2013 URMIA Journal Reprint

MOOCs and the Institution's Duties to Protect Students from Themselves and Others: Brave New World or Much Ado About Nothing?

Joseph C. Monahan
Saul Ewing LLP

Christina D. Riggs
Saul Ewing LLP

URMIA

University Risk Management and Insurance Association

I used to think that cyberspace was fifty years away.

What I thought was fifty years away, was only ten years away.

And what I thought was ten years away... it was already here.

I just wasn't aware of it yet.

—Bruce Sterling (1954–),

American Science Fiction Author

MOOCs and the Institution's Duties to Protect Students from Themselves and Others: Brave New World or Much Ado About Nothing?

Joseph C. Monahan and Christina D. Riggs, Saul Ewing LLP[1]

Abstract: As massive open online courses, or MOOCs, increase in both numbers and enrollment, colleges and universities may face new and emerging risks related to student speech and conduct. While some of the risks are the same as the risks facing brick and mortar classroom settings, others are quite unique. What is a college's duty if a MOOC participant makes a threat? Are MOOC participants even "students"? Who is responsible for monitoring speech and conduct in these types of courses? This article discusses one issue of particular interest for risk managers: student speech in online discussion boards associated with a MOOC and its impact on the institution's interest in identifying and addressing campus safety concerns.

Introduction

Issues surrounding student speech and conduct pose interesting challenges for college and university administrators in the context of the traditional ivy-covered bricks and mortar of a campus setting. The increasing prevalence of "massive open online courses," or MOOCs, presents its own set of challenges and risks related to student speech and conduct. While some of these issues are the same as presented on the terrestrial campus, others are specific to the electronic world in which MOOCs exist. This article will focus on one such issue of particular interest to campus risk managers: student speech appearing on online discussion boards associated with a MOOC and its impact on the institution's interest in identifying and addressing campus safety concerns.[2] These postings could include threats directed at a member of the school community, including other students enrolled in the MOOC, or could be more in the nature of statements indicating the student's intent to do harm to himself.

A threshold question important for an analysis of the university's duties toward MOOC participants is whether the relationship between the individual and the university is that of student/university or whether it is something else.

I. What Is a MOOC?

Generally speaking, a MOOC is an online course with very large scale enrollment, often in the tens of thousands. The courses are typically free and not offered for credit. That said, a number of colleges and universities have started offering fee based courses which, while not offering college credit, do offer certificates evidencing the student's completion of the course. It would appear likely that as MOOCs continue to develop and the business model of the companies providing the platform for the courses evolves, it will become more common for students to obtain credit through their enrollment in a MOOC. At present, three of the more prominent MOOC providers are Coursera, edX, and Udacity, each of which offers online courses from various college and university partners. In addition to providing the course content for the MOOCs available through those providers, certain institutions of higher education also own an equity stake in the MOOC providers.[3]

II. Are MOOC Participants "Students"?

A threshold question important for an analysis of the university's duties toward MOOC participants is whether the relationship between the individual participating in a MOOC and the university offering that MOOC is that of student/university or whether it is something else. This is an interesting question and one that is not easily answered, particularly given the various and evolving forms of MOOCs and the different policies of the MOOC providers. For instance, under the heading "Disclaimer of Student-University Relationship," Coursera's Terms of Use call for the participant to agree that a university/student relationship is not created by virtue of the individual's participation in any of its courses

and that the individual's enrollment in the MOOC does not enroll him in the university offering the MOOC.[4] edX's Terms of Service state that "when you take a course through edX, you will not be an applicant for admission to, or enrolled in, any degree program of the institution as a result of registering for or completing a course through edX" and further provides that the course participant will not be eligible for student privileges or benefits provided to students enrolled in the degree program of the university offering the course.[5] Udacity, by contrast, has no similar provisions in its Terms of Use.[6]

