

MITIGATING RISK: A LEGAL AND QUANTITATIVE STUDY OF
INSTITUTIONAL ACTIONS IN THE DEVELOPMENT AND IMPLEMENTATION
OF UNDERGRADUATE EDUCATION ABROAD PROGRAMS

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By

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MITIGATING RISK: A LEGAL AND QUANTITATIVE STUDY OF
INSTITUTIONAL ACTIONS IN THE DEVELOPMENT AND IMPLEMENTATION
OF UNDERGRADUATE EDUCATION ABROAD PROGRAMS (216 pp.)

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The purpose of this study was to explore the application of U.S. law to conduct occurring during undergraduate education abroad and to investigate the impact of established best practices on the number of critical incidents that transpire during such programs.

Legal analysis was completed using doctrinal law methodology to ascertain how the U.S. legal system treats complaints brought under state and federal laws for conduct occurring outside the U.S. territorial boundaries. Specifically, this study considered the extraterritorial application of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendment Act of 1972, The Family Educational Rights and Privacy Act, and The Health Insurance Portability and Accountability Act of 1996. An understanding of the statutory language and relevant judicial decisions provided clarity for education abroad administrators in considering the potential legal ramifications of international critical incidents for a higher education institution.

Quantitative data were collected from administrators familiar with their institution's education abroad management and injuries to participant students. Bivariate

analyses were used to explore the relationship between adherence to the Forum on Education Abroad's health and safety best practices and the number of critical incidents that happen during undergraduate education abroad programs. Significant relationships were found between two statistical control and five main independent variables and the number of critical incidents. Hierarchical multiple logistic regression identified institution size, annual education abroad enrollment, and STEP registration as the most influential in predicting the number of critical incidents. Implications of effective education abroad program development and implementation are discussed as are recommendations for future research.

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When I reflect upon my beginnings as a graduate student in higher education I recall panicking because my first submitted paper lacked a cover page, a component of APA style with which I was wholly unaware. The sting of making what seemed like such an egregious error was compounded by the feeling of a need to prove myself in a new academic field amongst classmates who had more recently completed their undergraduate degrees. I surmounted my fears and entered into an academic and professional field that introduced me to concepts such as metacognition, instructional design, servant leadership, and preventative law. The more I learned, the more I wanted to learn.

While beginning the doctoral program was certainly not easy, completion of the degree would not have been possible without the tremendous amount of support I received during the process. Thank you first and foremost to my dissertation committee, Dr. Stephen B. Thomas, Dr. Aryn C. Karpinski, and Dr. Martha Merrill. Beginning in my master's program, Dr. Thomas challenged me with the application of the law to higher education. You opened an area of knowledge to me that I significantly enjoy. Thank you for your support and encouragement during my graduate education. Dr. Merrill provided me with a perspective on academics and the world in general that far surpasses the geographic radius in which I have lived. You have broadened my worldview in a manner that will forever be a component of my thought process. Dr. Karpinski expanded my knowledge of quantitative analysis past anything I learned in the

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Completing the dissertation and doctoral program is certainly closing the book on a chapter of my life. I leave the doctoral program stronger than I entered both in knowledge, but more importantly in perspective. Knowledge can always be forgotten (and relearned), but the ability to step back and consider the world through a new lens will never be left behind.

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CHAPTER I: INTRODUCTION

Statement of Problem and Significance

Beau Solomon. Thomas Plotkin. Ravi Thackurdeen. Tyler Hill. These are the names of four American college students who passed away while participating in an international education program. Outrage and concern regarding the overall safety of abroad programs followed. Spurred by these tragedies, legislation has been passed in Minnesota (Study Abroad Programs, Minnesota Statutes § 5.41 (2017)) and Virginia (Study Abroad Programs, Code of Virginia § 23.1-903.1 (2016)) to regulate study abroad. Additional legislation has been introduced at the federal level calling for greater transparency in education abroad. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) requires U.S. college and universities to disclose student safety data to actively promote greater campus safety. These regulations, however, do not encompass all education abroad programs. This leaves consumers of education abroad and their loved ones devoid of comprehensive statistics regarding safety and education abroad.

Campus safety is an increasingly relevant concern for students and families. The 2016 Your First College Year survey (YFCY) administered through the Cooperative Institutional Research Program (CIRP) at the University of California, Los Angeles found that 23.6% of respondents indicated they “occasionally” or “frequently” felt unsafe on their campus. Additionally, 24.9% of respondents reported a belief that sexual violence is prevalent on their campus (Bates & Bourke, 2016). Students’ perceptions of safety appeared to impact likelihood of persistence at their current institution with 47.1% of

students who “frequently” felt unsafe on their campus indicating they would “probably not” or “definitely not” reenroll at their current institution again compared to 13.5% of students who identify their campus as a safe place. Safety, thus, is of some concern to American freshmen to the extent of impacting reenrollment in domestic campuses. These safety concerns can be amplified when applied to locations thousands of miles from home.

In contrast with the potential health and safety concerns to education abroad participants are the documented benefits of engaging in an international program. Education abroad has quickly become a major component of higher education. Former First Lady Michelle Obama, speaking at the Stanford Center at Peking University, impressed upon those in attendance the importance of gaining global experiences, “Because getting ahead in today’s workplaces isn’t just about getting good grades or test scores in school, which are important. It’s also about having real experience with the world beyond your borders – experience with languages, cultures and societies very different from your own” (White House, Office of the First Lady, 2014). Employers laud the global-minded student who can work cross-culturally. A 2014 study of over 800 executives in American companies reported that almost 40% of companies surveyed identified a lack of personnel with international competence as a key contributing factor to missed international business opportunities (Daniel, Xie, & Kedia, 2014). Staff and faculty speak to the importance of students gaining global experience to develop key academic, professional, and personal skills. Prospective students increasingly include the availability of education abroad on their lists of desired characteristics when selecting a

post-secondary institution. Cressey and Stubbs (2010) found that 80% of prospective college students and their parents viewed an institution's international components as critical to the college search process. Education abroad has become ingrained in what can be called the "college experience" and higher education institutions have acted to provide international opportunities for their students.

Responding to these pressures, institutions without a large portfolio of education abroad offerings are increasingly either developing their own programs or partnering with other institutions to ensure their students can reap the benefits of a cross-cultural experience. Even in the age of high profile cases involving American education abroad programs, such as the Amanda Knox trial, institutions often may not fully understand the legal responsibilities they undertake when sponsoring an international program. These same institutions may not be prepared for the unique legal risk to the institution that comes with managing students abroad.

The Forum on Education Abroad, the standards designating organization for education abroad, states that member institutions are following the standards of good practice in the creation and implementation of education abroad programs. Little quantitative data supports this assertion other than self-reported member response. The considerable lack of published research on health and safety in education abroad poses a problem as the deficit of information creates an opening for misinformation, misunderstanding, and fear for consumers. Institutionally, individuals at all levels of higher education administration, eager to increase their school's international presence or to institute a specific abroad program, may be tempted by shortcuts that can quickly

increase student participation, but also expose the institution to greater legal risk. From a legal perspective there is little significant case law concerning the application of American laws to conduct occurring overseas. One can anticipate the true number of cases of harm against an American student abroad is higher than what is publicly available given the propensity of tort cases to settle rather than be fully tried in the court of law (Johnson, 2006). Greater clarity in the responsibilities for education abroad programs can work to provide an objective view of the risks of education abroad for participants and guide administrators towards program components that encourage safety.

Purpose Statement

This study seeks to fill a gap in the education abroad literature since little published research exists on institutional risk management and education abroad. Specifically, this study will address this issue in two manners. First, this study will perform a legal analysis of the extraterritorial application of American laws that have an impact on education abroad programs. Second, this study will quantitatively explore the relationship between adherence to established professional best practices for education abroad programs and the occurrence of critical incidents abroad. Third, it will identify whether a relationship exists between specific best practices and the occurrence of critical incidents abroad.

This next chapter will summarize the extensive literature regarding the benefits of education abroad, the inherent challenges in sending undergraduate students to participate in international learning experiences, and the legal environment surrounding education abroad. It is expected that higher education professionals working in a domestic context

are versed in laws applicable to their professional and administrative conduct. Those professionals who engage in the administration of international programs have the added expectation of discerning the additional impact applied by an international jurisdiction. As such, the following chapter highlights relevant case law and administrative decisions to answer the legal research question: (1) What does United States (U.S.) law require and allow for conduct that occurs outside of the U.S. territorial boundaries? The case law, administrative decisions, and academic literature will inform the survey and analysis of following chapters to quantitatively explore the remaining research questions: (2) Does a correlation exist between the best practices and the number of critical incidents occurring to U.S. undergraduate students participating in abroad programs? (3) What factors best explain the variance in the number of critical incidents occurring abroad for U.S. undergraduate students participating in abroad programs? (4) What items in the data best predict the number of critical incidents for U.S. undergraduates participating in abroad programs? It is my sincere hope that this research can make a positive impact on the number and severity of critical incidents abroad through this analysis of the law and the actions of higher education institutions.

CHAPTER II: LITERATURE REVIEW

Prevalence and Benefits of Education Abroad

Data on education abroad are predominantly collected and aggregated by The Institute on International Education (IIE) and The Forum on Education Abroad. During the 2014-2015 academic year, 313,415 American students studied abroad for academic credit, a 2.9% increase from the previous academic year (Institute of International Education, 2016). Three hundred seventy-three institutions reported 22,431 American students participated in non-credited education abroad programs such as international internships and volunteering. Of the students participating in international credited academic study, the majority (63.1%) enrolled in short-term programs, 34.3% enrolled in mid-length and 2.5% of participants enrolled in long-term programs (Institute of International Education, 2016). When participation data are combined for both credited and non-credited programs an increase is seen only in the short-term category (by 1%), while marginal participation decreases were reported in mid-length (0.6% decrease) and long-term (0.5% decrease) programs as compared to the previous reporting year. Statistics from The Forum on Education Abroad Field Survey (2013) confirms the growth in education abroad participation is primarily occurring in short-term programs, with 48.4% of U.S. institutions, 22.2% of international host institutions, and 18.8% of third-party providers reporting short-term programs as their area of primary growth. According to the 2015 State of the Field Survey Report from The Forum on Education Abroad, 68% of member American public institutions and 57% of member American private

institutions reported an increase in student enrollment (Forum on Education Abroad, 2015b).

