The Revivification of *In Loco Parentis* Behavioral Regulation in Public Institutions of Higher Education to Combat the Obesity Epidemic*

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**ABSTRACT**

In the past decade the obesity epidemic has exploded, leading to a prevalence of health and wellness issues associated with obesity and unhealthy weight. While recent litigation and legislation have aimed at curtailing obesity, particularly in elementary and secondary schools, only one program has attempted to curtail obesity in an institution of higher education (“IHE”). In 2005, Lincoln University became the first IHE to actively regulate students in an attempt to attack the obesity epidemic by requiring students to take a physical education class, or to place out by having a body mass index (“BMI”) below 30. While Lincoln’s program has now become optional, its presence may be a harbinger of a possible solution to the obesity epidemic—mandatory educational programs in IHEs.

While such a program may be desirable from a health perspective,
there are many legal and social challenges to implementing such a program. Before the 1960s, IHEs were capable of implementing almost any regulation that would shape the morals, values, or behaviors of students under the doctrine of in loco parentis. However, since that time courts have been less willing to defer to IHEs and more willing to investigate IHE-student relations. This does not mean that IHEs cannot implement such a program, it simply creates legal perimeters from which IHEs cannot stray. Such legal perimeters include: the Fourteenth Amendment Due Process & Equal Protection Clauses; the Americans with Disabilities Act; the common law right to privacy; and various state and local restrictions. Likewise, an IHE program may cause social backlash as students feel that they are losing their autonomy.

This Note attempts to synthesize these concerns and propose a workable, legally insulated, program. By recognizing these legal and social concerns, IHEs can prepare for possible litigation and social backlash, and preemptively articulate programs that furthers the fight against obesity, while protecting themselves to the fullest from criticism or litigation.

INTRODUCTION

In 2005, Lincoln University, a predominantly African-American university located in Pennsylvania,\(^1\) required, as a condition for graduation, that students be tested for their body mass index (“BMI”).\(^2\) If the student’s BMI was above 30, the student was required to take a physical education course as a condition of graduation.\(^3\) The program

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\(^1\) Lincoln University is a “state-related” institution. About Lincoln: A Legacy of Producing Leaders, LINCOLN UNIV., http://www.lincoln.edu/about.html (last visited Dec. 13, 2010). The University receives operational funding from the state yet remains under independent control; the District Court for the Eastern District of Pennsylvania has held that Lincoln is a non-public “non-profit corporation chartered for educational purposes.” Krupp v. Lincoln Univ., 663 F. Supp. 289, 292 (E.D. Pa. 1987).

\(^2\) Obesity is determined by a weight-height ratio called the body mass index. Calculate Your Body Mass Index, NAT'L. HEART LUNG & BLOOD INST., http://www.nhlbisupport.com/bmi/ (last visited Dec. 13, 2010). BMI is determined on a sliding scale from 0 to 30+, broken down into four categories: less than 18.5 is considered underweight; 18.5 - 24.9 is considered healthy; 25.0 - 29.9 is considered overweight; 30.0 or more is considered obese. Id.

\(^3\) Marcia Wade Talbert, Lincoln University Repeals Controversial Health Requirement, BLACK ENTERPRISE (Dec. 22, 2009), http://www.blackenterprise.com/business/business-news/2009/12/22/lincoln-university-repeals-controversial-health-requirement. The class was entitled “HPR 103: Fitness Walking/Conditioning,” and students received a single credit for its completion; enrolling in and passing the course was a precondition for graduation if the student did not qualify for exemption. See Lincoln University Core Curriculum, LINCOLN UNIV., http://www.lincoln.edu/math/forms/LU-CoreCurriculum.htm (last visited Dec. 13, 2010). The class has recently been re-designated as “HPR 103: Fitness for Life.” See Faculty Meeting
proved to be controversial; critics found the condition to be overzealous, paternalistic, and invasive, while supporters lauded it as a catalyst for healthy living. While the program has become optional as of December 2009, its creation heralds a potential solution to the obesity epidemic via behavioral regulation in institutions of higher education (“IHE”) and represents a sensible starting point for any debate about what such regulation should entail.

The question of whether educational institutions should use their position of power to instill or maintain cultural values, morals, and behavioral practices in students has been debated since antiquity. Until the 1960s, it was part and parcel of the American collegiate system for institutions of higher education to formulate value systems that would be implemented through IHE policy and regulations. These institutional-
value overlays were part of the long-standing Anglo-American legal and social doctrine of *in loco parentis*.\(^9\) Pursuant to this doctrine, IHEs legally stood “in the place of the parent.”\(^10\) This formally granted IHEs the same rights in relation to the students as parents have to their children; i.e., the right to mold students’ morals, behaviors, and cultural beliefs, and the concomitant responsibility to protect the students from harm.\(^11\) As a response to this relationship, courts tended to defer to the decisions of IHEs with respect to student affairs.\(^12\)

During the 1960s, drastic changes in constitutional interpretation, particularly the extension of Fourteenth Amendment Due Process rights to students in public IHEs, greatly eroded *in loco parentis*, and most courts and legal scholars accepted that the doctrine had become obsolete.\(^13\) This theory lasted for two decades, until a partial resurgence in the 1980s and '90s as courts began to require IHEs to protect students in the context of alcohol-related injuries and deaths, personal injury claims stemming from third-party actors such as rape or assaults, and harm that occurs through institutional actions.\(^14\) However, the creation of legal duties for IHEs is but one portion of *in loco parentis*.\(^15\) And, while the duty portion of the doctrine has flourished in the past two decades, IHEs have tended to stay away from the creation of policy requirements aimed overtly at instilling morals, values, or behavioral practices.\(^16\) This reticence, however, does not mean that the loss of judicial deference has preempted IHEs from instituting

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\(^9\) See Walton, *supra* note 8, at 247-48; see also KAPLIN & LEE, *supra* note 8, at 16.

\(^10\) BLACK’S LAW DICTIONARY 858 (9th ed. 2009).

\(^11\) Lake, *supra* note 6, at 533-34.

\(^12\) See infra Part II.A.

\(^13\) See, e.g., Dixon v. Alabama, 294 F.2d 150, 154-57 (5th Cir. 1961); Soglin v. Kauffman, 295 F. Supp. 978, 986-87 (W.D. Wis. 1968) (stating that courts will intervene with IHE’s policies where doing so is necessary to uphold student due process rights); see also William W. Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 AM. J. COMP. L. 403, 405-08 (1969) (discussing the decline and disappearance of *in loco parentis* in larger American IHEs); Charles A. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1030-32 (1969) (discussing that Dixon signaled a shift in thinking with respect to due process and college students); Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1148-51 (1991) (reviewing the decline of *in loco parentis* at IHEs during the second half of the twentieth century).


\(^15\) See Walton, *supra* note 8, at 256.

\(^16\) Id. ("Missing is the once complementary power of colleges to police and control students’ morals . . . .") (quoting James J. Szablewicz & Annette Gibbs, *Colleges’ Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453, 465 (1987)).
programs that shape students’ behaviors.\textsuperscript{17} Indeed, the current trend of IHE restraint from regulating students’ behavioral choices in the area of health and wellness may be ending, as augured by Lincoln University’s anti-obesity plan.

This Note will analyze the legal and social barriers to implementing anti-obesity programs at IHEs, and will propose a paradigm within which IHEs can develop anti-obesity programs without overstepping the legal perimeters created post-1960s. This Note further proposes that fashioning and implementing these programs in IHEs would benefit society by emphasizing the importance of maintaining a healthy weight, and proactively attempting to shape students’ behaviors to enhance their long-term health.\textsuperscript{18}

Part I of this Note will explore the problems emanating from the obesity epidemic and the rationale behind public health initiatives aimed at curbing obesity. Part II of this Note will investigate the doctrine of \textit{in loco parentis}; explore the doctrine’s history; and detail its decline \textit{in toto}, its partial resurgence in the area of legal duties, and whether IHEs can currently regulate student behavior. Part III will present a number of possible legal and social consequences of instituting a program to curb obesity in an IHE, including the possibility of constitutional and legal challenges based on federal and state protections against discrimination, invasion of the right to privacy under the Fourteenth Amendment and common law, and possible social reproach for infringing on students’ autonomy. Part IV of this Note will apply the concerns raised in the previous sections in proposing a workable, and legally insulated, program for curbing obesity in IHEs.

