.

181. *Jain v. State*, 617 N.W. 2d 293, 297 (Iowa 2000) ("the law generally imposes no duty upon an individual to protect another person from self-inflicted harm in the absence of a 'special relationship,' usually custodial in nature"); see *Schiezler*, 236 F. Supp. 2d at 609.

182. *Schiezler*, 236 F. Supp. 2d at 606.

183. *Id.* at 609.

184. *Id.* at 610.

185. *Id.* at 609.

“take affirmative action to assist [the student].”¹⁸⁶ A later case built upon this holding, stating that a university has a special relationship and a corresponding duty to prevent suicide where it has “actual knowledge” of a student’s recent suicide attempts or their suicidal intentions.¹⁸⁷

A special relationship may also serve as the basis for imposing a duty to provide mental health treatment.¹⁸⁸ In *O’Meara v. New England Life Flight, Inc.*, a helicopter pilot claimed that the defendants, a group of hospitals and affiliated entities, had a duty to provide him with access to a mental health counselor due to the emotional distress he encountered by flying to and from accident sites.¹⁸⁹ In support, he claimed that his emotional harm—which is defined to include depression, anxiety, and other mental illnesses—was a foreseeable injury.¹⁹⁰ However, the pilot failed to demonstrate a special relationship with the defendants, as they could not have reasonably foreseen that they would be expected to provide mental health care, especially when he did not request treatment.¹⁹¹

Ultimately, the existence of duties to prevent against self-harm or suicide, or to provide mental health care all turn on the existence of a special relationship.¹⁹² In finding these relationships, courts—much like in the context of physical injuries—focus on the foreseeability of the injury and whether it was foreseeable that a party would be expected to take action to prevent that injury.¹⁹³

IV. ANALYSIS

Student-athletes around the country are—in overwhelming numbers—experiencing mental health issues.¹⁹⁴ Yet, due the stigma surrounding psychological treatment, impracticalities related to university counseling centers, and the lack of student-athlete mental health services, student-athletes seek treatment at a much lower rate than their peers.¹⁹⁵ These barriers, coupled with the demands and pressures of collegiate athletics that may exacerbate

186. *Id.* at 609-10; *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984) (“[f]oremost among [considerations for finding a special relationship] is whether a defendant reasonably could foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff from the failure to do so”).

187. *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 142 (Mass. 2018) (finding that a student who never communicated his plans to commit suicide and repeatedly made clear that he wanted to keep his mental health issues separate from his academics was not owed a duty by his university).

188. *O’Meara v. New England Life Flight, Inc.*, 842 N.E.2d 953, 954 (Mass. App. Ct. 2006).

189. *Id.*

190. *Id.*; RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 45, cmt. a (AM. LAW. INST. 2012).

191. *O’Meara*, 842 N.E.2d at 954.

192. *Id.*; *Schiezler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

193. See *Schiezler*, 236 F. Supp. 2d at 609.

194. *Wolanin et al.*, *supra* note 9, at 168.

195. *Carr & Davidson*, *supra* note 10; *Velasco*, *supra* note 24.

mental health issues, have proven to have widespread, potentially life-threatening consequences for student-athletes.¹⁹⁶ Despite the serious impact of mental health issues, the question of whether institutions have a duty to provide student-athletes with mental health services remains unanswered. Based on similar cases, though, a student-athlete can likely show that this duty exists by virtue of their special relationship with their university.

Not only is the relationship of “a school with its students” expressly listed as a special relationship in the Third Restatement of Torts, but the factors commonly considered by courts when classifying a relationship as “special” can be easily satisfied by student-athletes.¹⁹⁷ For instance, schools exert a significant amount of control over their student-athletes, both on and off the court.¹⁹⁸ Further, there is a level of mutual dependence among student-athletes and their schools; schools gain publicity and recruiting opportunities, while student-athletes gain an education and training in their sport.¹⁹⁹ Finally, it is foreseeable that an institution would be expected to take affirmative action to protect their student-athletes.²⁰⁰ While colleges are not insurers of their student’s safety, they have still fostered the expectation that they would act with reasonable care to protect their students.²⁰¹ The argument that this expectation exists is even more persuasive for a student-athlete, who is being exposed to the dangers of athletics, in part, for the benefit of their institution.