While a court examining the issue would no doubt find the language of the provider's Terms of Service relevant to the issue of whether the MOOC participant is considered a student to which the university owes certain duties, that language may not be dispositive of the issue, and the court could still look beyond those terms to consider the actual features of the relationship between the participant and the university offering the MOOC. Here, too, there is variation. At one end of the spectrum is a MOOC for which the individual pays a fee, in return for which he receives a certificate of completion or perhaps actual college credit. In that context, it is quite possible that a court would consider that person to be a student to whom the university owes certain duties. As we move down the spectrum towards free MOOCs, open to anyone with a computer, the participant's status vis-a-vis the university is less clear. Indeed, one can imagine someone registering for a MOOC only to watch a lecture or two on a topic of interest to them, which might comprise a fraction of the MOOC curriculum as a whole, and never returning to the site. Such a casual viewer's connection to the university is particularly attenuated and would seem more akin to someone who views a video on YouTube than a student.[7] The duties, if any, that a university might owe to this person if it became aware of a threat posted in a MOOC online discussion are not clear, but it is less likely that the university will owe the person at this end of the spectrum the same duties that a university might owe to its traditional students or even that it might owe to a person participating in a fee-based MOOC.

The balance of this article will focus on the liability analysis a court is likely to apply assuming the MOOC participant is, in fact, deemed to be in a student/university relationship with the institution offering the MOOC.[8]

III. The Institution's Potential Liability for Harm to Its Students: A Primer

Before turning to the unique issues raised in the MOOC context, a brief review of the university's duties and risk exposure in the context of a traditional campus may be useful.[9] In short, courts imposing liability on the college for injuries suffered by its students typically have done so either by finding a "special relationship" between the college and its student or based on the college's independent duty, as landowner, to make its premises safe for invitees. These cases relate to "negligence by omission," where the college or university is alleged to have caused the injury by virtue of its failure to take some affirmative action to protect the injured student.[10]

A. The Restatement (Second) of Torts (1965)[11]

While the general rule traditionally has been that there is no special relationship between an institution of higher education and its students sufficient to trigger a duty to protect those students, there are exceptions to this general rule. A number of sections of the Restatement (Second) are relevant to this issue and provide the general parameters of the scope of a university's duty to act to protect one of its students from harming herself or to protect a student from harm caused by a third party.[12] Specifically, § 314A spells out a number of special relationships where an actor has a duty to take "reasonable action" to protect another from the "unreasonable risk of physical harm." Although that list of relationships does not include the school/student relationship, comment b to that Restatement section indicates that the list is not meant to be exclusive.

Restatement (Second) § 315 also has potential application in the college and university setting, providing that there is no duty to control a third person to prevent him from causing harm to another unless there is either a "special relation [that] exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct" or where a "special relation exists between the actor and the other which gives to the other a right to protection." Finally, Restatement (Second) § 323 provides that one who undertakes to render services to another "which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertak-

ing" if such failure either "increases the risk of such harm" or because the "harm is suffered because of the other's reliance upon the undertaking."

B. The Restatement (Third) of Torts (2011)

In 2011, the ALI released its Restatement (Third). Unlike its predecessor, the current Restatement (at § 40(b)(5)) includes the relationship between a school and its students in the listing of special relationships giving rise to a duty of reasonable care. As made clear by comment l to that section, however, "[t]he relationship between a school and its students parallels aspects of several other special relationships – it is a custodian of students, it is a land possessor who opens the premises to a significant public population, and it acts partially in the place of parents. . . . As with other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities. And 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." This explanation is of particular interest in predicting how the courts might view the relationship between a university that offers a MOOC and the students enrolled in that course and will be revisited below.

Restatement (Third) contains other sections that are analogous to the sections of Restatement (Second) described above. For example, § 37 explains that it is still the general rule that an "actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other" unless one of the affirmative duties imposed by one of the other sections enumerated in the Restatement applies, while § 42 is similar to § 323 of the Restatement (Second) that it replaces.

C. A Brief Overview of Case Law

Consistent with the general rule as set forth in both Restatements, before imposing on a college or university a duty of care with respect to the protection of its students, courts often analyze the issue by considering whether there was a special relationship between the parties sufficient to justify a duty of care. In many cases, courts have refused to find such a relationship. In many others, however, courts have determined that such a relationship exists. The inquiry is typically a very fact-specific one, and a review of the following cases should help to illustrate on which factors courts focus.

Two factors courts have considered is the degree to which there is a "mutual dependence" between the student and the college and the degree to which the college exercises control over the student.