I. A Recent History of Obesity

In the past two decades there has been a rapid escalation in the percentage of Americans who qualify as overweight or obese.\textsuperscript{19} Between 2005 and 2006, 32.7\% of Americans over the age of twenty qualified as overweight, while 34\% of Americans qualified as obese.\textsuperscript{20} These individuals are more likely to have a number of debilitating physical conditions including cardiovascular diseases, diabetes, hypertension, lowered

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\textsuperscript{17} See infra Part II.D.
\textsuperscript{18} See infra Part III.
\textsuperscript{19} See NAT’L INST. OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS 1, 12-23 (1998).
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hormones, infertility, thyroid conditions, and cancer. Furthermore, obesity-related illnesses have been responsible for 300,000 deaths per year, and “may well be the leading cause of preventable deaths in the United States.” As a result, concerns over health and wellness issues connected with being overweight and obese have become increasingly prevalent.

While some authors indicate that “preventing obesity requires decisions about personal behavior that by definition can only be made by the individual,” many individuals often do not have the singular will power to overcome the external pressures that lead to obesity. These external pressures include the “socially contagious” nature of obesity, the eating and exercise activities of an individual’s peers and family, the cost of food, the presence or lack of recreational parks and facilities, as well as pervasive advertising and marketing from food and beverage companies. For example, companies in the food and beverage industry have succeeded in slowing down legislation intended to limit the sale of high calorie, sugar, and fat products, and have successfully lobbied legislation that protects these companies from obesity-related tort litigation. These factors present a significant barrier to individuals attempting to lose weight.

However, as awareness of the pervasiveness of obesity and its health

21 See Nat’l Inst. of Health, supra note 19, at 12-23.
23 See Nat’l Inst. of Health, supra note 19, at 1, 12-23.
25 See Jason A. Smith, Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity, 28 U. Ark. Little Rock L. Rev. 443, 444-45 (2006) (stating that obesity is a public health concern that is born from a “complexity of . . . environmental factors”).
26 See Leah Loeb, Childhood Obesity: The Law’s Response to the Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity, 12 J. Health Care L. & Pol’y 295, 300 n.52 (2009).
29 Yosifon, supra note 28, at 277 (explaining that the food industry has successfully lobbied bills in twenty-three states “forbidding tort suits against food corporations in connection with obesity-related illnesses”).
30 See supra notes 26-29 and accompanying text.
complications mounts, there has been some headway toward changes in social and cultural norms: \(^{31}\) “[a] flurry of antiobesity legislation . . . aim[ed] at the environmental factors that have contributed to the epidemic . . .” \(^ {32}\) and consumer litigation against restaurants and food vendors. \(^ {33}\) One notable area where significant legislative action has occurred is in relation to food consumption by public schoolchildren, and the stocking and availability of high fat, caloric, and sugar foodstuffs in schools. \(^ {34}\)

In comparison state and federal legislative and legal actions have been notably silent with regard to IHEs. \(^ {35}\) Indeed, there has been a paucity of mandatory IHE regulation besides those that are a result of student pressure for healthier choices. \(^ {36}\) IHEs have also offered, typically optional, educational programs dealing with nutrition, healthy eating, and physical education. \(^ {37}\) However in 2005, Lincoln University in Pennsylvania took a

\(^{31}\) See, e.g., Antonio Vives, Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries, 83 CHI.-KENT L. REV. 199, 201-02 (2008) (stating that society has now begun to hold food manufacturers liable for producing unhealthy foods).


\(^{37}\) For example, the University of Massachusetts offers a number of courses, including “Nutrition for a Healthy Lifestyle,” which is optional. See FIVE COLLEGES, FALL 2010 COURSES 2 (2010), available at http://www.fivecolleges.edu/sites/chs/documents/Fall%202010_Courses.pdf;
more expansive and paternalistic approach to obesity and weight loss, mandating that failure to participate in a physical education course, or to place out of the course by having a BMI below 30, would lead to ineligibility to graduate.38

The main proponent of the program, Dr. James L. DeBoy, the Chair of Lincoln’s Health, Physical Education, and Recreation Department, has stated that he believes that educators are tasked with the responsibility to:

[B]e honest with our students and inform them when behavior, attitude, knowledge bases or habits of mind are not what we, the faculty, deem as acceptable. Any factor/trait/characteristic that we believe will hinder students’ maximum development and full realization of life goals must be: (1) brought to their attention; (2) substantiated as being detrimental; and (3) adequately redressed.39

While Dr. DeBoy advocates that these messages be couched in a nurturing vernacular,40 the fundamental question as to whether educators can instill behavioral choices, and if so, if they should, needs to be addressed.41

II. In Loco Parentis and IHEs

The statements of Dr. DeBoy signify that a possible cure to the ongoing obesity pandemic may rest in the application of educational programs intent on bending students’ values to match those that educators have determined promote good health.42 The question of whether IHEs should regulate the normative behavior of their students is not a new question; in fact, for the majority of American history, similar behavioral, attitudinal, and moral regulation was the status quo of IHE policy, and was not only tolerated by society, but expected.43

A. In Loco Parentis: A Brief Historical Analysis Prior to the 1960s

Prior to constitutional doctrinal developments in the 1960s, IHEs, both public and private,44 were given essentially free reign to determine the

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38 See supra note 3.
39 Excerpt of E-mail to the Faculty, supra note 4.
40 See id.
41 See infra Part III.
42 See infra Part I.
43 See MICHAEL CLAY SMITH & RICHARD FOSSEY, CRIME ON CAMPUS: LEGAL ISSUES AND CAMPUS ADMINISTRATION 3-5 (1995); infra Part II.A.
44 Schools that are privatized have been allowed more leeway in dealing with their students’ beliefs and behaviors as they are not considered part of the state and therefore are
morals, values, and behavioral practices they wanted to instill in their students by exercising a “parental role in securing the ‘physical and moral welfare’ of their students.”45 Starting in the 1800s, courts held that colleges and universities stood in loco parentis, and had the legal right to create and enforce any rule or regulation pertaining to students’ social lives.46 Attached to this right was a large amount of judicial deference to IHEs in determining what was best for students; for example, in an early case, People ex rel. Pratt v. Wheaton College, the court held judges were to act with deference to the decision making of IHEs, so long as the rules “violate[d] neither good morals nor the law of the land.”47 Some legal scholars have noted that this limitation was “largely theoretical”48 and that the scope of deference to IHEs extended to “any rule or regulation.”49 This created an environment where courts were reticent to debate the merit of IHE decisions, and students who brought claims for wrongful dismissal and suspension based on IHE social policy rarely found redress.50 This reticence went so far as to allow for almost arbitrary dismissals, based upon unbecoming conduct, insubordination, or anything that IHEs deemed to be “appropriate reason[s].”51 What constituted an appropriate reason essentially extended to any reason an IHE could conceive; for example, in Anthony v. Syracuse University, the court upheld a university determination to dismiss a female student for the exiguous rationale that she was not “a

not beholden to the Constitution. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 660-62 (1819). However, if the government is significantly involved in the affairs of the privately run school, the school may become liable to students as a state actor. Cf., e.g., Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

45 See Hirshberg, supra note 14, at 195 (quoting Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913)).

46 See Gott, 161 S.W. at 206.

47 40 IId. 186, 187 (1866).


49 See Gott, 161 S.W. at 206. A fuller statement of the court is instructive:

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere . . .

Id.

50 See, e.g., Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924); Gott, 161 S.W. at 206; Tanton v. McKenney, 197 N.W. 510, 512-13 (Mich. 1924).

51 See John G. Hill, Jr., The Fourteenth Amendment and the Student—Academic Due Process, 3 CONN. L. REV. 417, 419-20 (1971); see also Jackson, supra note 13, at 1148.
typical Syracuse girl.”

On a few occasions courts did author decisions favorable to students in which the courts recognized students’ minimum due process rights. In those cases that found for students, the courts held that students were entitled to pre-dismissal hearings concerning the cause of their dismissal, as well as the ability to present a defense as to the charges accused. This latter view was by far in the minority, and court decisions that found for students met with widespread criticism. As IHEs argued, and courts tended to agree, the role of courts in this area should be limited because courts are less adept at dealing with appraising student conduct, court decisions undermine school authority, and court decisions may impinge the student-university relationship.