Statistics from the Institute of International Education (IIE) Open Doors Report and Forum on Education Abroad State of the Field Reports provide the best available quantitative view of post-secondary education abroad in the United States. However, these reports have their limitations. A major limitation of both reports is that they are not mandatory and rely on institutional self-reporting. Both reports also exclude students who pursue entire degree programs abroad. The I.I.E. Open Doors Report mentions reported statistics for students who participate in non-credited abroad programs, but this information is not represented in The Forum's Education Abroad Survey of the Field. Both reports likely underreport or do not report those students who participate in non-credited abroad programs, specifically those programs that are not affiliated with the student's home institutions. Thus, the actual number of American undergraduate students who engage in international programming is probably higher than the reported numbers.

According to the National Center for Education Statistics there has been a 59.2% increase in education abroad participation from the 2003-2004 to the 2013-2015 academic years (U.S. Department of Education, 2015). Growth in participation has slowed since the 2008-2009 academic year with the growth in participation under 6.0% in comparison to previous years, all of which showed growth of 8.0% or higher (USDOE, 2015). The Great Recession, a global period of economic decline observed during the late 2000s and early 2010s, is a reasonable explanation for changes in education abroad participation. Research suggests that finances are a significant barrier to intent to

participate (Salisbury, Umbach, Paulsen, & Pascarella, 2009; Sanchez, Fornerino, & Zhang, 2006; Stroud, 2010). Sutton and Rubin's (2010) final report for the Georgia Learning Outcomes of Students Studying Abroad Research Initiative (GLOSSARI) found a 4% decrease in likelihood of participation for each \$1,000 of unmet need (2010). In addition, Salisbury, Umbach, Paulsen, and Pascarella (2009) identified that student socio-economic status has a clear impact on intent to participate, with a 20% increase in probability of participation from low to high socio-economic status.

Participation statistics are not the sole area of documented research for education abroad. The benefits of education abroad to students are well documented and fuel the growth in institutional development of international programs. Global academic experiences are reported to positively increase cognitive development (McKeown, 2009), second language development (Carroll, 1967; Elola & Oskoz, 2008), written performance (Perez-Vidal & Juan-Garau, 2009), intercultural competence (Savicki, Adams, & Binder, 2007; Rexeisen, Anderson, Lawton, & Hubbard, 2008; Braskamp, Braskamp, & Merrill, 2009), timely degree completion (Paige, Fry, Stallman, Josic, & Jon, 2009), global engagement (Paige, Fry, Stallman, Josic, & Jon, 2009), student preparedness for graduate school (Franklin, 2010), and career advancement (Franklin, 2010). Additional research has focused on the benefits to faculty who either lead or participate in abroad programs. This area of the literature, while still in the nascent stage, reports positive gains in the domestic classroom for faculty members upon return from an international experience (Hulstrand, 2009; Sandgren, Ellig, Hovde, Krejci, & Rice, 1999; Oberst, 1999).

Research on the benefits of education abroad uses both qualitative and quantitative methods with survey research as the most common method of data collection. According to Rexeisen, Anderson, Lawton, and Hubbard (2008), The Intercultural Development Inventory (IDI) has been used in several studies to assess an individual or group's orientation towards cultural differences. The IDI is a cross-culturally valid, 50-question instrument that can be completed either online or as a paper-and-pencil assessment in 15 languages. An in-depth profile of an individual or group's primary level of intercultural competence is generated at the completion of the assessment. A detailed narrative interpretation is also provided to IDI participants that includes transitional issues the participant(s) may encounter, and suggestions for actions to foster growth in intercultural competence in addition to the profile. Other tools commonly used in quantitative studies include the Measure of Intellectual Development [MID] (McKeown, 2009), the Cross-Cultural Adaptability Inventory (CCAI), and the Global Awareness Profile (GAP). Qualitative studies such as that by Paige, Fry, Stallman, Josic, and Jon (2009) utilize participant interviews to identify the impact of education abroad.

The impact of length of time abroad is another area of the research that is important in institutional development of education abroad programs. It is reasonable to suggest that programs of a longer duration will have a greater impact on student development. Dwyer (2004) in a survey of 3,723 ($n=3,723$) alumni of Institute for the International Education of Students (IES) abroad programs looked at the impact of program duration on student development. A paper-based survey was distributed to

14,800 alumni who participated in IES abroad programs between the academic years of 1950-1951 and 1999-2000 (25% response rate). The researcher elected to use a survey distributed once by U.S. mail rather than an electronic survey to increase the potential response rate from individuals in the alumni classes between 1950 and 1970. Dwyer (2004) found that student who participated in full-year programs were more likely to report gains in self-confidence, tolerance of ambiguity, and maturation as compared to students who participated in semester-long or short-term abroad programs. Horn and Fry (2013) in their study on development volunteerism found that length of time abroad positively impacted the probability of the participant engaging in development volunteerism later in life. Participation in programs of a longer duration offer an increased number of opportunities for students to advance their academic, personal, and professional competencies.

Despite offering fewer opportunities in terms of time to grow, short-term education abroad programs offer different benefits as compared to those lasting a full semester or academic year, including access to a greater range of intense, subject-specific abroad courses (Long, Akande, Purdy, & Nakano, 2010; Mills, Deviney, & Ball, 2010). These programs may fulfill a specific academic requirement, or general elective, or have personal or professional interest to the student. Research from McKeown (2009) indicates the depth of a program, rather than its length, is the critical factor that impacts student cognitive and psychosocial growth. McKeown's study sought to describe the relationship between participation in study abroad and intellectual growth in American undergraduate students. Ninety-eight students ($n = 98$) completed both a pre- and a post-test instrument

regarding their ideal learning environment (pre-test), discoveries of oneself as a learner (post-test), and student demographics (multiple choice). Student responses were rated by two trained raters using a nine-point scale based on the criteria laid out by Perry's Theory of Intellectual Development (1968). Results suggested no significant change in student intellectual development as defined by the Perry scale and that most participants began the study abroad program with a pluralistic perspective. The only result of statistical significance was a tendency for those participants with no previous international experience ($n = 50$) to demonstrate a greater level of pluralistic thinking after the study abroad program. One major challenge to this study is the use of the Perry theory of intellectual development. Perry's theory was developed based on interviews of male undergraduate students at Harvard University in the 1950s and 1960s. Alternative theories of intellectual development such as those of Belenky, Clinchy, Goldberger, and Tarule (1968), Baxter Magolda (1992), and King and Kitchener (1994) may be more appropriate theories to ground a study of intellectual development in the 21st century. A second challenge is that no differentiation is made between the individual programs in which students participated in terms of location or topic. A short-term program in the United Kingdom likely presents a dramatically different experience for a student's first international experience as compared to a short-term program in a less developed nation. A third challenge is the low number of participants who completed the entire set of study instruments. Of a pool of 1,868 students contacted, only 226 (12.1%) completed the pre-test. Of that, only 98 participants completed both the pre- and the post-test representing an attrition rate of 62%. McKeown attempted to qualify his data by comparing his

sample with larger population estimates through chi square tests and estimated *p*-values. While the study does have shortcomings, it presents a different view of the impact of study abroad in that it focuses on intellectual rather than psychosocial development.

Assessment of education abroad is an important topic as all constituents from across the administrative and faculty ranks are invested in ascertaining whether the international academic experience was worthwhile. Did the student gain the anticipated demonstrable skills or did the student simply spend a semester in another country? This question cannot be answered without assessment at all levels of international education. Deardorff (2015) suggests use of the program logic model, a holistic assessment framework, as the most effective and meaningful structure for international assessment. The program logic model recommends including the following components in an international education assessment plan; inputs, activities, outputs, outcomes, and impact. This type of assessment begins with considering what are the goals of the program (i.e., specific world language acquisition) and establishes what actions need to occur for such goals to be met (i.e., level of immersion in the language). Furthermore, the program logic model establishes how the goals will be assessed to determine whether learning occurred and what steps will be taken based on the information gathered in assessment. The program logic model is similar to the backward design method for curriculum development introduced by McTighe and Wiggins in 1998 (Wiggins & McTighe, 1998). Both methods focus on outcomes assessment in which assessment focuses on the outcomes directly rather than the input factors. Hemming Lou, Vande Berg, and Paige (2012) highlight the importance of clearly identifying what are the intended outcome(s)

of the education abroad program (p. 413). It is regularly assumed that student learning simply occurs due to the international nature of education abroad. The Georgetown Consortium Project suggests that immersion alone without structured intervention does not support intercultural development (Vande Berg, Connor-Linton, & Paige, 2009). International educators thus must establish the important outcomes desired from education abroad and build the program from that point. Regular assessment is key to identifying whether the outcomes are being met and what needs to be done to continue supporting international education. Assessment should be a repetitive process and the results should not only inform program development but should also advise the next series of assessments.

The available literature on education abroad is vast and continues to grow. Comp, Gladding, Rhodes, Stephenson, and Vande Berg (2007) estimate the number of scholarly publications about study abroad to be well over 1,000 for decade beginning in the year 2000. These studies cover a broad variety of topics including the impact of multiple variables on student learning, intercultural competence, the impact of study abroad on the host country culture, program assessment, and campus internationalization. Additional topics of consideration such as faculty development are becoming a larger percent of the literature as the field of international education continues to grow. Collaborative approaches between institutions and between institutions and government agencies, nonprofit organizations, and other supporters of education abroad will further encourage diversity in research topics. The direction of research will continue to broaden as more

institutions embrace the importance of international education and more scholars and practitioners query the most effective mechanisms for fostering student learning.

Legal Responsibilities of Institutions Sponsoring Education Abroad

This study is a direct response to the literature gap regarding the vast administrative responsibilities of institutions sponsoring education abroad programs. As institutions increase the pace of development and implementation of their education abroad programs, they take on greater risks. Given the number of stakeholders, financial requirements, involvement of students, excitement of an international experience, and location outside of the institution's legal jurisdiction, institutions must strategically consider how to mitigate risk *before* launching a program, as opposed to managing crises in an ad hoc manner. Despite the disqualification of the doctrine of in loco parentis for college and university students as found by *Furek v. University of Delaware* (1991), *Beach v. University of Utah* (1986), and *Bradshaw v. Rawlings* (1979), institutions still hold a legal responsibility for the safety of students participating in institutionally-sponsored programs abroad. Moreover, although international programs exist outside the typical jurisdiction of the American court system, previous case law supports a limited application of American law to international occurrences during the implementation of American education abroad programs. More specifically, *King v. Board of Control of Eastern Michigan University* (2002) supports the extraterritorial application of Title IX of the Education Amendment Act of 1972 (Title IX). Courts have also held institutions legally responsible for the actions of students and/or faculty and staff occurring solely abroad (*Munn v. Hotchkiss School* (2017)). The legal precedent of the application of Title

IX to conduct occurring outside the United States alone is reason enough for education abroad professionals to be cognizant of American law when instituting and implementing policy abroad.