Two factors courts have considered is the degree to which there is a "mutual dependence" between the student and the college and the degree to which the college exercises control over the student. For instance, where a University of North Carolina (UNC) junior varsity cheerleader was injured while performing at a women's basketball game, UNC was found to have a special relationship with the cheerleader sufficient to impose liability on the university.[13] Important for the court's analysis in that case was the fact that there was a mutual dependence between the student and the university, with UNC depending on the cheerleading program for a number of benefits and the participants also benefitting from the relationship, including university-provided uniforms and transportation and the ability to use their membership on the squad to satisfy one hour of their physical education requirement. Also important for the court was the degree of control that UNC exercised over the program. Noting that the cheerleaders had to maintain a minimum grade point average and abide by certain standards of conduct, the court noted that where a college exercises significant control over a student, the students not only have a higher expectation regarding the protections they will receive from the school but also that any concerns regarding a stifling of student autonomy by finding the existence of a special relationship between the parties are less compelling. Nevertheless and notwithstanding the finding that there

was a special relationship in that case, the court was careful to note that a university "should not generally be an insurer of its students' safety, and that, therefore, the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care."[14]

A third factor courts have also considered is the degree to which the university had knowledge of the student's participation in a dangerous activity. For example, where a student pledging a fraternity was injured while being subjected to hazing, the court found that a special relationship sufficient to impose a duty of care on the university existed.[15] After emphasizing that there is no generalized duty requiring the university to control its students based merely on the university/student relationship, "where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control."[16] In that case, the court also found liability based on the university's status as landowner and the injured student's status as invitee.[17]

A fourth factor on which courts have focused in finding a special relationship is the "community consensus." In a case involving campus sexual assault, the court found that even though "changes in college life" reflected a "general decline of the theory that a college stands *in loco parentis* to its students," the court nevertheless found that the school had a duty to protect its students from the criminal acts of third parties. The court noted this duty was "firmly embedded in a community consensus" that colleges and universities "customarily exercise care to protect the well-being of their resident students."[18] The court identified this consensus by relying on expert testimony that 18 other colleges in the area all took steps to provide adequate security on their campuses. Noting the school had undertaken a duty to protect its students from criminal conduct, the court also found that the university owed a duty of care to the student based on the principle that a "duty voluntarily assumed must be performed with due care."[19]

Perhaps the most important factor courts consider in determining whether a special relationship exists sufficient to impose a duty on the university is whether the harm was foreseeable. For instance, a college has been held liable for the suicide of one of its students where the college had knowledge of the student's prior threat of suicide as contained in a note to his girlfriend and was on notice of bruises to the student's head that he indicated he had inflicted on himself.[20] In so holding, the court recognized that there can be no claim for negligence unless there is breach of a duty recognized by law. Citing to §314A of the Restatement (Second), the court noted that a duty to assist or protect another person only arises where there is a special relationship between the parties. While recognizing that the Restatement listed a number of "special relationships" sufficient to give rise to tort liability, it did not include the relationship between a college and its students. The court also recognized that, as made clear by the commentary to that Restatement section, the list was not intended to be exhaustive.[21] The court went on to explain that under the facts of that case, where the student was a dormitory resident, where he had previously threatened to kill himself, where he had been observed by campus police with bruising on his head that he admitted he had inflicted on himself, where the college had notice of the student's anger management and emotional issues, having previously required him to receive counseling for same before being allowed to return to school, the suicide was sufficiently foreseeable that the college had a special relationship with the student sufficient to give rise to a duty to protect him from hurting himself.[22] In so holding, the court rejected the college's argument that the duty to prevent the suicide of another is limited to cases involving psychiatrists and their patients or jailors and prisoners.[23]

Perhaps the most important factor courts consider in determining whether a special relationship exists sufficient to impose a duty on the university is whether the harm was foreseeable.