B. The Quelling Emphasis of In Loco Parentis and the Doctrine’s Sudden Death in IHEs

At the onset of the 1960s, students rebelled against the paternalism of in loco parentis, claiming the right to regulate their own lives and value choices. The doctrine became severely eroded in 1961 when the Fifth Circuit held in Dixon v. Alabama State Board of Education that students could not be summarily dismissed without notice and an opportunity for a hearing. The students in this case were dismissed from Alabama State College on the grounds that they had protested racial segregation by entering a grill located at the Montgomery County Courthouse and attempting to receive service. The appeals court overruled the lower court’s deferential finding, stating that the constitutional tenets of fair procedural due process under the Fourteenth Amendment required, at a minimum, that students who are to be expelled from the academic community be given notice and a hearing on the expulsion. This seminal

53 See Commonwealth ex rel. Hill v. McCauley, 3 Pa. C. 77, 84 (1887) (reinstating student who had been dismissed without a hearing for disorderly conduct); Walton, supra note 8, at 249.
54 Comment, A Student’s Right to a Hearing on Dismissal from a University, 10 STAN. L. REV. 746, 747 (1958).
55 See Walton, supra note 8, at 250.
58 294 F.2d 150, 154-57 (5th Cir. 1961).
59 Id. at 152-53.
60 Id. at 158-59.
case was the first to conclusively sweep in loco parentis aside, and “[t]he avalanche of court decisions following . . . Dixon . . . have one by one added judicial nails into the coffin of [in loco parentis].”

Further legal developments ensured that students in secondary schools and IHEs did not “shed their constitutional rights . . . at the schoolhouse gate.” Over the course of the next two decades constitutional principles regarding the Fourth Amendment right to be free from unreasonable searches and seizures, and the First Amendment rights to freedom of speech and association were also extended to students at public IHEs. In general, courts across the nation retraced their abstemious deference to IHEs by treating students as fully legally cognizable persons, asserting that students—not IHEs—should “claim the right to define and regulate their lives.” Furthermore, courts now took it upon themselves to investigate school policy, which eventually lead to the erosion of in loco parentis; the more active role by the courts was thought to have “greatly diminished . . . [the doctrine to the point of being] not generally regarded as having any substantial impact . . . on court decisions involving college students.” In response, IHEs took on the legal role of “bystanders,” which included “eschew[ing] over-involvement in student life for fear of assuming”

62 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that the First Amendment right to freedom of expression and speech is retained by students at public institutions); see also Cheryl McDonald Jones, Note, In Loco Parentis and Higher Education: Together Again?, 1 CHARLESTON L. REV. 185, 188 (2007). While Tinker did not directly apply to IHEs, its tenets were expanded to IHEs in subsequent Supreme Court cases. See, e.g., Healy v. James, 408 U.S. 169, 180 (1972).
63 See Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971).
64 See Widmar v. Vincent, 454 U.S. 263, 277 (1981); Healy, 408 U.S. at 194; Lewis Bogaty, Comment, Beyond Tinker and Healy: Applying the First Amendment to Student Activities, 78 COLUM. L. REV. 1700, 1701-04 (1978). A number of lower court cases have further extended the protections of actual and symbolic speech to students at IHEs. See, e.g., Burnham v. Ianni, 119 F.3d 668, 676 (8th Cir. 1997).
65 See also Jackson, supra note 13, at 1150-51 & nn.126-27.
68 See Bradshaw, 612 F.2d at 138 (“American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades.”); see also Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987); Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986).
reprisal from students and the courts.69

C. The 1980s-90s and the Resurgence of In Loco Parentis: The Duty Doctrine

In-between 1961 and the 1980s, the notion that IHEs could freely regulate student behavior quelled to the point that almost all legalists had deemed that in loco parentis had become an archaic legal relic from yesteryear.70 However in the 1980s, modern courts and scholars noted a partial resurgence of in loco parentis in court decisions that affirmatively created a duty for IHEs to ensure students’ safety.71 These cases dealt primarily with IHEs’ duties to students’ issues concerning alcohol related injuries and personal injury claims stemming from third-party actors to students.72

Starting in the 1980s, a number of courts held that IHEs were required to protect students from physical attacks on the basis of a landlord-tenant or landlord-invitee relationship.73 These cases noted that IHEs, as landlords, were required to protect students from foreseeable criminal activity such as rapes and physical assaults.74 As time elapsed, the landlord-tenant rationale for these cases was subsequently replaced by the broader theory that IHEs were required to protect students on the basis that IHEs had entered into a special relationship with students.75 In the 1990s this rationale was further embraced, and courts held that IHEs were responsible for educating students about potentially dangerous behavior, warning them of unsafe conditions on campus, and protecting them from tortious injury arising therefrom.76 As commentators rightfully noted, this

69 Lake, supra note 6, at 532.
70 See Walton, supra note 8, at 254-69.
71 See Hirshberg, supra note 14, at 209-21; Walton, supra note 8, at 256-69.
72 See Hirshberg, supra note 14, at 209-21; Walton, supra note 8, at 254-69.
74 E.g., Miller v. State, 467 N.E.2d 493, 494 (N.Y. 1984); see Hirshberg, supra note 14, at 205-07.
76 See Furev v. Univ. of Del., 594 A.2d 506, 522 (Del. 1991) (holding university liable for student’s injury from lye-based burns acquired during a fraternity hazing ritual); Robertson v. State, 747 So. 2d 1276, 1284 (La. Ct. App. 1999) (holding university not liable for student’s death that resulted from his own reckless act of climbing the roof of the university’s natatorium); Loder v. State, 607 N.Y.S.2d 151, 153 (App. Div. 1994) (holding university to be sixty-percent liable for student’s injury that occurred when she was kicked in the face by a horse during equine studies).
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duty to protect students from themselves very much resembled the special relationship between IHEs and students that is the sine qua non of in loco parentis.77

D. In Loco Parentis Lives?: From Duty to Rulemaking

While the response of IHEs to Dixon and its progeny has been an unequivocal shunting of the behavioral regulation of students,78 with the exception of those behavioral regulations that the court has determined IHEs to have a duty to enforce for the sake of their students,79 this response is but one path that IHEs could have followed. It is incontrovertible that the judiciary will not shy away from evaluating student claims of IHE action that is illegal, results in student harm, or violates the constitutional rights of students, for the sake of deference.80 However, Dixon and its progeny do not eviscerate behavioral regulation, but rather create definitive parameters without which an IHE may not stray.81 Indeed, court decisions in the 1990s definitively answered the question of whether IHEs have the right to regulate student behavior in the affirmative—at least where the courts found it necessary to ensure student safety.82

It is therefore foreseeable that under the current paradigm an IHE could create a program aimed at the regulation of students’ attitudes, behaviors, or morals, so long as it did not trip any of the constitutional or legal “landmines” that line the post-Dixon perimeter. For the purposes of this Note, the essential inquiry is how IHE programs intended to curb obesity may step beyond the “perimeter” created by Dixon and its progeny by regulating student behavior in a way that violates constitutional or legal guarantees.83 Once the perimeter of possible IHE regulation is ascertained, a workable plan can be formulated for such a program.84

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77 See Bradshaw v. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979) (“A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college.”).

78 See Walton, supra note 8, at 256.

79 See supra Part II.C.

80 See supra Part II.B.

81 These parameters are the constitutional and legal perimeter over which IHEs may not cross without judicial reproach. See Jones, supra note 62, at 188-89.

82 Id. at 204.

83 See infra Part III.

84 See infra Part IV.
III. Discussion: The Legal and Social Perimeter—Watching Where IHEs Throw Their Weight

While Dixon and its progeny leave open the possibility of moral or behavioral regulation in IHEs, it is important for any IHE to be cognizant of the possible legal and social pitfalls when determining in what capacity to regulate obesity.85 Because some programs may differentiate between parties who are overweight/obese and those who are of a healthy weight, it is important to determine whether such division would constitute illegal discrimination.86 Likewise, because these programs deal with students' decisions concerning their bodies and information concerning their bodies, there is a substantial chance for claims that these programs invade upon students' privacy rights.87 In addition to these legal concerns are more fundamental social and philosophical concerns that underlie our concepts of privacy and discrimination, particularly whether IHEs should infringe upon students' autonomy to take a paternalistic role for the sake of students' health.88

A. Discrimination

One of the most likely stumbling blocks for an obesity program at an IHE is the possibility of discrimination claims from students.89 A program that delineates between students on the basis of a single characteristic engages, at least nominally, in a discriminatory practice.90 However, not every act of discrimination is illegal under state and federal law.91 There are three relevant sources of protections for students at public IHEs from discrimination: (1) the Equal Protection Clause of the Fourteenth Amendment; (2) statutory protection under Title II of the Americans with Disabilities Act (“ADA”); and (3) state based anti-discrimination laws.92