Section 504 of the Rehabilitation Act of 1973 (Section 504) and Titles II and III of the Americans with Disabilities Act of 1990 (ADA) are the governing federal disability discrimination laws. Both laws and their regulations apply in the higher education context and prohibit institutions from discriminating against otherwise qualified individuals with disabilities based on the documented or perceived disability. Like Title IX, there is a presumption against the extraterritorial application of Section 504 and the ADA to conduct occurring outside the United States. The Civil Rights Act of 1991 extended the application of Title VII of the Civil Rights Act of 1964 and Title I of the ADA to overseas conduct. This action was taken in response to the Supreme Court ruling in *EEOC v. Arabian American Oil Company* (1991) (Aramco) holding that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially. Thus, the legislative action was taken to apply only Title I of the ADA, which governs employment discrimination, but not Titles II or III of the ADA or Section 504. The lack of broadening the specified scope of the ADA and Section 504 to Titles II and III further reinforces the presumption that these laws are not applicable extraterritorially. *Bird v. Lewis & Clark College* (2000/2002) and *Tecza v. University of San Francisco* (2010/2013), suggest that Section 504 and ADA may have some application to actions that occur on education abroad programs despite the occurrence on foreign soil. In addition to the limited case law, opinion letters from The Department of Education's Office for Civil Rights (OCR)

also provide some indication that Section 504 and the ADA have limited application to conduct abroad.

Between 1996 and 2005, 135 million civil lawsuits were filed in the United States, of which approximately 15% were considered tort lawsuits (McQuillan & Abramyan, 2010). The cost of tort lawsuit defense is high and can include monetary judgments, attorneys' fees, court costs, increased insurance premiums, and administrative fees. The Pacific Research Institute in 2010 estimated tort costs in the United States in 2007 equaled \$252 billion (McQuillan & Abramyan, 2010), and this number only represents reported data for civil tort lawsuits. Given the propensity of tort cases to settle out of court to avoid uncertain trial outcomes, decreased privacy, and the cost of a lengthy trial, the real costs of tort lawsuits are bound to be much higher (Congressional Budget Office, 2003).

Risk, however, is a broad term, and the risk an institution encounters when sponsoring education abroad programs is just as broad. How an institution manages risk will largely depend upon the area in which the risk occurs. For this dissertation we are using the term "risk" to describe those situations that may lead the institution or members of the institution to be engaged in legal proceedings. The Association of Governing Boards of Universities and Colleges (AGB), the National Association of College and University Business Officers (NACUBO), and the University Risk Management and Insurance Association (URMIA) all encourage institutions to employ Enterprise Risk Management (ERM) tactics in order to evaluate institutional risk and develop a strategic plan (National Association of College and University Business Officers, 2001; University

Risk Management and Insurance Association, 2007; Association of Governing Boards, 2009). Enterprise Risk Management (ERM) is, "...a process for identifying, analyzing, responding to, and monitoring risks" (Wills, 2011). Organizations use ERM to help identify, assess, and respond to potential threats in a variety of institutional areas.

Although ERM was created as a risk management tool for financial institutions, the AGB recommends that institutions consider using ERM tactics to combat strategic, operational, compliance, and reputational risk as well (Association of Governing Boards, 2009).

Even if institutions do not wish to use ERM as a strategic risk management program, though, other options are available. May and Koski (2013) put forward two general approaches to mitigate potential risk to the institution and associated individuals. The first consideration is the traditional approach of mandating specific actions to decrease harm. An example of this approach applied to education abroad is an institutional requirement that students sign a waiver of liability or student code of conduct to decrease the risk of litigation. Also known as hold harmless agreements or a release from liability, waivers of liability are common requirements for students electing to participate in education abroad programs. However, the use of waivers of liability, while common, are not a silver bullet for shielding institutions from civil suits in the event of a student incident abroad. Waivers of liability are built around the legal concept of a hold harmless clause: a contractual agreement in which parties agree not to hold the other party legally responsible for loss, liability, or damage (Garner, 2014), but courts have regularly struck down the legality of waivers used in education abroad situations due to overbroad language, ambiguity, and instances in which the institution asked the

signatory to relinquish rights to which they were entitled (*Munn v. Hotchkiss School* (2017); *Fay v. Thiel College* (2001)). This is not to say waivers of liability should not be utilized; however, liability waivers must be carefully crafted by an attorney familiar with contract and civil law to increase the likelihood that the waiver will hold up in court. Education abroad administrators should also be aware that valid waivers of liability may bar claims of negligence, but are unlikely to bar claims of gross negligence, behavior which is evidenced by willful and wanton conduct (*Harsh v Lorain County Speedway, Inc.* (1994/1996)).

The second approach to mitigating risk suggested by May and Koski (2013) is utilizing the provision of information and planning to decrease potential risk. Providing students with documents listing the education abroad program's timeline and directions in the event of a lost student is an example of mitigating risk through planning. Institutions should implement a combination of the two approaches to decrease risk in education abroad programs.

Risk is inherent to overseas programs. In their Accident Ratio Study of industrial accidents, Bird and Germain (1992) suggest a critical incident ratio of 600/30/10/1, meaning that for every 600 safety-related occurrences with little or no consequence, there were 30 occurrences of minor property damage, 10 occurrences involving physical injury, and 1 occurrence involving severe injury or death. While one cannot use the number of minor accidents to conclusively predict the occurrence of a high-potential critical incident, the ratio illustrates the general breakdown of potential incident severity. Education abroad encompasses a wide variety of programs in which student are placed in

unfamiliar situations, commonly in an unfamiliar language, with a high degree of independence. Given those variables it is not unwise to expect possible negative situations may occur.

In addition to the inherent risks involved in overseas travel, education abroad students may begin their programs without a strong awareness of potential health-related risks for the host country. Hartjes, Baumann, and Henriques (2009) utilized a cross-sectional design to collect data on travel health risk perceptions and prevention behaviors from American education abroad students ($n = 318$). The study utilized a web-based survey to collect information on the students' predominant source of travel health information and their anticipated top-rated risks. Results indicated that the primary source of travel health related information was youth-oriented travel guidebooks (85%) such as the *Lonely Planet* series, followed by consultation with a primary care provider (60%) and the U.S. Department of State website (57%). Family and friends were also a common source of information for travel related health information (75%). Education abroad students were less likely to consult travel-health specific sources such as the World Health Organization (21%) or a travel health specialist (24%). Data from Hartjes, Baumann, and Henriques (2009) also showed that, overall, students did not perceive threats to their health while traveling abroad to be highly likely or worrisome. Of the 18 travel-health threats presented, students rated contaminated food and water (2.61), psychological distress (2.50), excessive sun exposure (2.41), and physical or sexual assault (2.22) to be the most likely health risks to occur (rated on a scale of 1 = *not at all likely* to 4 = *very likely*). Additionally, contaminated food and water (2.15), psychological

distress (2.15), physical or sexual assault (2.24), and excessive sun exposure (1.91) were rated by the student participants as the most worrisome health risks related to engagement in education abroad. Thus, students may participate in education abroad programs without knowing what potential threats to their health and safety exist. These same students may also have the intent to engage in risk-taking behaviors while abroad. Hummer, Pedersen, Mirza, and LaBrie (2010) found that students who participate in education abroad programs may engage in greater alcohol-related behaviors than compared to students remaining in the home country. A lack of awareness of the threats that exist abroad combined with the intent to act more freely presents a situation in which the participant may be negatively impacted by adverse health or safety occurrences. How then does an institution manage education abroad programs and remain legally protected in the event of a crisis abroad?

The first step institutions should make towards decreasing the risk of being held responsible for a critical incident abroad is to follow the standard of care laid out by professional organizations committed to the field of education abroad. The standard of care is the duty of a person or professional to act how an ordinary, reasonably prudent person or professional in the field would under similar circumstances (Garner, 2014). The Forum on Education Abroad, a non-profit, membership association, is recognized by the U.S. Department of Justice and the Federal Trade Commission as the Standards Development Organization [SDO] for the field of education abroad (Forum on Education Abroad, 2014). As the Forum on Education Abroad is the established SDO for education abroad, the best practices reviewed in this document will be those written and distributed

by the Forum on Education Abroad in their “Standards of Good Practice for Education Abroad” (2015a). Nine standards have been written and are expected to be used as a guide in the development, implementation, and assessment of education abroad programs.

Little published research speaks to how well The Forum’s standards in program development and implementation have been integrated into abroad programs. The 2015 State of the Field Survey Report (Forum on Education Abroad, 2014) notes that 70% of all respondents strongly agree or agree with the question whether The Forum’s *Standards of Good Practice for Education Abroad* are being used to shape organizational policy on education abroad. This same field report also noted in general that U.S.-based program providers are more likely to use the *Standards* as compared to American institutions and international host institutions and program providers. Specifically, 64% of all respondents report using the *Standards* in the development of new programs, 63% report using the document for the approval and adoption of new programs, 59% report using the *Standards* to evaluate programs, and 41% use the *Standards* to assess other programs to approve student participation (Forum on Education Abroad, 2015). The survey also includes data on institutions’ consideration of their abroad programs’ economic, environmental, and social consequences for the host country. Data, however, were not collected regarding the impact of programs on students or regarding any health or safety concerns. It is interesting the survey elects to review institutional consideration of education abroad programs’ carbon footprint, but not health and safety. Data for State of the Field Survey have been collected and distributed by The Forum on Education Abroad

since 2006. The purpose of this survey has been to report on important data in the field of education abroad and to help shape The Forum's research and programs. Survey data are collected using an online survey distributed via email to the designated institutional representatives from The Forum member institutions. A total of 298-member institutions completed the survey of the initial 734 survey invitations (40% response rate).