However, not every court has found that the university had a special relationship with a student that committed suicide. For instance, the Iowa Supreme Court refused to impose liability on the University of Iowa for the dormitory room suicide of one of its students, even where university administrators had notice of the student's previous

threats to harm himself and were aware that he had moved his moped into his room so that he could use it as the instrumentality of his death.[24] Interestingly, the court did not employ a foreseeability analysis, but instead focused on Restatement (Second) § 323 and its duty not to negligently perform once the actor has undertaken to act. Specifically, the court rejected the argument that by adopting a policy of notifying the families of students who have engaged in self-destructive behavior, the university took on a duty, and that it negligently performed that duty when it failed to notify the student's parents of his psychological issues. In so doing, the court emphasized that before such a theory could impose a special relationship, a plaintiff would have to establish that the failure to complete the undertaking actually put the injured party at greater risk than he would have been had the university never taken on the undertaking initially. Since no such showing could be made, the court found for the university. "[T]he record before us reveals that the university's limited intervention in this case neither increased the risk that Sanjay would commit suicide nor led him to abandon other avenues of relief from his distress."[25]

In another case, the Massachusetts Superior Court refused to find a special relationship existed that would impose a duty on the university to protect its student from overdosing on heroin.[26] In so doing, the court noted that it was appropriate to balance the foreseeability of harm to the student against the burden imposed by taking the steps necessary to protect that student from harm. The court found that the student's use of heroin was not reasonably foreseeable and further noted that it had "grave reservations about the capacity of any university to undertake measures to guard against the risk of a death or serious injury due to the voluntary consumption of drugs."[27] Not only did the court believe that it was "not possible for the most vigilant university to police all drug use and protect every student from the tragic consequences" of illegal drug use, but the court also emphasized that if it were to find a special relationship existed giving rise to a duty to protect the student from harm, it would "conflict with the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students."[28]

Reading all of these cases together, several general principles emerge. While courts have been willing to find that a special relationship between student and college exists in certain circumstances, such a finding is not a certainty, and there is no generalized special relationship between universities and their students for all purposes. The instance where the courts are most likely to find that a special relationship exists is where the threatened harm is foreseeable or the conduct is particularly dangerous. Even where the harm is foreseeable, however, the court may still look to balance that foreseeability against the burdens associated with protecting the student from such harm.

While courts have been willing to find that a special relationship between student and college exists in certain circumstances, such a finding is not a certainty, and there is no generalized special relationship for all purposes.

IV. What Does All This Mean for MOOCs?

Mindful of the general overview of the duties imposed on brick and mortar colleges and universities, we turn now to MOOCs and the extent to which those duties have application in this rapidly growing part of the higher education landscape. In other words, what exposure does the college or university offering a MOOC have for a student who threatens himself or others in the online message boards? Should the school monitor those online discussions? Is the school offering the MOOC required to do anything to protect its students from harm, either self-inflicted or caused by a third party?

While the situation could arise under any number of factual scenarios, this article will focus on the two that would seem to be the most likely—either a MOOC student makes comments in the MOOC online discussion forum indicating that she intends to do harm to herself, or a MOOC student posts some sort of threat to a fellow student. In either situation, what duties, if any, does the school offering the MOOC have?

Given the novel nature of MOOCs, the courts have not yet been asked to consider these questions. If they did, however, and assuming the MOOC participant is considered a student, it is likely the court would use as an analytical starting point the principles articulated in the Restatement and the established jurisprudence applicable to colleges generally. There are clear differences between MOOCs and traditional university courses, however, the most obvious of which is that, unlike the situation where college students attend classes on a physical campus and reside in dormitories owned by the college, students enrolled in MOOCs attend classes by logging in from their own homes or offices that may literally be anywhere in the world. This distinction would seem to render inapplicable any duty that a college might otherwise have as landowner to make its campus safe for invitees. As is clear from the above discussion, however, the college has other duties towards its students beyond those imposed on it by virtue of its status as property owner.

Putting aside that physical difference in the learning environment, the relevant question for a court faced with the issue is whether there was a special relationship between the MOOC student and the school sufficient to impose a duty of care on the institution. As previously noted, given the fact-specific nature of this inquiry, it is difficult to predict the outcome with any degree of certainty. That said, certain factors will be relevant in guiding the discussion.