85 See supra Part II.D.
86 See infra Part III.A.
87 See infra Part III.B.
88 See infra Parts III.A, III.B.3.
90 Discriminate is defined as “to make a difference in treatment . . . on a class or categorical basis . . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 648 (2002).
91 See infra Part III.A.1-3.
92 See infra Part III.A.1-3.
1. Fourteenth Amendment Equal Protection Clause

The Fourteenth Amendment states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”93 In United States v. Carolene Products, Co., the Supreme Court of the United States indicated that the Equal Protection Clause may protect individuals from being discriminated against on the basis of being part of a “discrete and insular minority.”94 The Court has expanded on this notion by indicating that when a public entity discriminates on the basis of “discrete and insular minorities,” or suspect classes, the courts will use strict scrutiny analysis to decide if the regulation comports with the Constitution.95 Strict scrutiny requires that state regulations based on a suspect classification “must not only serve a compelling state interest, but the classification ‘must be “necessary . . . to the accomplishment’” of its legitimate purpose.”96 So far the Court has only afforded this form of raised scrutiny to racial, religious, and ethnic based discrimination.97 These regulations will only be upheld if there is a compelling state interest and the regulation is narrowly tailored so as to be the least discriminatory as possible.98 The Court has also recognized that discrimination based on gender deserves a more searching analysis than rational basis, though the Court has not required that the regulation meet the level of scrutiny afforded to racial, religious, and ethnic

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93 U.S. CONST. amend. XIV, § 1.
94 See 304 U.S. 144, 152 n.4. As Charles Taylor notes, these hierarchical classifications were based primarily on social construction that, once unmasked as such, were “without basis in the nature of things . . . and hence ultimately without justification.” Charles Taylor, Conditions of an Unforced Consensus on Human Rights, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 139 (Joanne R. Bauer & Daniel A. Bell eds., 1999).
95 See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that miscegenation laws are invalid under the Equal Protection Clause); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation of races in public schools does not comport with the Equal Protection Clause); Korematsu v. United States, 323 U.S. 214, 216 (1944) (announcing that restrictions on the civil rights of a single racial group are subject “to the most rigid scrutiny”); see also Romer v. Evans, 517 U.S. 620, 632 (1996) (striking a law that discriminated between homo- and heterosexuals under rational basis scrutiny); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (holding that discrimination on the basis of mental retardation does not warrant heightened scrutiny, however, still finding that “the record does not reveal any rational basis . . . to the city’s legitimate interests . . .”).
discrimination. The Court has set forth three factors to determine whether a group deserves heightened review: (1) has the group suffered a history of purposeful discrimination; (2) does the group lack the ability to influence the political process; and (3) is the discrimination so unfair as to be inconsistent with the rationale behind equal protection? The Court has been resistant to allowing new classifications into the pantheon of “suspect classes.”

If a classification does not meet the criteria of the above test, then it will not be protected by heightened review under the Equal Protection Clause; rather it will be heard under rational basis review, which involves an investigation of whether the stated purpose of the government’s action isrationally connected to a legitimate end. These classifications are split: those classifications based on permanent or semi-permanent conditions of the individual and not transient qualities that can change and fluctuate sometimes receive “raised” rational basis, which involves an actual investigation into the means and purposes of the legislation. All other classifications receive “regular” rational basis review; these classifications are of a more transitory nature, such that the person who is part of the group is not confined to that group for the entirety of their life. An Equal

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100 See Shapiro, supra note 96, at 428-29.

101 See Tharan, supra note 97, at 114.


103 See Cleburne, 473 U.S. at 448.


[Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .” And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.
Protection challenge will only succeed if a state action has illegitimate ends, or the means to which the end is attained are arbitrary and capricious.106

Some authors note an extensive history and prevalence of discrimination aimed at overweight and obese individuals.107 Likewise, at least one court has held that obesity should receive quasi-suspect status on the basis that “physical characteristics are often attributable to the person’s genetics and gender.”108 However, most courts have steadfastly held that individuals with obesity are not considered to be part of a suspect class,109 primarily because individuals with obesity do not endure “continuing prejudice . . . [that] deprives[es] them of rights.”110 With one-third of voting-age American adults being considered obese111 it would be impossible to claim that obese individuals lack the political clout that the Supreme Court was concerned with when it announced its discrimination protections.112 Likewise, the lines between who is obese, overweight, and of normal weight are ever-changing; as individuals lose weight or gain weight they automatically switch classes, making an exact finding of who is part of a “discrete class” of obese individuals substantially difficult.113 As such most courts have steadfastly held that discrimination on the basis of weight should receive rational basis review.114

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Id. at 686 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

106 See Catlin, supra note 89, at 1103.


108 Collier, supra note 98, at 51 (discussing Vance v. United States, 434 F. Supp. 826, 835 (N.D. Tex. 1977), aff’d, 565 F.2d 1214 (5th Cir. 1977)).


112 See Shapiro, supra note 96, at 428-29.


114 See Donelson v. Fritz, 70 P.3d 539, 544-45 (Colo. App. 2002) (holding peremptory strikes against jurors on the basis of weight received no heightened review); State v. Elie, 936 So. 2d 791, 798 n.7 (La. 2006) (discussing that heightened equal protection analysis is not triggered when peremptory strikes are based on obesity); People v. Dolphy, 685 N.Y.S.2d 485, 487 (App. Div. 1999) (holding that discrimination on basis of weight is to be heard under rational basis
Under rational basis review, an IHE simply needs to show that the anti-obesity program serves a legitimate purpose, and its application is not arbitrary and capricious. IHEs may claim that protecting the future health of students, as well as furthering their holistic education, is a legitimate interest, and that applying these programs only to obese or overweight students is rationally connected to their purpose of achieving a healthier student population. Under Supreme Court jurisprudence it is not necessary under rational basis for a program to deal with a whole issue at one time; rather IHEs can attempt to curb obesity one step at a time by focusing on those areas IHEs believe need immediate attention.

While some authors have lambasted the current paradigm of equal protection analysis, calling for changes in both jurisprudential and legislative controls over who is protected from discrimination to include the overweight, their concerns tend to deal with the negative side of discrimination. Programs such as the one at Lincoln University are not aimed at demonizing the overweight, but rather creating an environment where students can further explore the possibilities of healthy living. Far from being a difference in phrasing and perception, the intent of discriminatory actions for the benefit of those with obesity is an important and legitimate state purpose.

2. Statutory Protections Under the Americans with Disabilities Act

The ADA protects individuals from discrimination on the basis of having a disability in a variety of contexts such as employment (Title I), public accommodations (Title III), public transportation (Title II), and

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115 See Catlin, supra note 89, at 1102; supra text accompanying note 106. 
116 See Excerpt of E-mail to the Faculty, supra note 4. 
117 See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute . . . .”). 
118 See Theran, supra note 97, at 152-71. 
119 See Excerpt of E-mail to the Faculty, supra note 4. 
122 §§ 12111-12117. 
123 §§ 12181-12189. 
124 §§ 12141-12150, 12161-12165.
by public entities (Title II).\textsuperscript{125} A public IHE qualifies as a public entity under Title II if it is an instrument of the state and/or it receives federal funding.\textsuperscript{126} For an individual to receive protection from discrimination under the ADA they must have a disability, defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”\textsuperscript{127}

Before 2009 the courts had determined that general obesity did not qualify as a disability.\textsuperscript{128} For an obese person to be considered impaired, they typically needed to be considered morbidly obese,\textsuperscript{129} and even if the person did qualify as morbidly obese the cause of that obesity must have been physiological—simply making poor health decisions did not qualify as a disability.\textsuperscript{130} Further, the impairment must have been significantly substantial; even extensive impositions on an individual’s life, such as needing help to get dressed, may not have qualified.\textsuperscript{131} The Supreme Court had further stated that the determination of whether a person was substantially impaired should be made from the perspective of any mitigating or corrective action.\textsuperscript{132} For individuals with obesity this meant