Sources of Risks

The literature provides little quantitative data on critical incidents that occur to American students participating in education abroad programs. In their March 2016 review of insurance claims data and mortality rate The Forum on Education Abroad found that college students studying abroad have a lower mortality rate of 13.5 deaths per 100,000 students as compared to the mortality rate of 29.4 deaths per 100,00 students of those remaining on U.S. campuses (Forum on Education Abroad, 2016b). These mortality rates are based on four reported deaths during an education abroad program; two of these deaths were ruled accidental and two were due to pre-existing medical conditions. Datum for college students remaining on a U.S. Campus was derived from "Causes of Morality Among American College Students: A Pilot Study" (Turner, 2013) published in the *Journal of College Student Psychotherapy*. This study used survey results and data from the Department of Education and the National Center for Education Statistics to determine the published mortality rate. Both sets of information were annualized based on a period of 33 weeks. The Forum's conclusions in this research have two major limitations that impact the overarching applicability of the claims. First, the research is based on claims data for the 2014 calendar year from the two largest

insurance providers for education abroad. While the sample was determined to be large enough to establish meaningful conclusions, the data are not representative of the entire population. In addition, the researchers have no way of identifying how many claims were not filed in instances of death during an education abroad program. A second limitation is the focus on mortality. While death could reasonably be concluded as the most serious form of critical incident to occur to a student abroad, the information presented does not elucidate the broader context of safety abroad. The study's insurance claims data identified that approximately 10% of all students abroad filed an insurance claim of which the predominant number of claims filed were for outpatient care (94.5%). Some additional information is reported to provide additional context to this number. Most of the insurance claims filed for outpatient care were for a category of claims titled "All Other" (40%). Outpatient care for a cold or flu (20%) and gastrointestinal (9%) illnesses were the next highest categories of claims filed. Results for inpatient care presented a similar picture with 48% of all claims for inpatient care were categorized as "All Other." The large percent of insurance claims grouped into an unidentified category does not provide enough context and limits the conclusions one can draw from the data. The Forum on Education Abroad's purpose with this study was to provide some reassurance to the public of the safety of education abroad programs. Kimble, Flack, and Burbridge (2012) surveyed 218 undergraduate students via a modified version of the Sexual Experiences Survey and found that female undergraduates participating in education abroad faced an increased risk for sexual assault as compared to students who remained at their home campus. This study from Middlebury College found that a woman

is four times more likely to have had an unwanted sexual contact, three times more likely to experience an attempted sexual assault, and five times as likely to be raped while on an education abroad experience. Risks were higher for students participating in programs situated in non-English speaking countries. Cultural differences, weak social networks, and greater access to alcohol were cited as contributing factors to the greater risk of sexual assault for women participating in education abroad programs. Additionally, Kimble, Flack, and Burbridge noted that participants' lack of familiarity with the counseling and health services available in foreign countries makes it more challenging for female education abroad participants to find assistance after a sexual assault.

Finally, one of the best sources of quantitative data from multiple institutions is the Forum on Education Abroad's Incident Database Pilot Project (2010), which sought to collect data regarding critical incidents occurring on education abroad programs to begin working towards safer programs. Critical incidents were divided into 16 categories: injury, illness, physical assault, structure fire, theft, robbery, equipment failure, motor vehicle accident, missing/separated person, sexual harassment, sexual assault, behavioral/psychological, natural disaster, disease outbreak, political upheaval, and terrorist event (Forum on Education Abroad, 2010). Thirty-eight organizations participated in the Pilot Project including 11 liberal arts colleges, nine large public universities, three small private universities, seven medium private universities, two large private universities, two community colleges, three program providers, and one state system. The data set includes data from more than 350 programs in 101 different countries collected from January 1, 2014 through December 31, 2014. Most of the

surveyed programs (50%) occurred in European countries. This is consistent with Open Doors data in that education abroad participation greatly favors European destinations (54.5%) (IIE, 2016). Participants in the Pilot Project reported a total of 311 incidents with the most reported type of incident being illness (105 reports).

Behavioral/psychological incidents (59 reports) and injury (53 reports) were the next most reported incidents. Most incidents occurred within the program host city and during student free time. Poor judgment, alcohol, and failure to follow program policies were the three most commonly reported contributing factors for the listed incidents (Forum on Education Abroad, 2010).

Types of Education Abroad Programs

International programs can be classified in a variety of ways, e.g., length of time or semester of involvement, demographic of participant pool, general location, or predominant activity. These classifications attempt to divide available education abroad programs into discrete categories. Creating a scheme based on such narrow descriptors may make the search process easier for interested students, but dramatically simplifies the complexity of the education abroad experience. Engle and Engle (2003) present a classification scheme based on multiple-criteria that focuses on the critical components and/or goals of the individual education abroad program. The framework put forward by Engle and Engle (2003) categorizes programs based on degree of immersion and challenge. The first aspect of the classification system divides programs based on amount of immersion in the host culture: Level One: Study Tour; Level Two: Short-Term Study; Level Three: Cross-Cultural Contact Program; Level Four: Cross-Cultural

Encounter Program; Level Five: Cross-Cultural Immersion Program (Engle & Engle, 2003, pp. 10-11). The second part of the classification framework includes program components: length of time, entry language competence, language of instruction, context of academic work, types of student housing, availability of guided social/cultural interaction, and requirements for guided reflection (p. 8). Comparing the levels against the components presents a rubric of available programs at each level. This two-dimension classification system greatly improves upon the division of programs simply on location or length of time abroad. Twombly, Salisbury, Tumanut, and Klute (2012) recommend the use of a multidimensional program classification scheme as most education abroad programs cannot be most accurately labeled with a single descriptive indicator. In addition, Twombly et al. (2012) indicates the use of a more complex classification system assists education abroad professionals in being aware of expected program outcomes.

When considering institutional liability, however, the operating status of an international program is the best method of classification. Categorizing education abroad programs by operating status rather than a more complex classification system is necessary as operating status will be considered when a court considers legal liability. Hoye and Rhodes (2000) suggest a model in which international education programs are divided into the following categories: University Owned/Operated Programs, Contractual Programs, Permissive Programs, and Unsponsored/Unapproved Programs.

- University owned/operated programs, such as Kent State University's Florence Program, expose the institution to the greatest amount of legal liability. These

programs incorporate an international location that is staffed and supervised by the institution. While the location may not be a formal branch or extension campus, the location acts as such.

- Contractual programs are those in which an institution has contracted with an American or international university or an education abroad company to provide an international opportunity for students. These programs involve either a formal contract between the institution and the education abroad program, or a Memorandum of Understanding (MOU). MOUs are less formal agreements between two institutions that stipulate the terms of the relationship.
- Permissive programs are those education abroad programs in which the home institution is aware of, and allows, student participation. Unlike a contractual program, the student's home institution does not have a formal relationship, contractual or otherwise, with the sponsoring organization.
- Un-sponsored or unapproved programs are those which are neither supported by, nor known to, the participant's home institution. This category also includes programs that a participant's home institution expressly denies its students from participating in, such as international programs in a country on the U.S. Department of State's Travel Warning/Alert list or those programs that inherently place the participant in danger. Since the participant's home institution expressly denies students the opportunity to participate in un-sponsored/unapproved programs, programs in this category present the least amount of legal liability for an institution.

Waivers of Liability

It is common practice for education abroad programs to require a waiver of liability or some version of a contract indemnifying the institution from litigation/responsibility in the event of a wide number of potential events. These waivers are typically a requirement for participation and may include language not only meant to shield the institution from legal responsibility, but to also provide the institution and/or its designees basic power of attorney for medical purposes. The waiver or contract of liability also sometimes includes a student code of conduct and contract of participant financial responsibility. Institutions rely on these documents to clarify participant and institutional responsibility in the event of a dispute between the two entities. The American court system has historically viewed these documents as contracts and applied aspects of contract and tort law in the event of a dispute. However, courts of law will often find these contracts unenforceable under the issues of contract law or issues of public policy.

Challenges to waivers of liability. The four most common reasons under which courts of law often will find waivers unenforceable under contract law are (a) unclear drafting, (b) inconspicuous language, (c) unconscionability, and (d) adhesion.

Unclear drafting. A contract can be deemed unenforceable due to unclear drafting in the event the language is unclear, vague, or ambiguous. Of special interest to college and university education abroad programs is that the waiver must also be written in language the signer, a college or university student, can reasonably understand. This means that excessive legalese, which is generally incomprehensible to the average

person, is a prime reason waivers can be deemed unenforceable. Courts will generally find it is unlikely the student participant understood what he or she was signing. In line with the issue of clear and understandable language, waivers must also be written in a way such that the signer is aware of exactly what rights he or she is waiving. While the waiver does not need to include an exhaustive list of all events that could be covered, the waiver must be broad enough without being overbroad. Thus, the importance of working closely with competent legal counsel is imperative to creating an enforceable waiver.

Inconspicuous language. A second issue of contract law to consider when drafting a waiver of liability for an education abroad program is that waiver clauses must be included in conspicuous language. This legal requirement entails not masking waiver language within a larger document, and could be met by including the waiver on an individual/separate document; highlighting, bolding, utilizing alternative text font; or otherwise conspicuously separating the waiver language from the remainder of the document.

Unconscionability. A third issue of contract law to consider when drafting an enforceable waiver is the issue of unconscionability. Unconscionability is a degree of unreasonableness or unfairness in a contract that is unfair or oppressive to one party and suggests an abuse of power during the contract's creation (Garner, 2014). Substantive unconscionability refers to the terms of the contract and whether the terms violate public policy or greater public interest. Courts will carefully analyze the specific contract to determine whether the alleged unfairness is sufficiently important to invalidate the contracting parties' privilege to write contract terms as they deem necessary. In *Bagley v.*

Mt. Bachelor, INC. (2014) the Oregon Supreme Court reversed the Appellate Court's awarding of summary judgement to the defendants and remanded the case to the lower court for review based on an unconscionable waiver. Specifically, the Court found the ski resort's blanket liability waiver that included release from liability caused by negligence to be unconscionable.

Adhesion Contract. Potential legal challenges to waivers of liability exist in the process of applying the waiver as well as during the drafting process. Education abroad professionals must be aware of the legal concept of a contract of adhesion since waivers of liability are common requirements for participation in education abroad programs. According to Kaplin and Lee (2007), a contract of adhesion is one that is offered on a "take it or leave it" basis. Typically contracts of adhesion involve one party with a stronger bargaining position. Courts will generally rule against the drafting party as a contract of adhesion offers no opportunity for the signing party to negotiate terms.