For one, to what degree did the institution exercise any control over the student?[29] Unlike a more typical university/student relationship, where the student is enrolled in classes for which they pay tuition and receive credit and which they attend in university buildings, while also perhaps living in university housing, the university's relationship with its MOOC students is very different. They typically pay no tuition and receive no college credit for the coursework. Moreover, because the courses are available online, the MOOC students can access them at any time on their own schedule. Accordingly, while it might not be accurate to say the college offering the MOOC has no control over the students enrolled in the course, the institution clearly has less control over the student than it does over a student enrolled in one of its traditional courses. This fact cuts against the finding of a special relationship between the college offering the MOOC and the MOOC student.

Another factor relevant to the determination of the existence of a special relationship is whether there is a mutual dependence between school and student, measured by the degree to which each receives benefits from the other.[30] For the student enrolled in the MOOC, the benefits of such enrollment are clear, as the student receives an education, on her own time, at a place that is convenient for her and at no or very low cost. Where the MOOC is offered free of charge, it may not be quite as apparent what benefit the university derives from offering the course, other than the publicity and good will generated by that offering. As alluded to earlier, however, some MOOCs charge a fee, in exchange for which the student receives a certificate of completion, if not full college credit. As this model becomes more common and perhaps even evolves into a credit for tuition arrangement, this mutual benefit analysis will also evolve, and the benefits conferred to both student and university will become more apparent. Moreover, for those universities having an ownership stake in the MOOC providers, the financial benefits to the university could be significant.

A third factor, and probably the most significant one, is the degree to which the harm in question was foreseeable by the college or university offering the MOOC.[31] For instance, where the university has actual notice of suicidal threats made by a student in a MOOC's online discussion forum or had notice of a specific threat made by one student against another student in that same forum, a court is likely to find that the later suicide of the MOOC student or harm caused by one student to the other was foreseeable to the university. In that case, the court would likely find the requisite special relationship existed and could impose liability if the institution failed to take adequate measures to assess and address that potential threat.[32] That said, given that the student posting the suicidal threat or the person being threatened by another MOOC participant could be located halfway around the world, with the university unlikely to know much at all about the student, including their living or family situations, a court could find that the burdens imposed by protecting such student outweigh the foreseeability of harm to them and thus decline to find the university has a duty to protect such students, or that the university's discharge of that duty is more easily achieved than for its students enrolled in traditional courses.

The question of whether the institution offering the

MOOC had notice of the threat, and thus whether it was foreseeable, raises the question of whether the university offering the MOOC is under any obligation to monitor the online discussion on the message boards associated with the MOOC to determine whether it contains any troubling student speech. While the professor or her teaching assistants (TA) will presumably be participating in at least some portions of the online discussion, given that MOOCs have a massive enrollment and that the online discussions emanating from these can have many threads and sub-threads, it is unlikely that the professor or her TAs will be involved in all of the discussions. Moreover, to attempt to monitor all of these discussions would itself be a very demanding undertaking.

Before deciding to monitor all MOOC electronic message boards, college risk managers should be mindful of the liability imposed for failing to adequately perform an undertaking as set forth in Restatement (Third) § 42. In short, if a university undertakes to render services to another and knows that the rendering of such services will reduce the risk of harm to another person, the university has a duty to exercise reasonable care in performing those services if failing to do so will increase the risk of harm to another person or where the person to whom the services are rendered relies on the fact that the university will exercise reasonable care in the undertaking. Given the practical challenges in monitoring the volume of postings at issue, it would be very difficult for anyone monitoring the discussions to be aware of everything that is said, and one can assume that some things would likely get missed.

While there are no easy answers, best practices suggest that the institution should err on the side of caution when it actually becomes aware of speech on a MOOC online message board that appears to be a direct threat against an identifiable person or a posting suggesting the poster's intent to do harm to himself. When faced with actual notice of such foreseeable harm, to the extent possible the university should proceed in the same way that it would in the context of a traditional campus, recognizing, of course, that it may be limited in what it can do to protect the MOOC students, over whom it has little control.

Best practices suggest that the institution should err on the side of caution when it becomes aware of speech on a MOOC online message board that appears to be a direct threat against a person or suggesting intent to do harm to oneself.