\begin{itemize}
\item\textsuperscript{126} 42 U.S.C. § 12102(2) (2006 & Supp. 2009).
\item\textsuperscript{127} See, e.g., Equal Emp’t Opportunity Comm’n v. Watkins Motor Lines, Inc., 463 F.3d 436, 443 (6th Cir. 2006) (405-pound dockworker was not physically impaired pursuant to the ADA). \textit{But see} Nedder v. Rivier Coll., 944 F. Supp. 111, 120 (D.N.H. 1996) (denying summary judgment on grounds that jury could find that party’s obesity substantially limited her ability to work).
\item\textsuperscript{128} See Smaw v. Va. Dep’t of State Police, 862 F. Supp. 1469, 1472-73, 1475 (E.D. Va. 1994); Erin E. Patrick, Comment, Lose Weight or Lose Out: The Legality of State Medicaid Programs That Make Overweight Beneficiaries’ Receipt of Funds Contingent upon Healthy Lifestyle Choices, 58 EMORY L.J. 249, 271-72 (2008) (citing Andrews v. Ohio, 104 F.3d 803, 809 (6th Cir. 1997)).
\item\textsuperscript{129} Patrick, supra note 129, at 271-72; Kevin H. Smith, Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach, 32 AKRON L. REV. 1, 53 n.143 (1999) (stating that temporary disabilities such as obesity typically do not qualify under the ADA).
\item\textsuperscript{130} Patrick, supra note 129, at 271-73 (“[I]mpairments causing an individual to ‘avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances’ do not substantially limit major life activities.”) (quoting Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002)).
\end{itemize}
that the determination would be made in light of potential “diet and exercise regiments, or even surgery.”133 Further, it is unlikely that general obesity will be covered under the ADA because the Court has not, as of yet, decided whether obesity is the result of some form of physical addiction. Often where the cause of the disability comes from an external source, such as alcoholism and drug abuse, the Court has treated physical addiction as the lynchpin for ADA protection.134

In January 2009 the Americans with Disabilities Act Amendments Act of 2008 (“Act”)135 became law.136 The most significant purpose of this Act was to redefine the term “disability” more broadly, in an attempt to more closely replicate the intent of Congress in passing the ADA.137 Indeed, the Act does not change the wording of the ADA, but rather changes the interpretation of what it means to be disabled by changing the interpretation of what it is to “have ‘a physical or mental impairment that substantially limits one or more major life activities;’ have ‘a record of such an impairment;’ or [be] ‘regarded as having such an impairment.’”138

The new interpretation of “substantially limits” is intended to require a far lower showing of impairment and altogether rejects the notion the Supreme Court advocated in *Sutton*, which required that the judgment of whether one has a disability be determined from the perspective of ameliorative measures.139 Instead, the determination is made from the perspective of the person at the time the determination is to be made.140 The Act also changes the interpretation of major life activities to include a non-exhaustive list that includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,”141 and includes major bodily functions such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and

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136 *Id.*
138 *Id.* at 108-89.
140 *Id.*
reproductive functions.”142 These changes overrule the strict reading of disability, providing expanded protection in areas that would not have qualified for protection before the amendment.143

The stringent showing required for an individual to qualify as disabled under the previous Title II made it unlikely that a majority of students would be able to claim that they were covered by the protections of the ADA.144 However, the lower requirement under the Act makes the possibility that a student will be able to claim a disability much more likely.145 One thing that stands in the way of students receiving protection is that under precedent they are still required to show a physiological cause to their obesity to enjoy protection under the ADA.146 Whether the amendment is interpreted as to reach to general obesity as opposed to physiological obesity will have a significant impact on IHE policy for regulating students.147 As of yet, federal courts have not had ample opportunity to apply the new standard in the area of obesity, and little can be gleaned from the courts’ findings to note that a significant change has occurred.148 As such, it is clear that an IHE cannot discriminate between the treatment of physiologically obese individuals and the treatment of other students solely on the basis of their obesity.149 Until the question of physiological versus general obesity protection is resolved, an IHE will not be able to determine the extent to which they can create programs that treat those that are not physiologically obese differently from those that are in long-term course planning.150

142 § 12102(2)(B).
143 See Avery Williams, Comment, Obesity, Canada’s “One Passenger One Fare” Rule and the Potential Effects on the U.S. Commercial Airline Industry, 74 J. AIR L. & COM. 663, 692 (2009).
144 See supra notes 128-34.
145 See Williams, supra note 143, at 692-93.
147 Williams, supra note 143, at 692-93.
148 The last federal case hearing an obesity claim under the ADA was Hill v. Verizon Md., Inc., No. RDB-07-3123, 2009 WL 2660088 (D. Md. July 13, 2009). While purporting to implement the new regulation, it refers to the physiological underpinnings as necessary for a claim to survive. See id. at *6.
149 See supra note 127 and accompanying text.
150 See Williams, supra note 143, at 692-93. Assessing whether a student is physiologically obese would involve an investigation into whether they had a “dysfunction of the metabolic system, lack of appetite suppression signals to the brain, genetic disposition [or] an abnormal number and size of fat cells.” William C. Taussig, Note, Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act, 35 B.C. L. REV. 927, 929 (1994). Such an investigation will
3. **State Protections**

Some states have explicitly extended statutory protection from discrimination to people with obesity. The first of these statutes was the Elliot-Larsen Civil Rights Act, which protects individuals in Michigan from discrimination on the basis of weight in the realm of contracts and employment. It remains the only statutory protection that fully protects overweight and obese individuals from discrimination.

Other states have created anti-discriminatory protections for obese individuals in more restrictive situations, such as Georgia’s Morbid Obesity Anti-discrimination Act, which protects individuals from being discriminated against for being morbidly obese by health insurers. The District of Columbia has made discrimination based on personal appearance illegal under its statutory construction. While not explicitly protective of obesity, a fair reading of the statute appears to protect overweight and obese individuals from discrimination. The municipalities of Santa Cruz and San Francisco, California; Urbana, Illinois; and Madison, Wisconsin have also passed anti-discriminatory legislation making discrimination on the basis of weight illegal.

An IHE in these municipalities and states will not be able to create anti-obesity programs that make distinctions between individuals on the basis of their weight, or in the case of the District of Columbia, their “appearance.” An IHE in another municipality or state will necessarily want to check for any forthcoming legislation that may restrict them from discriminating between students on the basis of weight if they decide that doing so is an appropriate way to structure their program.

necessitate testing the student—testing that is likely to invade the student’s right to privacy under the common law. See infra Part III.B.2.


155 D.C. Code § 2-1401.01.


158 See supra notes 151-57.
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B. Privacy and Autonomy Rights

In formulating an anti-obesity program, an IHE must determine whether the program will overstep the perimeter laid down in Dixon by violating students’ right to privacy. As authors have said, “[a]t the most fundamental level, the ethos of public health takes the well-being of the community as its highest good and would, to the extent deemed necessary, limit freedom or place restrictions on the realm of privacy in order to prevent morbidity from taking its toll.”161 Another way of saying this is that the utilitarian design of public health initiatives, such as curbing obesity, often restricts an individual’s right to privacy, and that the protection of this privacy can often “interfere with the ability of . . . the state to achieve collective goals.”160

To determine whether an IHE program violates an individual’s right to privacy involves a mutli-layered analysis, as there is no single “right to privacy.”161 The concept of the right of privacy is in actuality manifold, entailing protections from state intrusion for the purposes of promoting self-realization and individual autonomy; protecting individuals’ intimate personal knowledge—some of which may be embarrassing—from being divulged without their assent or acquiescence; and to ensure, on a more primal level, that individuals have the simple right to be “left alone.”162 Because the right itself is manifold, the protections of the right have been manifold.163

Legally there are two types of privacy rights that may be implicated in the creation of an IHE anti-obesity program: (1) the generalized

160 Ellen Frankel Paul et al., Introduction to THE RIGHT TO PRIVACY, at vii (Ellen Frankel Paul et al. eds., 2000).
161 See John Lawrence Hill, The Constitutional Status of Morals Legislation, 98 KY. L.J. 1, 9 (2009) ("[o]ur concept of the ‘private’ is hopelessly equivocal."); Lloyd L. Weinreb, The Right to Privacy, in THE RIGHT TO PRIVACY, supra note 160, at 25-29 ("It is scarcely surprising that the right to privacy is problematic, if it is so uncertain what it is a right to.").
162 See Judith Wagner DeCew, The Priority of Privacy for Medical Information, in THE RIGHT TO PRIVACY, supra note 160, at 213 ("Privacy shields us not only from interference and pressures that preclude self-expression and the development of relationships, but also from intrusions and pressures arising from others’ access to our persons and details about us."); Alexander Rosenberg, Privacy as a Matter of Taste and Right, in THE RIGHT TO PRIVACY, supra note 160, at 68; Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890).
163 See infra Part III.B.2.
constitutional “right to privacy” emanating from the Fourteenth Amendment; and (2) the common law right to privacy.164 As with discrimination, IHEs should also be keenly aware that an intrusion into the realm of privacy that would not constitute a violation of constitutional or legal privacy may still lead to possible social admonition; as some authors point out there is a perceived “right to privacy not dependent on positive law, such that it ought ordinarily . . . be respected without regard to the consequences, good or bad, simply because it is right.”165