While these factors support finding a special relationship, the specific facts of a student-athlete’s claim will likely affect whether the relationship is deemed “special.” For instance, the court in *Kleinknecht* found it important that the athlete was “actively recruited” by the institution to participate in their sport.²⁰² Such a finding requires an analysis of the parties’ communication prior to enrollment but could likely be satisfied by many student-athletes. The *Kleinknecht* and *Davidson* courts also emphasized the importance of the injury occurring during practice or a game, rather than when the student-athlete was engaged in their own affairs.²⁰³ Unlike physical injuries, which can be more easily attributed to an incident or activity, the invisible nature of mental health issues makes tracing their origin particularly challenging. A student-athlete could potentially prove a connection between their mental health issues and participation in athletics by attributing them to a traumatic physical injury that occurred during their sport. Research suggests that physical and mental health

196. Carr & Davidson, *supra* note 10; *Suicide Second Highest Cause of Death Among College Students*, *supra* note 26.

197. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012).

198. Rhim, *supra* note 100, at 338.

199. McGirt, *supra* note 109 at 228.

200. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983); *Schiezler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002).

201. *Mullins*, 449 N.E.2d at 336.

202. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1368 (3d Cir. 1993).

203. *Id.*; *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

are “inextricably linked,” meaning there is evidence to support a student-athlete’s claim that a physical injury was the source of their mental health issues.²⁰⁴ Absent that, a student-athlete would likely have to testify as to the specific factors of their participation in athletics that led to or exacerbated their harm. While this connection would be harder to prove, a student-athlete could support their argument with studies that suggest a correlation between aspects of collegiate athletics—including the pressures, demands, and team dynamics—and mental health issues.²⁰⁵

A university may argue against the existence of a special relationship by relying on cases that involved individuals with mental health issues. Specifically, an institution could claim that if a student-athlete did not inform them of their mental health issues or desire to receive mental health services, then no special relationship existed.²⁰⁶ This is because, due to their lack of knowledge, the potential for injury would not be foreseeable, and the institution would not have been expected to provide mental health services to the student-athlete.²⁰⁷ While this argument could be made, it would likely be unsuccessful. In the relevant cases, the requirement of knowledge on the part of an institution served to create special relationships with students where they did not otherwise exist.²⁰⁸ Contrary to members of the general student population who are seldom found to have special relationships with their universities, the aforementioned factors considered by courts support finding a special relationship with student-athletes regardless of whether the university knew about their mental health issues.

Assuming that a student-athlete has a special relationship with their university, the student-athlete would be owed an affirmative duty of reasonable care with regard to the risks within that relationship.²⁰⁹ The question then turns to whether this encompasses the duty to provide mental health services. In delineating a specific duty, a court will first look at the foreseeability of harm.²¹⁰ Because this does not require the university to foresee the exact harm that occurred, the requisite foreseeability is demonstrated where a reasonable person could foresee that mental health issues may occur as a result of participating in athletics.²¹¹ Studies and educational material from the NCAA suggest correlations between participation in athletics and mental health issues.²¹²

204. *Interassociation Consensus Document: Best Practices for Understanding and Supporting Student-Athlete Mental Wellness*, *supra* note 12.

205. Carr & Davidson, *supra* note 10.

206. *See Schiezler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002); *see also Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 142 (Mass. 2018).

207. *Schiezler*, 236 F. Supp. 2d at 609.

208. *Id.*; *Nguyen*, 96 N.E.3d at 142.

209. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW. INST. 2012).

210. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993).