Given the burdens associated with generally monitoring all MOOC online discussions for problematic content and the liability that could attach if the school attempts this undertaking but somehow falls short of successfully identifying all threats to the safety of students communicated on those boards, risk managers should give careful consideration before instituting a policy of monitoring the MOOC discussion boards generally. If the college or university chooses not to monitor all of the MOOC online forums, it would be advisable to disclose that fact to the students enrolled in the course, similar to the way that Coursera, Udacity, and edX make similar disclosures, thus reducing the chance that a student could later claim he was relying on the school to protect him from himself or others by monitoring the MOOC discussion boards for threatening speech.

V. Conclusion

As noted above, in preparing Restatement (Third) § 40, which added the school/student relationship to the list of special relationships that can give rise to a duty of care, the American Law Institute's (ALI) commentary recognized that the relationship between a school and its student can take many forms and that the level of care an elementary school must exercise towards its students differs from the reasonable care applicable to college students. While the ALI commentary does not address MOOCs, it is probably fair to infer that the level of care owed to MOOC students is different from that owed to college students generally. Also, in noting the many hats that higher education institutions wear, as "custodian of students . . . a land possessor who opens the premises to a significant public population . . . [and one who] acts partially in the place of parents," the ALI signaled its rationale for including the school/student relationship on the list.

As the university wears none of those hats in the context of a MOOC, any argument based on the Restatement that there is a special relationship between the school offering the MOOC and its students is somewhat undermined, at least where the school had no notice of the threat at issue. However, where the institution does acquire actual notice of the threat, such that the threatened harm becomes foreseeable, the institution that chooses to do nothing does so at its peril.

MOOCs are a new and exciting entrant onto the higher education scene. While they bring great promise, they do not come without risks, at least several of which are discussed above. It will be interesting to see how MOOCs develop over time and to see whether courts treat them as analogs to traditional courses offered on campus or as different creatures altogether. Until these issues are addressed by the courts, campus risk managers would be prudent to proceed with caution, mindful of the potential exposures that threatening speech and conduct in the context of a MOOC can pose.

About the Authors

Joseph C. Monahan is a partner in the Philadelphia office of Saul Ewing LLP. He is a litigator and a member of the firm's Higher Education Practice Group. Mr. Monahan can be reached at 215.972.7826 or jmonahan@saul.com

Christina D. Riggs is an associate at Saul Ewing LLP in Philadelphia and a member of the firm's Higher Education Practice Group. She focuses her practice on the defense of colleges and universities in state and federal proceedings. Ms. Riggs can be reached at 215.972.7810 or criggs@saul.com

Endnotes

1 The authors thank Jim Keller, their colleague in Saul Ewing's Higher Education Practice Group, for his invaluable assistance with this article.

2 The university's ability to discipline students based on such electronic postings raises its own set of issues, including, among others, potential First Amendment concerns. Those issues are beyond the scope of this article.

3 For a description of MOOCs generally, see James G. Mazoue, "The MOOC Model: Challenging Traditional Education," *EDUCAUSE Review*, January 28, 2013, http://www.educause.edu/ero/article/mooc-model-challenging-traditional-education.

4 Coursera, "Terms of Use," https://www.coursera.org/#about/terms.

5 edX, "edX Terms of Service," https://www.edx.org/tos.

6 Udacity, "Terms of Service," https://www.udacity.com/legal/tos.

7 One notable difference being that unlike the YouTube viewer, one wishing to participate in a MOOC must register for it and must provide certain personal information in order to do so.

8 While it is beyond the scope of this article, a separate issue exists regarding whether the company providing the MOOC and hosting the online discussion on its servers, whether it be Coursera, Udacity, edX, or some other provider, could have some duty to act if it learned of a threatening posting in one of the online discussions. Indeed, there have been cases seeking to impose liability on various social media sites based on claimed injury resulting from the content of the postings appearing on those sites, but the authors are not aware of any cases where the plaintiffs were successful in doing so. *See e.g.*, *Klayman v. Zuckerberg*, No. 11-874-RBW, 2012 WL 6725588 (D.D.C. 2012) (refusing to impose liability on Facebook for not timely removing postings calling for violence against Jews); *Doe v. MySpace Inc.*, 96 Cal. Rptr. 3d 148 (Cal. Ct. App. 2009) (refusing to impose liability on MySpace for sexual assaults against minors after meetings with perpetrators arranged through online MySpace exchanges). The terms of use for Coursera, Udacity, and edX all contain explicit provisions purporting to limit or disclaim their liability, along with terms prohibiting certain types of postings, including those threatening or harassing another. Moreover, each of the companies' respective sites make clear that they do not routinely monitor the content in the online discussions.