Institutions should be aware of the propensity for waivers of liability to be viewed as contracts of adhesion given that students are typically denied participation in the education abroad program if the waiver is not signed and submitted. *Fay v. Thiel College* (2001) is an example in which the Courts found the higher education institution's waiver of liability to be a contract of adhesion and ruled against the applicability of the waiver. When drafting such documents, counsel should be careful to provide opportunities for "fairness," such as creating grievance mechanisms for participants, establishing a standard of good practice, and providing opportunities for students to participate in shared governance (Kaplin & Lee, 2007, p. 301). The opposite rulings of *Bradshaw v.*

Rawlings (1979), *Whitlock v. The University of Denver* (1987), *Beach v. The University of Utah* (1986) as compared to *Furek v. The University of Delaware* (1991) illustrate the importance of a close connection between the international education office and institutional legal counsel. Institutions cannot avoid all responsibility towards students by taking no action; this would constitute negligent behavior. However, institutions should be careful not to create a duty where one does not exist.

Education Abroad Case Law

***Munn v. Hotchkiss School*, 326 Conn. 540, 165 A.3d 1167 (2017)**

Carla Munn was a minor student who suffered permanent brain damage including loss of the ability to speak and limited control of her facial muscles following the contraction of tick-borne encephalitis (TCE) during a school-sponsored trip to China in 2007. The student and her family sued The Hotchkiss School for negligence. Damages of \$41.5 million, \$31.5 million for non-economic damages such as pain and suffering, was awarded by a federal district court in 2013. The court found the school negligent in its failure to warn the student and her parents about the remote possibility of insect-borne diseases. The Second Circuit Appellate Court affirmed the student's injuries were foreseeable, but certified two questions to the Connecticut Supreme Court: 1) does Connecticut public policy impose a legal duty on schools or protect against the foreseeable risk of a serious insect-borne disease and 2) whether the jury's damages award, particularly that awarded for noneconomic damages, was warranted.

In their decision, the Connecticut Supreme Court concluded that schools do have a duty to warn students in their care and take appropriate protective measures to defend

against foreseeable insect-borne diseases. The Court noted that while the duty to protect exists, this duty is not limitless. However, schools must act with the prudence of a parent under similar circumstances. It is important to note The Hotchkiss School is a secondary school and the students involved were not legal adults.

***Bradshaw v. Rawlings*, 464 F. Supp. 175 (E.D. Pa. 1979), *aff'd in part, rev'd in part*, 612 F.2d 135 (3d Cir. 1979)**

While not involving behavior in the international arena, *Bradshaw v. Rawlings* (1979) is an important case in higher education law because it establishes that an institution is not an assumed insurer of student safety and does not have an inherent duty to protect students from harm. Thus, *Bradshaw v. Rawlings* (1979/1979) is a seminal case in the erosion of an assumed *in loco parentis* relationship between institutions of higher education and students.

In summary, Bradshaw brought a negligence claim against Delaware Valley College and against fellow student Rawlings for injuries sustained in an automobile accident. The accident, which caused the Plaintiff to suffer incurable quadriplegic paralysis, occurred while the Plaintiff was a passenger in the car Rawlings was driving while intoxicated after an off-campus sophomore class picnic. Plaintiff Bradshaw alleged negligence on the part of Defendant Rawlings in operating the vehicle and negligence on the part of Delaware Valley College in not adequately supervising the class picnic. The court ruled against the Plaintiff in finding that he had no legal standing to bring a negligence lawsuit against the College on the basis that the institution did not have a duty to protect him from harm.

***Beach v. University of Utah*, 726 P.2d 413 (Utah 1986)**

Beach v. University of Utah (1986) provides additional case law supporting the adult status of students, insomuch that the students are responsible for their own safety. Plaintiff Beach brought a negligence lawsuit against the University of Utah after Beach suffered incurable quadriplegic paralysis after falling off a cliff while intoxicated on a geology class field trip. Like the ruling in *Bradshaw v. Rawling* (1979/1979), the court found against the Plaintiff in *Beach v. University of Utah* (1986). The court claimed that the University was not responsible for an individual student's safety given the student's adult status.

***Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991)**

Furek v. University of Delaware (1991) is relevant in that it establishes precedent for institutional liability for third-party behavior. Specifically, in the case of *Furek v. University of Delaware* (1991), the Plaintiff Furek brought a negligence suit against the University of Delaware, the local and national fraternity Sigma Phi Epsilon, and fellow student Joseph Donchez after suffering injuries during a fraternity hazing incident. In the incident, lye-based oven cleaner was poured over Furek causing Furek to suffer permanent scarring from first- and second-degree chemical burns on the face, neck, and back. The lawsuit against Sigma Phi Epsilon National was dismissed on jurisdictional grounds. Sigma Phi Epsilon Local was also dismissed from the lawsuit based on ineffective service of process. The University of Delaware was found liable for negligent and reckless failure to control Sigma Phi Epsilon, and Joseph Donchez was found liable for negligence and wanton failure to exercise reasonable care. A \$30,000.00 judgement

was awarded to the Plaintiff with 93% of the judgment apportioned to the University and 7% to Donchez. However, in a post-trial judgment, the court ruled in favor of the University because there was not sufficient evidence that the University had a duty to protect Furek from the actions of the Fraternity or its members. The court then reassigned the burden for the entire \$30,000.00 judgment to the defendant student, Donchez.

The primary legal question in *Furek v. University of Delaware* (1991) is whether the University owed a duty of care to Furek, i.e., whether the University owed a duty of care to protect Furek from actions resulting from Furek's voluntary actions [to pledge and therefore submit to hazing]. The court established the University was aware of the potential for dangerous conduct as related to hazing by University-affiliated fraternities. This was established in that the University had distributed communication to Greek Life organizations regarding hazing. Negligence, as defined by *Black's Law Dictionary*, is "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would or would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances" (Garner, 2014). Therefore, civil or criminal negligence suits can be brought in the event or the perceived event that this negligence led to damage to another person or persons. For the purposes of the legal system, liability for negligence is determined by the legally defined duty.

A duty of care must be established to find one legally liable for negligence. The university-student relationship has been reviewed through a variety of legal theories to

establish whether a duty of care or special relationship exists. In previous generations the university was viewed to act *in loco parentis* (“in the place of a parent”), and therefore owed students a broad duty of care. More recently, higher education institutions have been presented with the challenge of establishing a successful balance between institutional and student responsibility. *Bradshaw v. Rawlings* (1979/1979) is a seminal case in which the University was directly not held liable for the damages to the student under the Court’s dismissal of *in loco parentis*. The overarching propensity of courts to rule against *in loco parentis* significantly decreases the expected legal responsibility of the university to its students (*Hartman v. Bethany College*, (1991); *Booker v. Lehigh University*, (1992/1993); *Benefield ex rel. Benefield v. Board of Trustees of the University of Alabama at Birmingham* (2002)). The courts have been reticent to ascribe parental-level supervisory duties to higher education institutions, particularly as applied to students voluntarily participating in activities. Said activities having school sponsored status or occurred on campus does not immediately establish that the institution has a duty of care.

***Whitlock v. University of Denver*, 744 P.2d 54 (Colo. 1987)**

In contrast to *Furek v. University of Delaware* (1991), the *Whitlock* court found the University not liable for nonfeasance negligence (failure to act). *Whitlock*, a student at the University of Denver, brought a claim of nonfeasance negligence against the University when the student was rendered a quadriplegic due to an accident occurring on a fraternity owned trampoline on fraternity property leased from the University. The student was successful in his original case and was awarded a judgment of \$5.26 million

on the grounds the University did not take reasonable measures to protect the Plaintiff from unsafe conditions. Subsequently, the court granted the University's motion for judgment notwithstanding the verdict, stating the University owed no duty of care to Whitlock. The Colorado Court of Appeals then reversed the trial court's decision and reinstated the original jury award. The Appellate Court held (a) the injury on the trampoline was foreseeable and (b) the injury occurred on University property. Upon appeal to the Colorado Supreme Court, the Appeals Court decision was reversed and remanded to the trial court for dismissal of Whitlock's complaint against the University of Delaware. Unlike the Appeals Court, the Supreme Court rejected the assertion that the injury was foreseeable.

In *Furek v. University of Delaware* (1991) the courts relied on precedent set by *Beach v. University of Utah* (1986) and *Bradshaw v. Rawlings* (1979/1979). Both cases found that the institutions did not have a duty of care to supervise extracurricular activities. The expectation of institutions to act in such a manner would require the institution to act in such a custodial manner towards students who are legally adults. The court in *Whitlock v. University of Denver* (1987) stated that "only by giving them [students] responsibility can students grow into responsible adulthood" and that taking away this responsibility would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of modern college education" (744 P.2d at 60 (quoting *Beach v. University of Utah*, 726 P.2d at 419)).

Despite the University of Denver ultimately being held not responsible, *Furek v. The University of Delaware* (1991) does establish that a higher education institution can

be held responsible for not doing enough to protect students against a known or foreseeable danger. *Furek v. The University of Delaware* (1991) and *Whitlock v. University of Denver* (1987) appear to be in direct contrast given that the *Furek* court ruled against the University and the *Whitlock* court ruled in favor of the University. The distinguishing difference is that, in the case of *Furek*, the University took some action to implement a policy and actions against hazing; hazing is ultimately the behavior that led to the Plaintiff's injuries. In the case of *Whitlock*, the University of Denver took no action to prevent the accident that led to the Plaintiff's injuries. The *Whitlock* court ruled that the lack of action on the part of the University identified a lack of foreseeability and with no foreseeability of the potential danger, the University could not be found to have a duty of care. With no duty of care to the student, the University was found to not have acted negligently towards the Plaintiff.

The demise of *in loco parentis* as the preponderant legal theory applied to institutional supervisory responsibility towards students does not protect the institution from all potential legal liability. Negligence, as defined above, still requires the institution to act or not act in line with that of the "reasonable man." Thus, the institution does hold a responsibility to students.