211. Bickford, *supra* note 162, at 102-03.

212. Carr & Davidson, *supra* note 10; NCAA, *supra* note 12.

Further, universities and organizations around the country have been outspoken about the severity of the mental health crisis on college campuses, and the detrimental impact that mental health issues have on student-athletes.²¹³ Based on this widely publicized information, suffering from mental health issues is a foreseeable harm resulting from participation in collegiate athletics. A court will then analyze whether providing student-athletes with mental health services is a reasonable way to protect against this harm.²¹⁴ This requires an analysis of the circumstances but, by demonstrating the benefits of providing mental health services—such as improving the quality and promptness of student-athletes’ treatment—and the potential for serious harm resulting from the relatively low number of student-athletes who currently receive treatment, a student-athlete could likely show that providing mental health services is reasonable.²¹⁵ This is also supported by the fact that institutions owe duties to provide prompt and appropriate medical treatment where student-athletes suffer physical injuries, and it would be unreasonable to treat mental health issues differently.²¹⁶

To avoid owing a duty of reasonable care to its student-athletes, an institution could claim that student-athletes assume the risk of suffering from mental health issues because the aspects of collegiate athletics that cause such issues are inherent risks of collegiate athletics.²¹⁷ Assuming that pressure and time commitments could be considered inherent risks, assumption of risk would be sufficient to show that an institution did not have a duty to prevent mental health issues from occurring; however, it cannot be said to negate the duty to provide mental health services. This is because colleges have a duty to not increase the inherent risks of a sport and failing to provide mental health services to student-athletes does just that.²¹⁸ Therefore, while courts vary in their findings of special duty-creating relationships, it is likely that institutions, under certain circumstances, owe their student-athletes a duty to provide mental health services.

CONCLUSION

Though no cases have directly addressed the duty to provide student-athletes with mental health services, the existence of a special relationship between student-athletes and their institutions gives rise to an affirmative duty of reasonable care. Just as this duty protects student-athletes from physical harm caused during their sport by requiring the provision of medical treatment, it may

213. Rische, *supra* note 9.

214. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40, cmt. d (AM. LAW. INST. 2012); *Kleinknecht*, 989 F.2d at 1370.

215. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40, cmt. d (AM. LAW. INST. 2012).

216. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1371 (3d Cir. 1993).

217. *Avila v. Citrus Comm. Coll. Dist.*, 131 P.3d 383, 390 (Cal. 2006).

218. *Id.*

also encompass a duty to provide mental health services to address the mental health issues caused or exacerbated by participation in collegiate athletics. To reiterate, this duty is only alleged to extend to the provision of mental health services, not the prevention of mental health issues themselves. The implications of this duty are that institutions who fail to provide their student-athletes with mental health services could be found liable for a student-athlete's emotional or physical harm. However, it is clear that there are variations in the ways that institutions provide such services, and this Article does not seek to define the limits of what is required to satisfy this duty. Therefore, what constitutes a breach of this duty is outside the scope of this Article. Further, the question of whether a duty is owed to student-athletes in a remote learning environment or during canceled athletic seasons—both effects of the recent COVID-19 pandemic—is also outside the scope of this Article.

Although mental health services for student-athletes are lacking in many ways, it is important to remember that research and understanding about mental health issues in the realm of collegiate athletics are still relatively new, and institutions across the country are working to implement services. It is also important to note that concerns stemming from a lack of institutional resources may be legitimate for many universities. But the fact that institutions are working towards providing services or that they did not allocate resources to be able to hire a sports psychologist is unlikely to affect the duty owed to their student-athletes. And, in light of the data demonstrating the severity of the mental health crisis, failing to provide mental health services to student-athletes can be viewed as an institutional choice to not prioritize student-athlete mental health. Ultimately, given the adverse effects on student-athletes and the potential for institutional liability, institutions should take a proactive approach and provide mental health services to their student-athletes.