9 This issue was discussed at length in an excellent article appearing in the 2011 Edition of the *URMIA Journal*. See Jeffrey Nolan, Esq., et al. "Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now," *URMIA Journal* (2011), 105-122, (the "Campus Threat Article") which explored, among other topics, the legal duties that colleges and universities have with respect to violent incidents on campus and how risk managers can work to minimize campus risks.

10 As there are no "premises" in the electronic world of MOOCs, cases analyzing liability based on the university as landowner are of little relevance for purposes of this article.

11 As explained in the Campus Threat Article, *supra* note 9, the American Law Institute (ALI) promulgates, reviews, and periodically updates the Restatement of Torts, summarizing what it views to be the state of the common law in the United States. While the judges of every state do not necessarily adopt every section of the Restatement, it is a good resource for understanding the current common law and identifying any trends in the development of that common law. In 2011, the ALI issued the Restatement (Third) of Torts (2011) (referred to hereafter as "Restatement (Third)"). As stated therein, the ALI intended it to replace at least certain

aspects of its predecessor, the Restatement (Second) of Torts (1965) (referred to hereafter as "Restatement (Second)"). A brief summary of relevant sections of both Restatement (Second) and Restatement (Third) will help inform an understanding of the general principles governing the duties of an institution of higher learning to protect its students from harm, whether caused by themselves or a third party.

[12] While Restatement (Second) has been largely replaced by Restatement (Third), because many of the cases were decided before the Restatement (Third) was issued, and thus cite to Restatement (Second), a description of its relevant provisions is included herein. Moreover, not all courts have adopted or had occasion to adopt the Restatement (Third).

[13] *Davidson v. Univ. of N. Carolina at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001).

[14] Ibid., 928.

[15] *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991).

[16] Ibid., 520.

[17] Ibid., 522.

[18] *Mullins v. Pine Manor College*, 449 N.E.2d 331, 335 (Mass. 1983).

[19] Ibid., 336.

[20] *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

[21] Ibid., 606-7.

[22] Ibid., 609.

[23] Ibid., 610-11. In another highly publicized case with similar facts, *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 1869101 (Mass. Super. 2005), a court found that MIT had a special relationship with a student who committed suicide in her dorm room sufficient to impose a duty on the university to protect the student from harm. Important for the court's determination was the fact that the university administrators had notice of the student's psychological difficulties and previous threats of suicide, such that they "could reasonably foresee that [the student] would hurt herself without proper supervision." Ibid., 13.

[24] *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000).

[25] Ibid., 300.

[26] *Bash v. Clark Univ.*, No. 06745A, 2006 WL 4114297 (Mass. Super. 2006). Ibid., 4.

[27] Ibid., 5.

[28] This question of control was important for the court in *Davidson*, *supra* note 13, where the court noted that when the college exercises a certain degree of control over the student, it ameliorates concerns that a finding that a special relationship between college and student exists would stifle student autonomy. Such autonomy would seem to be one of the hallmarks of a MOOC, which a student can take anywhere, at any time and at their own pace.

[29] The *Davidson* court also focused on this factor. *Davidson*, *supra* note 13.

[30] This was the key factor for the court in *Schieszler*, *supra* note 20.

[31] For a complete discussion of campus threat assessment measures on campus, *see* the Campus Threat Article, *supra* note 9.

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 2013 *URMIA Journal* was edited and designed by Christie Wahlert, URMIA, Bloomington, Indiana; and the *URMIA Journal* was printed at Indiana University Printing Services, Bloomington, Indiana.

There is no charge to members for this publication. It is a privilege of membership, or it may be distributed free of charge to other interested parties. Membership and subscription inquiries should be directed to the National Office at the address above.

UNIVERSITY RISK MANAGEMENT &
INSURANCE ASSOCIATION

URMIA National Office
P.O. Box 1027
Bloomington, Indiana 47402
www.urmia.org