***Schulman v. Institute for Shipboard Education, Anchorage Hotel Ltd., Global Citizens Travel, LLC. and Fountaine-Pajot*, No. 13-CV-23766, 2015 WL 11018438, at *1 (S.D. Fla. January 20, 2015), *aff'd sub nom. Schulman v. Institute for Shipboard Education*, 624 F. App'x 1002 (11th Cir. 2015)**

Casey Schulman was struck and killed by a catamaran propeller while snorkeling as part of a Semester at Sea excursion organized by Global Citizens Travel, LLC. in Dominica. David Schulman, father and personal representative of the Estate of Casey Schulman, Plaintiff, filed a negligence claim against Global Citizens Travel, LLC., the Institute for Shipboard Education d/b/a Semester at Sea; Anchorage Hotel Ltd., (owner of the boat), and Fountaine-Pajot, S.A. (manufacturer of the boat). The Institute for Shipboard Education, sponsored by the University of Virginia, is the legal title of the group engaging in business as Semester at Sea. The Complaint stated a claim that Semester at Sea failed to exercise reasonable care in the supervision and safety of participating students. The specific claims against Semester at Sea were:

- SAS had a duty to prevent the Plaintiff from participating in shore excursions and tours known to be unsafe.
- SAS had a duty to warn the Plaintiff that Global Citizens Travel had little or no experience in organizing college student tours or knowledge of safeguards necessary to prevent injuries in foreign locations.

In all, eight counts of negligent behavior were filed against the defendants:

- Count 1: Negligence against SAS
- Count 2: Negligence against Anchorage Hotel
- Count 3: Negligence against Global Citizens Travel
- Count 4: Strict Liability (design defect) against Fountaine-Pajot
- Count 5: Strict Liability (failure to warn) against Fountaine-Pajot
- Count 6: Negligence against Fountaine-Pajot

- Count 7: Strict Liability (design defect) against Anchorage Hotel
- Count 8: Strict Liability (failure to warn) against Anchorage Hotel

Suits against all defendants were dismissed due to lack of jurisdiction in the case of claims against Fountaine-Pajot or lack of evidence. The 11th Circuit Appellate Court affirmed the lower court's findings.

***King v. Board of Control of Eastern Michigan University*, 221 F.Supp.2d 783 (E.D. Mich. 2002)**

King v. Board of Control of Eastern Michigan University (2002) is a seminal case that applied Title IX (1972) extraterritorially. The Plaintiffs were six African-American women, enrolled students at Eastern Michigan University (EMU), who participated in EMU's five-week Intensive Educational and Cultural Program in South Africa. Sixteen students participated in the program and nine students (eight women and one man), including the Plaintiffs, ultimately left the program approximately one week early due to alleged harassing behavior on the part of three male EMU students. Two of the alleged harassers were program participants, and one was an assistant hired to help a student with disabilities and support the faculty leader. Students who raised complaints regarding the harassing behavior at a student meeting chaired by the assistant were met with derogatory slurs and continuation of the reported harassment. Six students ultimately left the program after a violent physical altercation occurred between the three male students engaging in harassing behavior. The Plaintiffs alleged that the faculty coordinator was present during times of the alleged harassment and was made aware of several

complaints, yet did nothing. The Plaintiffs' claim is for sexual discrimination in violation of Title IX's prohibition against hostile environment sexual harassment.

The question in this case is whether Title IX can be applied extraterritorially. There are two general presumptions against the extraterritorial application of U.S. law. First, the presumption that Congress is largely concerned with domestic issues (*Foley* at 285), and second, for purposes of avoiding unintended discord between the laws of the U.S. and those of other nations. Clashes between the laws of two sovereign nations could lead to severe implications for foreign policy and relations. The Supreme Court in *EEOC v. Arabian American Oil Company* (1991) established the standard that "clear evidence of congressional intent" must be present to overcome the presumption against extraterritorial application of a U.S. law.

Title IX prohibits discrimination based on sex by public and private educational institutions who are recipients of federal funds (Kaplin & Lee, 2013). Institutions whose students receive federal financial aid funds are considered recipients thus including most postsecondary institutions in the United States. Title IX is administered by the Office of Civil Rights (OCR) of the United States Department of Education (US DOE). Each recipient institution is required by law to designate at least one employee to coordinate institutional compliance with Title IX. Traditionally this individual is titled the Title IX Coordinator. Institutions are responsible for communicating the name and contact information of the Title IX Coordinator to all students and employees. The coordinator's responsibilities include maintaining institutional efforts to comply with Title IX, to oversee all complaints of sex discrimination, and to identify and address any patterns of

noncompliant behavior. Grievance procedures must be clearly identified and communicated to students and employees. Additionally, certain classifications of employees qualify as “mandatory reporters” for Title IX purposes. These employees have a responsibility to report any Title IX violations they directly observe or receive report of to the Title IX Coordinator as soon as possible. Mandatory reporters include, but are not limited to, Vice presidents, vice chancellors, vice provosts, deans, department heads, directors, coaches, employees in supervisory or management roles, faculty members, student affairs professionals, and residential life staff (U.S. Department of Education, Office for Civil Rights, 2017).

The Plaintiffs contended that the statutory language in Title IX, specifically “any education program or activity” and “all of the operations” is sufficient to imply the extraterritorial application of Title IX in this case. Specific exemptions in Title IX do not include an exemption for education abroad programs. In addition, Title IX is remedial legislation. Remedial legislation typically exists for two purposes; (a) to avoid the use of federal resources in support of discriminatory practices and (b) to provide individual citizens protection against discriminatory practices. Case law supports a broad application of remedial statutes in order to apply the statutes overarching purpose (*Gebser v. Lago Vista Independent School District* (1998); *Grove City College v. Bell* (1983)). The use of the word “any” is meant to be most comprehensive in application as established by *Niece v. Fitzner* (1996). In the specific case of Title IX, the court found the legislative history made clear that “all” was meant to be read comprehensively and no implied exceptions to statutory protections exist.

In the case of *King v. Board of Control of Eastern Michigan University* (2002), the Court determined the actions of the Defendants denied the Plaintiffs access to the education abroad program through severe and persistent sexual harassment. Eastern Michigan's University failure to address and stop the actions of the Defendants undermined the Plaintiffs' educational experience and was thus a violation of Title IX.

***Earlham College v. Eisenberg*, No. IP 97-0592 (S.D. IN. April 21, 1998)**

Earlham College v. Eisenberg (1998) is the first case in which a student sought damages for a sexual assault which occurred abroad. This case asked the broad question of whether U.S. education abroad programs should be held to the same responsibilities under Title IX and other U.S. civil rights laws as programs run on the institution's domestic campus. The Plaintiff sued Earlham College for damages based on common law negligence, the handling of her report of sexual assault, and sexual discrimination protections under Title IX after being sexually harassed, assaulted, and sexually assaulted by her host father in a homestay arrangement established by the College. Earlham College based its defense on the liability waiver the Plaintiff signed prior to participating in the education abroad program. This case was settled out of court and the case was unpublished; however, media coverage of the incident called attention to the issues of student safety abroad.

***Bloss v. The University of Minnesota Board of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999)**

The Plaintiff, a student, was sexually assaulted by a taxi driver while participating in the University of Minnesota's Spanish in Cuernavaca Program at the Cemanahuac

Educational Community. Ms. Bloss was traveling in the taxi from her host family's house to engage in a non-program activity. The Plaintiff sued the University for negligence in failure to secure housing closer to the academic campus, failure to provide transportation, failure to adequately warn students about risks, and failure to protect students from foreseeable harm. The University filed for statutory immunity, which was denied. However, this immunity was affirmed on appeal. The University alleges that claims were barred by the Plaintiff's signature of an "Acceptance, Release, and Waiver" document; the fact that the University does not have the duty to warn students about potential criminal acts by third parties without a specific threat; the fact that a failure to warn is not actionable when no preceding threat is made; and that the student had received specific warnings, which she failed to follow.

***Boisson v. Arizona Board of Regents*, No. CV2010-025607 (Ariz. Super. Ct. Maricopa County, August 1, 2013), *aff'd*, 236 Ariz. 619, 343 P.3d 931 (Ct. App. 2015)**

In the above case, the mother of a student who died due to altitude sickness while participating in a student-organized trip in Tibet during an education abroad program in China sued the State of Arizona, the Arizona Board of Regents, and the Nanjing American University. The Court granted summary judgment for the Defendants as the trip was an off-campus, non-school activity, and thus the Defendants did not owe a duty of care. While duty of care has been established in certain circumstances for off-campus school activities, no case law establishes a duty of care between a college or university and students while students are voluntarily participating in off-campus, non-school activities. The Arizona Court of Appeals affirmed the decision.

***Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.*, 130 F. Supp. 3d 792, 796 (S.D.N.Y. 2015), *aff'd*, 660 F. App'x 43 (2d Cir. 2016), No. 1:16CV1108, 2018 WL 1478131, at *1 (M.D.N.C. Mar. 23, 2018)**

This lawsuit, originally filed in the State of New York, was transferred to the U.S. District Court of the Middle District of North Carolina on September 1, 2016 from the U.S. Court of Appeals, 2nd Circuit. The Plaintiffs were appealing the September 2, 2015 dismissal of their suit against Duke University and the Organization for Tropical Studies, Inc. (OTS). The original lawsuit claimed negligence and intentional infliction of emotional distress rising from the drowning death of Ravi Thackurdeen, son of the Plaintiffs, while the student was participating in an education abroad program in Costa Rica. The Appellate Court found in favor of the Plaintiffs in that the District Court was wrong to dismiss rather than transfer the case upon finding the Defendants not subject to personal jurisdiction in New York. While the injury occurred in Cost Rica, the Plaintiffs contested that New York was an appropriate jurisdiction given that the Plaintiffs and their son lived in New York and had signed various documents related to the education abroad program at their place of residence in New York. Both the District and Appellate Court found this assertion insufficient to establish New York as the appropriate jurisdiction for the lawsuit. Claims of negligence and wrongful death were dismissed by the North Carolina District Court. In dismissing the claims, the judge indicated Duke University's actions did not meet the legal characteristics to qualify as gross negligence. Additionally, the student and parents signed waivers prior to the trip releasing the defendants from the defendants from the listed complaints. A claim of intentional infliction of emotional

distress was allowed to move forward. The case was confidentially settled in August 2018.

***Mattingly v. University of Louisville*, No.3:05CV-393-H, 2006 WL 2178032 (W.D. Ky. July 28, 2006)**

Amanda Mattingly, the Plaintiff, sued the University of Louisville after she was sexually assaulted while participating in an institutionally-sponsored education abroad program in Portugal during the summer of 2004. The suit was brought against the University and against the coordinating professor, Shawn Parkhurst, under Title IX of the Education Amendments of 1972 as well as under state negligence and breach of implied contract of security law. Specifically, the Plaintiff asserted a claim for monetary damages under Title IX indicating that the University showed deliberate indifference to the alleged sexual assault as Parkhurst did not immediately take the Plaintiff to the hospital for medical attention or to the police to report the assault. It is clear the Defendant is a recipient of federal education aid and thus is responsible to act in accordance with the rules laid out by Title IX. Summary judgment was granted for Defendant Parkhurst as he is not a recipient of federal education aid and cannot be sued under that law.