1. Fourteenth Amendment Right to Privacy

The Fourteenth Amendment to the U.S. Constitution states that no state may “deprive any person of life, liberty, or property, without due process of law . . . .”166 The Fourteenth Amendment Due Process Clause not only guarantees individual procedural rights but also protects certain rights that are fundamental to the concept of ordered liberty, or in the vernacular of the Court: “substantive due process rights.”167 As the Court stated in Planned Parenthood of Southeastern Pennsylvania v. Casey, “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”168 While the Court has given many rationales for the fundamentality of these liberties, one of the earliest rationales, and one that has continuing significance, is that there is an entrenched right to privacy in the Fourteenth Amendment that is created from the aggregate of privacy rights in the other portions of the Bill of Rights.169 The Fourteenth Amendment therefore essentially protects privacy interests, but unlike the Court’s analysis of the Fourth Amendment, where the Court has specifically stated that the rationale is the protection of individuals’ privacy rights from unreasonable searches and seizures from the government,170 the right to privacy in the Fourteenth

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164 See infra Part III.B.1-2.
165 Weinreb, supra note 161, at 25 (emphasis added). As political philosopher Hannah Arendt reminds us, “[t]he distinction between the private and public realms . . . equals the distinction between things that should be shown and things that should be hidden.” HANNAH ARENDT, THE HUMAN CONDITION 72 (2d ed. 1998).
166 U.S. Const. amend. XIV, § 1.
Amendment has not been explicitly articulated.\textsuperscript{[171]} As Justice Douglas stated in \textit{Griswold \textit{v. Connecticut}}, the penumbra of the privacy rights in the other amendments overlap and create a protected “zone of privacy” under the Fourteenth Amendment.\textsuperscript{[172]} So far the Court has specifically found that the rights to procreation, contraception, abortion, child rearing and education, and private consensual acts of sexuality between adults are within the protected zone.\textsuperscript{[173]} Tying all of these rights together is the belief in the constitutional necessity of privacy to liberty.\textsuperscript{[174]} While it is disputed as to the exact privacy interest that is protected by the Fourteenth Amendment, many modern authors agree that it primarily protects the right to autonomous decision making.\textsuperscript{[175]} These authors principally hold that respecting privacy concerns is a method of “affirming the centrality of uncoerced individual decision-making in important areas of human activity…. Privacy is protected in order to allow us to decide about issues central to our identity . . . .”\textsuperscript{[176]}

This view of privacy for autonomy’s sake is reiterated in a number of court cases heard by the Supreme Court. In \textit{Eisenstadt \textit{v. Baird}}, which held that a law that prohibited the sale of contraception to persons that were not married was unconstitutional, Justice Brennan stated that “[i]f the right of


\textsuperscript{[172]} 381 U.S. at 484. Specifically, the Court found that the overlap is created by the First, Third, Fourth, Fifth, and Ninth Amendments. \textit{Id.} at 484-85.

\textsuperscript{[173]} \textit{See} Lawrence \textit{v. Texas}, 539 U.S. 558, 578-79 (2003) (holding unconstitutional a Texas statute that made consensual homosexual intercourse illegal); Cruzan \textit{v. Dir., Mo. Dep’t of Health}, 497 U.S. 261, 278 (1990) (recognizing the right to refuse unwanted medical care); Roe \textit{v. Wade}, 410 U.S. 113, 153 (1973) (holding a woman’s right to choose an abortion should receive higher than rational basis scrutiny); Loving \textit{v. Virginia}, 388 U.S. 1, 12 (1967) (holding that the right of individuals to enter into an interracial marriage is fundamental); \textit{Griswold}, 381 U.S. at 485 (protecting the choice to use contraceptives); Skinner \textit{v. Oklahoma ex rel. Williamson}, 316 U.S. 535, 541-42 (1942) (finding that procreation is a fundamental right); Pierce \textit{v. Soc’y of Sisters}, 268 U.S. 510, 535 (1925) (finding a fundamental right for parents to rear and educate their children).

\textsuperscript{[174]} \textit{Griswold}, 381 U.S. at 484 n.* (“[T]his right of privacy . . . affect[s] the very essence of constitutional liberty and security.”).


privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” 177 In Planned Parenthood of Southeastern Pennsylvania v. Casey, Justice O’Connor stated that “[m]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”178 These statements clearly denote that the fundamental interest is in the decision-making process and in the right of individuals to be free from government intrusion into that process.179 In accordance with the view that these autonomous rights are fundamental, the court has afforded them heightened review.180

However, heightened review, though rhetorically allocated to interests that implicate “autonomy,” has been allotted to only those enumerated rights that are within a certain spectra of procreation, marriage, and child education and rearing.181 Indeed, the Court has stated that although “many of the rights and liberties protected by the Due Process Clause sound in personal autonomy . . . [it does not follow] that any and all important, intimate, and personal decisions are so protected . . . .”182 For those interests that do not fit within the ambit of an enumerated constitutional right, the court will review the constitutionality of the law by evaluating whether the state actor has a legitimate purpose behind the law, and whether the means are rationally connected to that end.183 Under this initial inquiry an IHE program to curb obesity will receive rational review unless it implicates one of the enumerated rights, as courts have been “very conservative in determining what constitutes a ‘fundamental privacy right’ . . . .” 184

The one area where IHEs may abut the Fourteenth Amendment right to privacy is if parts of the program involve “forced medical treatment.” The Supreme Court has determined that the Fourteenth Amendment protects an individual from forced medical treatment, i.e. that individuals have a right to refuse medical treatment.185 This right is thought of as a

177 405 U.S. 438, 453 (1972) (second emphasis added).
179 Eisenstadt, 405 U.S. at 453.
180 See Hill, supra note 161, at 29.
181 Id.
183 See Hill, supra note 161, at 31.
185 See, e.g., Sell v. United States, 539 U.S. 166, 176 (2003) (“[T]his Court’s cases make clear [that] involuntary medical treatment raises questions of clear constitutional importance. . . . ‘A
corollary to a patient’s right to informed consent and as a protection of an individual’s autonomy and self-determination. As the Court has stated, “the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician.” In Cruzan v. Director, Missouri Department of Health, the Court assumed that individuals have a vested constitutionally protected interest in refusing medical treatment. The Court concluded that a Missouri law requiring clear and convincing evidence of an individual’s desire to terminate palliative medical care if the individual was in a vegetative state was constitutionally permissible because it upheld an important state interest—the right of an individual to retain the choice to refuse medical treatment. The Court stated that a violation of an individual’s right to refuse medical treatment will be “determined by balancing [the complaining parties’] liberty interests against the relevant state interests.” While the analysis was somewhat unclear, “it appears that the Court endorsed the rational basis test.”

In determining whether the right to refuse medical treatment covers the area testing of an individual’s weight, the term “medical treatment” must first be determined. In common parlance the term refers vaguely to “the care and management of a patient to combat, ameliorate, or prevent a disease, disorder, or injury.” This definition can further be delineated into separate categories of treatment determined by the degree, location, and temporality of the treatment in connection with the injury. While the courts have long used the phrase “medical treatment,” the Supreme Court has typically applied the “right to refuse” constitutional analysis to

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187 See sources cited supra note 175 and accompanying text.
189 497 U.S. 261, 278 (1990); see Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (“We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.”).
190 Cruzan, 497 U.S. at 284.
191 Id. at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).
194 Id. at 1744-45.
palliative treatments, or the administration of drugs to unwilling patients. The Supreme Court has been remiss to extend the right to refuse treatment under the Fourteenth Amendment, stating in *Jacobson v. Massachusetts*, that “there are manifold restraints to which every person is necessarily subject for the common good,” over the petitioner’s argument that he should be able to refuse mandatory vaccinations because they are “hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best.”

However, even if a program treating obesity is viewed as “medical treatment,” the courts will still likely hear it under the rational basis-balancing test, which requires simply that a legitimate state interest is provided, and that the means are rationally connected to those ends. While it is clear that individuals have a desire to maintain privacy and autonomy over their bodies, it is equally clear that IHEs have legitimate goal in furthering the holistic growth of students to provide them with the tools to succeed in the outside world, as well as in protecting students’ health. Although the “potential for constitutional challenges over aggressive wellness programs is very real,” the likelihood that an individual will be able to assert that an IHE program aimed at curbing obesity is constitutionally invalid is highly unlikely, as they would have to prove that the IHE had no legitimate purpose or that the means to that purpose are completely irrational. It is not enough to claim that the goal is under- or over- inclusive, or that it is “unwise, improvident, or out of harmony with a particular school of thought.”