As it relates to the Defendant University, the Title IX claim seeks to identify whether the University's failure to respond in an immediate manner to a solitary instance of sexual assault by a third-party individual with no institutional affiliation can support a private suit for monetary damages. Title IX does not explicitly provide a private remedy for monetary damages; however, through case law the courts have provided an implied private right of action (*Gebser v. Lago Vista Independent School District* (1998)). In

defining the scope of the private right of action, the Supreme Court held that the recipient can be held financially liable under Title IX if the sexual harassment or assault of a student occurred in a federally-funded educational program and the harassment or assault was perpetrated by an individual affiliated with the funded institution (*Franklin v. Gwinnett County Public School* (1991)). Student-on-student harassment can also qualify for a claim for monetary damages (*Davis v. Monroe County Board of Education* (1999)). What ties these cases together that is not present in *Mattingly v. University of Louisiana* (2006) is the affiliation of the alleged perpetrator to the federally funded institution.

Title IX, while clearly establishing a set of conditions under which a federal recipient must act, does not address whether said recipient is also financially responsible for the actions of non-affiliated individuals. In addition, the Supreme Court has been careful to limit financial restitution available under Title IX. Since the legislation is treated much like a contract between the federal government and the recipient institution, there must be clear language and clear acceptance to conditions of a putative manner in accordance with the Spending Clause of the United States Constitution. The *Davis* court interprets this to establish that a clear notice requirement is present and funding recipients can only be held financially responsible under Title IX if the funding recipient engages in intentional conduct that is in violation of Title IX or acts with deliberate indifference to known discriminatory actions.

In addition, the court in *Davis v. Monroe County Board of Education* (1999) noted that to be held liable for damages, the recipient institution must have some control over the alleged perpetrator of the discriminatory behavior. The Defendant University

had no control over the private, Portuguese citizen who allegedly assaulted the Plaintiff. In addition, sufficient pre-departure orientations presented students with clear recommendations for appropriate and safe behavior while living in Portugal. Notice is a legal concept that refers to the requirement that a party be aware of a legal process affecting rights, obligations, or duties. Actual notice specifically indicates that such information was delivered to the party in a manner that provides legally sufficient assurance the actual knowledge of the material was disseminated to the intended recipient. In contrast, constructive notice refers to information that a reasonable person or entity should have known if the party(ies) have actual knowledge of the information. The Court in *Mattingly v. Louisville* (2006) did not support a private claim for monetary damages under Title IX. As it applies to the claims under state negligence and contract law, the Defendant University is immune from the suit under the doctrine of sovereign immunity.

Slattery v. Antioch Education Abroad, No. 3:10-cv-00010, 2010 WL 3264050 (S.D. Ohio Oct. 28, 2011)

In a case settled out of court, a student was sexually assaulted while in Mali on a program sponsored by Antioch Education Abroad (AEA). The assailant was a local bus driver hired by AEA. The student alleged AEA was negligent in not educating participants about Malian sexual customs and that AEA had a duty to protect the student from foreseeable, reasonable dangers.

***Fay v. Thiel College*, 55 Pa. D. & C. 4th 353 (Ct. Com. Pl. 2001)**

In the above case, plaintiff Amy Fay was injured while participating in a Thiel College sponsored education abroad program in Peru. After her injury, the plaintiff was admitted to a medical clinic in Cuzco, Peru, and was left under the supervision of a Lutheran missionary, not affiliated with Thiel College, to act as a translator. While at the clinic, the Plaintiff was sexually assaulted and subjected to an unnecessary appendectomy. The Plaintiff's requests for alternative courses of action such as transport to a hospital in Lima, transport to the U.S., and a phone call to her parents were denied. In a motion for summary judgment, the Defendant, Thiel College, cited the Plaintiff's execution of a "Waiver of Liability" and a "Thiel College Consent Form" shielded the institution from legal action.

In its analysis of the facts, the Court found (a) the "Waiver" to be a contract of adhesion and (b) the exculpatory clauses contained within, upon which the Defendants based the Motion for Summary Judgment, were not valid. The court also found a duty of care existed between Thiel College and the Plaintiff because of the special relationship created by the consent form the Plaintiff was required to execute as a condition of participating in the Peru program. Thus, Thiel College was found to have abandoned the Plaintiff.

Whether the duty of care was violated was not established, as this was a question of fact for a jury. The Court also found that the "Consent Form" was not an additional waiver or release of liability as applied to the section regarding medical needs of participants. Instead, the Court established the document to be a form of health care power-of-attorney. Taking into consideration the contract of adhesion status of the

Waiver of Liability and the Defendant's established duty of care towards the Plaintiff, the Court dismissed the Defendant's request for summary judgment.

***Nova Southeastern University, Inc. v. Gross*, 758 So.2d 86 (2000)**

In *Nova Southeastern University, Inc., v. Gross* (2000) student Bethany Gross filed a negligence action against the Nova Southeastern University for injuries sustained during a sexual assault while the Defendant was participating in an off-campus, mandatory internship. Initial summary judgment for the University was reversed and remanded by the District Court of Appeal. The Appellate Court held that a University can be found liable in tort for injuries sustained by a participant when that University assigned the participant to a known unreasonably dangerous site without warning or with inadequate warning. Additionally, the above question was certified to the Florida Supreme Court in *Gross v. Family Services Agency, Inc.* (1998). The Florida Supreme Court found in favor of the Plaintiff identifying that students should be able to reasonably expect institutional offices to avoid placing students at sites of known danger. It was made clear by the Supreme Court that this does not impose a duty of supervision on institutions given the adult status of the student.

***McNeil v. Wagner College*, (N.Y. Kings County August 28, 1996), *aff'd*, 246 A.D.2d 516, 667 N.Y.S.2d 397, 398 (1998)**

In the above case, the Plaintiff, Eileen McNeil, sued defendant Wagner College, alleging negligent supervision of medical care after sustaining a broken ankle while participating in a Wagner College education abroad program. The Plaintiff claimed that she sustained permanent injuries because the Defendant's overseas administrator, Dr.

James Mittelstadt, failed to advise her of the treating physician's recommendation to undergo immediate surgery. This claim assumes that the overseas administrator had a duty to act as an interpreter for the student while the student was being treated in the Austrian hospital. The original claim was dismissed on summary judgment by the Supreme Court and affirmed by the Appeals Court. The dismissal was factually based in The State of New York's rejection of the doctrine of *in loco parentis* at the collegiate level, and therefore the defendant had no legal duty to supervise the student's medical care. In addition, three points of discovery identified that the Defendant's treating physician in Austria was fluent in English and no interpreting services were needed. The Plaintiff additionally failed to present evidence that the overseas administrator was aware of the recommendation for immediate surgery and negligently failed to advise the Plaintiff of this information.

***Bird v. Lewis & Clark College*, 104 F. Supp. 2d 1271, 1274 (D. Or. 2000), *aff'd*, 303 F.3d 1015 (9th Cir. 2002)**

In the above case, the Plaintiff, Arwen Bird, filed an action against Lewis & Clark College for (a) violation of the Rehabilitation Act, (b) violation of Title III of the Americans with Disabilities Act, (c) breach of contract, (d) breach of fiduciary duty, (e) defamation, (f) negligence, (g) fraud, (h) negligent misrepresentation, and (i) intentional infliction of emotional distress. All nine allegations were tied to alleged discrimination by the College based on the Plaintiff's disability by failure to provide full and complete wheelchair access to the education abroad program in Australia. The District Court identified an extraterritorial application of Section 504 and the ADA given that the

student was an American citizen participating in an American university's abroad program taught by American faculty. All claims under Section 504 and the ADA were denied by the Ninth Circuit Court of Appeals finding the program to be readily accessible. Lewis & Clark College was found to have breached their fiduciary duty to the Plaintiff and a judgement of \$5,000 was awarded.

***Phillips v. St. George's University*, No. 07-CV-1555 (NGG), 2007 WL 3407728 (E.D.N.Y. November 15, 2007)**

In the above case the Plaintiff, Phillips, was enrolled at St. George University's (SGU) Grenada campus and incurred alleged sexual harassment by an SGU mailroom employee. Phillips claimed that the Perpetrator's actions created a hostile environment and that the Defendant failed to take corrective action. The Plaintiff sued the Defendant alleging a Title IX violation. The Defendant moved to dismiss the complaint based on lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient service of process, and *forum non conveniens*. *Forum non conveniens* is the discretionary power that allows courts to dismiss a case if another court is better suited to hear the case. This judicial power does not prevent the plaintiff from refiling. The Court found for the Defendant, largely based on the lack of subject-matter jurisdiction.

***Tecza v. University of San Francisco*, No. C 09-03808 RS, 2010 WL 1838778, at *1 (N.D. Cal. May 3, 2010), *aff'd in part, rev'd in part*, 534 F. App'x 667 (9th Cir. 2013)**

Jason Tecza (Tecza), a first-year law student at the University of San Francisco (USF), alleged USF violated his privacy by disclosing his documented disability while participating in a University sponsored abroad program in Europe. Tecza received

accommodations for attention deficit-hyperactivity disorder (ADHD) that included extended time on test and an isolated testing environment. The original, first, and second amended complaints claimed the plaintiff experienced difficulty receiving his testing accommodations while abroad and that his disability and accommodations were disclosed to other students. Claims of invasion of privacy and disclosure of private facts, violation of the California Information Practices Act of 1977, violation of the California Public Records Act, breach of contract, violation of Section 504 of the Rehabilitation Act of 1973, violation of the Americans with Disabilities Act, violation of California's Unruh Civil Rights Act, intentional infliction of emotional distress, unfair business practices, negligent misrepresentation, and negligence. USF moved to dismiss all claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, that a claim may be dismissed because of a failure to state a claim under which relief can be granted. As it relates to all the above claims, the court made no mention of the international location of the incidences when coming to its decision to dismiss the second amended complaint with no leave to amend. Instead, the merits of the case were construed solely by the letter of the law without any consideration as to where the events occurred.