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197 197 U.S. 11, 26 (1905).
199 See Excerpt of E-mail to the Faculty, *supra* note 4.
200 Hendrix & Buck, *supra* note 184, at 488.
health is one of the fundamental police powers, and therefore would be considered a legitimate IHE goal. Likewise, the means are likely to be upheld since any program will require that students take steps to live a healthier lifestyle, denoting a debatable rational means-ends connection.

2. Common Law Right to Privacy

Whereas the Fourteenth Amendment principally protects the interests of individuals for the purposes of promoting autonomy and self-determination, the common law right to privacy primarily protects an individual’s “informational privacy, a person’s control over others’ acquisition and distribution of information about himself.” The common law right to privacy has been recognized by many as a tort remedy for the invasion of privacy that protects a person’s right to “solitude or seclusion.” First proposed in the seminal writings of Samuel Warren and Louis Brandeis, the right to privacy is recognized in some form by many jurisdictions in the United States. A person becomes liable for the invasion of another’s privacy if that individual “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person,” or if unreasonable publicity is given to a person’s private life “if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” The main issues with an invasion of privacy cause of action against an IHE for a program aimed at loss of obesity are whether a student has a privacy interest in the public knowledge of their obesity, or against testing for obesity, and if so, whether such knowledge or testing would be found to be highly offensive.

For the purposes of a common law claim of invasion of privacy, an

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203 See Mayer, supra note 201, at 261-62.
204 See 16B AM. JUR. 2D Constitutional Law § 965 (2009) (“If it is at least debatable whether a rational relationship exists between a governmental policy and a conceivable legitimate governmental objective, there is no substantive due process violation.”).
205 Weinreb, supra note 161, at 34.
207 See Warren & Brandeis, supra note 162.
208 See, e.g., Sidis v. F-R Publ’g Corp., 113 F.2d 806, 808-10 (2d Cir. 1940); Brents v. Morgan, 299 S.W. 967, 969-70 (Ky. 1927); Feeney v. Young, 181 N.Y.S. 481, 482 (App. Div. 1920).
209 Id. §§ 652A(2)(c), 652D. A common law invasion of privacy can also occur in the appropriation of another’s name or likeness, or if a person is placed in a false light publicly. Id. § 652A(2)(b), (d).
210 See id. §§ 652(2)(c), 652D; see also Hendrix & Buck, supra note 184, at 496.
obese person most likely does not have a reasonable expectation of privacy in being obese, “because such information is public—i.e., we can usually see a person is overweight.” The question that is more important for this analysis is whether a particular method of testing for wellness, such as BMI, or testing that focuses on a non-public aspect of an individual’s make-up, such as their “cholesterol levels and genetic make-up,” and any information gleaned from these methods is subject to liability under this tort.

While defining the boundary between public and private space can sometimes be troublesome, it appears possible that some information from testing would be considered non-public, and highly objectionable by the parental and student populations, and would therefore be protected from invasions of privacy. Testing based on BMI is one of the least intrusive means of testing for obesity, as it involves only external measurements, most of which can be roughly estimated based on visual inspection of a student, but which are traditionally determined by information received from the patient or from actual measurements. Both weight and height, the basis of BMI testing, can be roughly ascertained by the public through visual inspection, and therefore it is unlikely that the courts will find that this information was private to begin with, or that its collection or dissemination would be highly objectionable. However, other methods of testing for obesity, while being more accurate, are also more intrusive; these include: skinfold thickness measurements, ultrasound, hydrometry, bioelectrical impedance analysis, and

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212 Hendrix & Buck, supra note 184, at 496.
213 Id. at 496-97.
214 WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 228-30 (2003) (detailing the facts of Shulman v. Group W. Prods., Inc., 955 P.2d 469, 475-77 (Cal. 1998)). A woman who was injured in an accident had her voice recorded while laying on the ground and while in an emergency response helicopter. Shulman, 955 P.2d at 475-77. The court held that the woman’s right to common law privacy was violated when she was taped in the helicopter, but not when she was on the ground. Id. at 489-92.
215 See Hendrix & Buck, supra note 184, at 497.
216 But see Fleischhacker, supra note 171, at 194-95 (suggesting that a BMI measurement would not be completely accurate).
217 Cf. Gill v. Hearst Pub’g Co., 253 P.2d 441, 444-45 (Cal. 1953) (citing Melvin v. Reid, 297 P. 91, 91 (Cal. Dist. Ct. App. 1931)) (holding a picture taken of a husband and wife in public and subsequently published did not rise to the level of invasion of privacy and stating that “[t]here can be no privacy in that which is already public”).
218 See Anna Bellisari & Alex Roche, Anthropometry and Ultrasound, in HUMAN BODY COMPOSITION 109, 109-22 (Steven B. Heymsfield et al. eds., 2d ed. 2005).
219 See id. at 122-27.
220 See Dale A. Schoeller, Hydrometry, in HUMAN BODY COMPOSITION, supra note 218, at 35-49.
D.E.X.A. (dual-energy X-ray absorptiometry) scans. Because these testing methods have the ability to uncover information that is secret, the disclosure of which would likely be offensive, a student may likely have a claim of invasion of privacy for any information, such as “cholesterol levels and genetic make-up,” that is discovered through these more intrusive testing practices. Likewise, disclosure of private information found through these tests to the public could also be considered highly offensive and therefore an IHE “may face potential litigation for disclosing information to [the public] resulting from wellness programs.” For programs that stick to BMI testing, such as the program at Lincoln University, or which do not require any form of testing, these questions are essentially moot.

3. Paternalism and Social Backlash: Should IHEs Limit Student Autonomy?

Regardless of whether an IHE can regulate student behavior and values for the purpose of curbing obesity, it stands to reason whether IHEs should regulate student behavior. The aim of in loco parentis regulation to curb obesity by IHEs necessarily falls into the rubric of paternalistic action, as it aims to protect students from making certain decisions by “forcing or manipulating individuals to change their behavior for their own good.” The main claim against IHEs paternalistic regulating of student behavior, outside of the legal context, is that it infringes on the more expansive right of students to make private autonomous decisions

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223 See Hendrix & Buck, supra note 184, at 497.

224 Id.

225 See Fleischhacker, supra note 171, at 194-95.

226 See supra Part III.A-B.

227 The word paternalism “has its roots in the Latin word pater, which means to act like a father.” See Taiwo A. Oriola, Ethical and Legal Analyses of Policy Prohibiting Tobacco Smoking in Enclosed Public Spaces, 37 J.L. MED. & ETHICS 828, 831 (2009).

about themselves. The basic concern with paternalistic action is the concept that autonomy is incompatible with the powers of authority, as authority forces the individual to surrender his rights to formative decision-making. Critics argue that the ability for students to make autonomous decisions is necessary to the creation of one’s self, and that paternalism “reinforces immaturity, conformity, and disinterest,” instead of promoting self-determination. To the liberal theorist, the very imposition of moral, behavioral, or attitudinal values on the individual by another in power is wrong. As John Stuart Mill states in his treatise On Liberty, “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”

On the other hand, others claim that public health initiatives, while in tension with private autonomy, are of greater importance. They argue that social planning saves individuals from self-inflicted harm and promotes utilitarian objectives by protecting society from the secondary fall-out of poor decisions, such as greater healthcare costs caused from obesity. The basis of this claim is that individuals often “behave in ways

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229 See Sarabyn, supra note 228, at 78-79.
231 See Weinreb, supra note 161, at 38-39.
234 John Stuart Mill, On Liberty (1859), reprinted in Utilitarianism and on Liberty 94-95 (Mary Warnock ed., Blackwell Pub’g 2d ed. 2003). The practical reality is that governmental and private institutions have become increasingly engaged in the “management of the life of . . . people.” F.A. Hayek, supra note 232, at 66 n.2. (citing John Maynard Keynes & the UK Committee on Finance and Industry, Report 4-5 (1931)).
235 See Leonard, supra note 159, at 1345-46.
237 See Leonard, supra note 159, at 1348-49.
that are disadvantageous to themselves and to society.” Further, while autonomy assumes that individuals’ decisions are well thought out, it is clear that individuals often make inferior decisions regarding their personal welfare “—decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control.” As Cass R. Sunstein and Richard H. Thaler posit, the fact that a large percentage of people are obese or overweight, even in light of “overwhelming evidence that obesity causes serious health risks, . . . [makes it] quite fantastic to suggest that everyone is choosing the optimal diet.” The authors state that individuals often make poor decisions because of a mixture of default rules, starting points, perspectives, and inertia. For many individuals, decisions are made based off of faulty information, ignorance, or doing what others around them are doing.

While autonomy is an important consideration, if the primary goal is to protect individuals from poor decisions concerning their health, it appears that an IHE anti-obesity program will necessarily need to assume the form of social planning. However, this does not mean that all student choices need be disregarded; paternalism comes in gradients, from pure restrictive control over an individual’s decisions (enforced through punishment in some form), to manipulation of an individual’s environment in an attempt to shape their subconscious and conscious decisions. As authors point out, even the slightest changes in a student’s behavior can be considered coercively paternalistic, but that does not mean that students necessarily lose the ability to make choices, it simply means that they may have to make choices more actively to retain pure autonomy. For example, a “liberal” or “soft” program may have classes on nutrition, exercise, and practical culinary skills, or may reorganize the cafeteria to place healthy

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238 Katherine J. Strandburg, Privacy, Rationality, and Temptation: A Theory of Willpower Norms, 57 RUTGERS L. REV. 1235, 1294 (2005); see Wikler, supra note 236, at 308.
240 Id. at 1167-68.
241 See id. at 1174-82.
242 Rizzo & Whitman, supra note 228, at 686; Sunstein & Thaler, supra note 239, at 1181. Cf. Michael Cardin et al., Preventing Obesity and Chronic Disease: Education vs. Regulation vs. Litigation, 35 J. L. MED. & ETHICS 120, 121 (2007) (discussing how changes in an individual’s environment can have a great effect on an individual’s choice set).
243 See Oriola, supra note 227, at 831-33 (discussing the paternalism of proscribing tobacco use in enclosed public spaces); supra text accompanying notes 227-28.
244 See Sunstein & Thaler, supra note 239, at 1188-90.
foods in a more prevalent place. IHEs will necessarily need to determine the level of involvement in student decisions that they wish to partake, and the level of autonomy they wish to leave with the students, when choosing the form of program that they wish to institute.

IV. Proposal for a Feasible Anti-Obesity Program

In describing a feasible anti-obesity program for an IHE, it is necessary to keep in mind two parameters: (1) that Dixon and its progeny have created a legal perimeter around which behavioral regulation can entail; and (2) that the complex environmental issues affecting obesity necessitates “targeting multiple aspects of [an individual[’s] environment[ ]]” to work at maximum efficiency. From a legal perspective it is important that any program does not infringe upon constitutional or legal rights to privacy, or discriminate unfairly between individuals. Programs that are most likely to be challenged on these fronts are those that discriminate between individuals who are obese or overweight from students who have “normal” weights, and programs that have measuring methodologies that invade students’ common law right to privacy, or divulge intimate information about students.

The analysis above demonstrates that discrimination under the Fourteenth Amendment is an unlikely candidate for a constitutional challenge to an IHE program—since students who are obese or overweight do not constitute a protected class, and IHE regulation has the legitimate purpose of promoting the health of its student population. The Fourteenth Amendment substantive due process claims are also likely to fail, as the courts will likely hear them under the rational basis test, requiring only that IHEs show some legitimate purpose—health concerns— and rationally related means—implementing health regulations that further the purpose of promoting healthy lifestyles. Further, while some headway has been made for protecting obese individuals under the ADA, such protections have been reserved for only those individuals whose obesity constitutes a “disability” under the ADA—who continue to

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246 See Sunstein & Thaler, supra note 239, at 1188-90.
247 See supra Part III.
248 Christina D. Economos & Sonya Irish-Hauser, Community Interventions: A Brief Overview and Their Application to the Obesity Epidemic, 35 J.L. MED. & ETHICS 131, 133 (2007); see Egger & Swinburn, supra note 27, at 479; supra Part II.
249 See supra Part III.
250 See supra Parts III.A., III.B.2.
251 See supra Part III.A.1.
252 See supra Part III.B.1.
represent only a small percentage of obese individuals. Common law privacy may provide students with more protections, depending on the testing method used by the IHE in its program and whether or not that information is disclosed to the public. An IHE that determines to employ compulsory testing should therefore employ a method that is the least invasive, and which has the least chance of divulging private information about students.

However, even though IHEs can legally regulate student behavior to promote healthier lifestyles, there are still significant issues concerning student autonomy and social backlash. In the face of this, IHEs will likely want to implement a program that imposes less restrictive requirements on students, while still attempting to efficiently promote anti-obesity. Some ways of forming such a program might include:

**Mandatory culinary, nutrition, and fitness classes:** Instituting educational classes in the areas of nutrition, fitness, and cooking provides a holistic view of health that aims to allow students to respond to the myriad environmental pressures that lead to obesity. By requiring classes in the nutrition and the culinary arts, IHEs will provide students with the skills to actively choose the quality and quantity that they eat, and allow students to tailor their diet to promote healthy weight goals. By requiring fitness classes, IHEs can teach students how to exercise safely, and about the physiology of their body, so that they are prepared to make life-long fitness goals to attain a healthy weight. In taking these courses, students will learn practical methods of reducing weight and living healthier, and IHEs can ensure that students will have the knowledge to make active and informed decisions about their health. An educational-based program has the added advantage of curving student behavior without

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253 See supra Part III.A.2.
254 See supra Part III.B.2.
255 See supra Part III.B.2.
256 See supra Part III.B.3.
257 See infra notes 262-63 and accompanying text.
commandeering students’ direct decisions about their bodies, just their decisions as to what classes they are required to take.

Non-Discriminatory Application: By making a program mandatory for all students, issues concerning discrimination are mooted. If all students are required to take classes there is also a lower possibility of social outrage from parents and students who feel they are receiving disparate treatment. Furthermore, requiring all students to take the class furthers the IHEs’ utilitarian concerns with obesity; by providing every student with the knowledge to make informed health decisions, IHEs assure that all students have a higher chance of staying healthy, as opposed to just those who are determined to be currently living unhealthy lifestyles.

Voluntary Testing: While testing can be extremely helpful in determining body composition and articulating the exact issues that an individual may have with their health, it can also be an extreme breach of a student’s privacy and autonomy. Some testing methods, such as BMI testing, are unlikely to cause legal issues for IHEs, but more intrusive testing may lead to litigation based on invasions of student privacy. While it would be necessary to test an individual if the purpose of the program was for short-term weight loss, if the point is to instill students with the tools to make proper weight-loss decisions, testing becomes of secondary importance. Because an anti-obesity program that is mandatory on all students would not require testing to determine which students need classes and which ones do not, testing would not be necessary for such a program’s implementation.

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261 See, e.g., Buxton, supra note 134, at 124 (“The court refused to hold that [the plaintiff] was discriminated against because . . . he was treated as any other . . . was treated.”) (summarizing the court’s decision in Sellick v. Denny’s Inc., 884 F. Supp. 388, 392 (D. Or. 1995)).


263 See Seiders & Petty, supra note 260, at 156 (stating that lack of information on the causes and consequences of obesity is a cause of an individual’s failure to make advantageous health decisions).

264 See sources cited supra notes 218-22.

265 See supra Part III.B.2.

266 See supra notes 258-60.

267 This is in contrast to the Lincoln University program, where testing was used to determine who would take the class. See Landau, supra note 262.
CONCLUSION

The role of *in loco parentis* behavioral regulation in IHEs has been severely limited in the past fifty years.\(^{268}\) However, with Lincoln University’s anti-obesity program as a harbinger, it may be time to reinstitute *in loco parentis* behavioral regulation as an effective means of curbing the obesity epidemic.\(^{269}\) While *in loco parentis* regulations are paternalistic by nature, and therefore infringe on students’ autonomous decision-making, they are not violative of constitutional or legal safeguards.\(^{270}\) Because of the special relationship between students and IHEs, IHEs are in the best position to create fundamental differences in students’ health and knowledge about obesity.\(^{271}\) While IHEs can legally intrude on students’ decision-making in regards to obesity, they may wish to formulate a plan that not only conforms to the constitutional and legal requirements to a degree that will lead to a lower chance of student instigated litigation, but also takes student autonomy into consideration.\(^{272}\)

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\(^{268}\) See *supra* Part II.B-D.
\(^{269}\) See *supra* Part II.D.
\(^{270}\) See *supra* Part III.
\(^{271}\) See *supra* Part IV.
\(^{272}\) See *supra* Part IV.