Summary

Participation in undergraduate education abroad programs has cemented itself as a critical component of higher education. Over the past decade student involvement in education abroad has tripled with participation equaling 1.7% of all U.S. undergraduates during the 2015-2016 academic year (I.I.E., 2017). Research in education abroad has largely favored issues of access, participant demographics, academic and psychosocial

outcomes, curriculum development, and teaching strategies. Significantly less research has focused on issues of program development relating to the legal responsibilities of institutions and best practices for student health and safety. The existing literature points to a concerning lack of objective data for education abroad professionals attempting to develop the health and safety component of programs using evidence-based practices (Forum on Education Abroad, 2016b). This absence of data presents a unique concern for increased institutional legal liability in the event of a critical incident involving an undergraduate student participating in an international program. Prevailing case law suggests that U.S. laws are applicable to conduct occurring outside the nation's boundaries (*Bird v. Lewis & Clark College*, 2000/2002; *King v. Board of Control of Eastern Michigan University*, 2002; *Munn v. The Hotchkiss School*, 2017). Not only are these laws applicable, but significant financial liability can be attached by the courts to such behavior. Thus, U.S. higher education institutions are placed in the exceptional position of being potentially held accountable under both U.S. and international law. The next chapter presents the methodology for exploring issues of risk management pertinent to education abroad professionals. Specifically, Chapter Three provides an explanation of the research design, data collection, and data analysis procedures used in this study.

CHAPTER III: METHODOLOGY

Purpose

Participation in credited education abroad by undergraduate students enrolled at U.S. institutions of higher education during the 2014-2015 academic year increased 2.9% from the year prior (Institute of International Education, 2016). The growth in student participation coupled with changes in the overall higher education landscape has led to increased institutional litigation risk related to critical incidents involving student health, safety, and/or conduct. A void exists in the published literature regarding the actions institutions take to decrease the number and severity of critical incidents that occur during international programs. In addition, little to no research is available examining the relationship between these actions and the number or severity of such incidents. Because of the potential to place institutions at legal risk, identifying the components of international programs that can impact critical incidents is important.

Most published research on education abroad concerns student outcomes across academic and social domains, trends in participation, or the academic components of effective programs. In contrast, information available in the public press is more likely to focus on dramatic incidents that threaten student health and safety. These dramatic incidents have led to grass-root efforts to increase reporting requirements for education abroad programs. Most of the efforts are led or initiated by parents who lost a child on an overseas program. Of primary concern is the lack of data related to health and safety incidents, particularly deaths, to American postsecondary students abroad. The Clery Act requires U.S. colleges and universities to disclose specific data related to health and

safety instances on domestic campuses with some limited applicability to international campuses. However, the Clery Act does not generally extend to programs outside of the institutions' immediate geographic region. Thus, reporting requirements under the Clery Act exclude most incidents that occur on overseas programs. The intent of this study was to explore the topic of risk management in education abroad from a legal and quantitative perspective.

Research Question 1 (RQ1) examined the extraterritorial application of U.S laws to conduct occurring abroad. This research question asked the following, "Which U.S. laws apply to conduct and incidences occurring outside of the U.S. territorial boundaries?" Students primarily enrolled at international institutions whose conduct abroad is called into question would be held to the jurisdictions of his or her host institution's country. As each sovereign nation acts under a different legal system, the choice was made to focus on U.S institutions rather than all global institutions. This delimitation set an important boundary for the research and narrows the focus to one legal system. A second important delimitation to Research Question 1 is the focus on the extraterritorial application of U.S. civil rather than criminal law. It is likely that a critical incident involving an education abroad student will have ramifications both in civil and criminal law fora. Some precedent for extraterritorial application of U.S. criminal law exists; however, most international applications involve crimes committed aboard ships or airplanes, crimes related to U.S. government employees or property overseas, crimes prohibited by international treaty, or crimes that directly impact the U.S. despite having been committed elsewhere (i.e., cybercrimes). The propensity of crimes are litigated

within the criminal system of the country in which the crime was committed. For this reason, Research Question One will focus on the extraterritorial application of U.S. civil law rather than U.S. criminal law to critical incidents involving undergraduate students participating in education abroad programs.

Research Question 2 (RQ2) explored the relationship between the education abroad health and safety best practices and the number of critical incidents that occur on international programs. This research question examined the interplay between best practices and critical incidences using a quantitative perspective, asking the question “Does a relationship exist between the health and safety best practices for education abroad and the number of critical incidents occurring to U.S. undergraduate students participating in abroad programs?” Colleges and universities send a wide variety of students at all levels of the academic spectrum abroad. This study focused specifically on undergraduate students enrolled at American post-secondary institutions, a second delimitation of the research. Students at the undergraduate level comprise the largest proportion (i.e., 87.9% during the 2014/2015 academic year) of post-secondary students who study abroad (National Center for Education Statistics, 2016, Table 310.10). Focusing on programs enrolling undergraduate students does not imply that graduate student programs do not experience critical incidents. This choice was made to concentrate on the largest population of post-secondary students studying abroad for purposes of informing education abroad practitioners. While the research is specifically looking at American institutions, the student population will likely include international as well as domestic students.

Research Question 3 (RQ3) further examined the relationship between education abroad health and safety best practices and the number of critical incidents. Specially, this research question asked, “Of the significantly predictive independent variables, which are the most influential in the model?” This research question aimed to identify which specific best practices are the most impactful on the number of critical incidences that occur abroad to undergraduate students on abroad programs.

This study used legal and quantitative research methods to examine issues of institutional legal risk management in American undergraduate education abroad programs. Specifically, this study first sought to explore the applicability of American laws to conduct occurring outside of the American territorial borders and thus in an international jurisdiction. Additionally, this study examined the relationships between adherence to the Forum on Education Abroad’s Standards of Good Practice for Education Abroad (i.e., the Standards) and the number of critical incidents occurring abroad. To explore the relationship between adherence to the Standards and critical incidents this study has three research questions (RQs). The first RQ is based in legal research methodology, and the remaining two RQs were addressed quantitatively.

(RQ 1) What does United States (U.S.) law require and allow for conduct that occurs outside of the U.S. territorial boundaries?

(RQ 2) What are the relationships between the education abroad health and safety best practices and the number of abroad program critical incidents among United States (U.S.) undergraduate students?

(RQ 3) Which education abroad health and safety best practices are the most influential in predicting the number of abroad program critical incidents in the model?

The present study bridges the gap between the legal executive office and education abroad practitioners. Given the complexities of supporting American undergraduate students abroad it is imperative education abroad professionals work in concert with institutional legal staff. This study investigated the relationship between actions taken in accordance with the best practices and the number of critical incidents occurring on undergraduate education abroad programs. Using Hierarchical Multiple Linear Regression, the hypothesized relationship between specific actions taken by the sponsoring institution and the number of critical incidents occurring abroad was explored. This provides insight into whether specific actions taken by sponsoring American institutions impacts the number of incidents.

Definitions

Contract of Adhesion: A contract of adhesion is a contract drafted by a party in which the signing party typically acts from a weaker position of bargaining power and has little to no ability to negotiate or modify the terms of the contract (Garner, 2014). There is a strong implication that such contracts are not freely bargained given the power differential between the drafting and the signing parties. Contracts of adhesion are also referred to as a “standard form contract” or a “boilerplate contract.”

Critical Incidents: Those actions that occur to or impact students participating in an international education opportunity that require professional intervention. The Forum on

Education Abroad's incident categories will be utilized; however, only 10 of 16 incident categories will be considered. The 10 critical incident categories include injury, illness, physical assault, theft, robbery, motor vehicle accident, missing/separated person, sexual harassment, and behavioral/ psychological. Eliminated categories include those that involve damage to property rather than to an individual. These include structural fire, equipment failure, natural disaster, disease outbreak, political upheaval, and terrorist event. While these categories may directly impact an individual student, the injury to the student would be reported in one of the accepted categories. Eliminating the broader category allows for incidents to be counted only once as the injury to the student rather than twice (injury to the student and impact on the program). This delimitation further established boundaries for the research.

Discrimination: The failure to treat all individuals equally with no reasonable purpose upon which to draw a distinction between those favored and those not favored (Garner, 2014).

Electronic Informed Consent (eIC): Electronic informed consent is defined as the use of electronic systems and processes including text, graphics, audio, video, podcasts, passive and dynamic websites, biological recognition devices, and card readers to distribute information related to the study and to document participant informed consent (FDA Use of Electronic Informed Consent, 2016).

Health and Safety Best Practices: The term "best practice" in general refers to those actions, policies, and/or protocols that are generally accepted by professionals in the field to be successful. Some best practices are supported by quantitative or qualitative

research to further indicate the quality of said practice. For this research the actions referred to as “health and safety best practices” are those actions, policies, and/or protocols recommended by The Forum on Education Abroad in the *Standards of Good Practice for Education Abroad* (2015a) and *Advocating for Student Safety Abroad: Working Together at Home and Abroad* (2016a).

Long-arm Statute: A statute that allows a state court to exert jurisdiction over a non-resident defendant on the basis that the defendant has minimum contacts with the state. Individual states’ long-arm statutes define the extent to which the court will grant jurisdiction over non-resident defendants.

Long-term Education Abroad Program: An education abroad program that lasts an academic or calendar year.

Mid-length Education Abroad Program: An education abroad program that lasts one to two quarters or one semester in length.

Purposeful Availment: When a party intentionally engages in actions within a jurisdiction and takes advantage of the benefits and protections of said jurisdiction’s laws.

Purposeful availment is a key component in the establishment of jurisdiction over a non-resident defendant as it is held that if a defendant expects to benefit from the laws of the jurisdiction then the defendant should adhere to said laws as well.

Recipient Institution: A recipient institution is one that receives Federal financial assistance to include the distribution of Federal financial aid to students.

Risk: The legal liability for loss, injury, or damage if such occurs (Garner, 2014).

Short-Term Education Abroad: An education abroad programs that last up to eight weeks in length.

Sponsor: The academic institution, for-profit, or non-profit organization legally responsible for the organization and implementation of the international program.

Thread: A new discussion topic on an Internet message board.

Data Sources

The following section outlines the sources from which data was collected in this study. Different sources were used for the research questions and will be described in the paragraphs below.

Legal Research

A doctrinal legal research method will be applied to this research question, which dictates primary sources as the principal foundation for analysis. Three primary sources of law were considered; (a) statutes, (b) cases, and (c) adjudications. Statutes include the United States Constitution and legislatively enacted laws by the federal or state governments. Federal laws applicable to this research primarily include privacy and civil rights laws. Privacy laws considered include The Family Educational Rights and Privacy Act (FERPA) and The Health Insurance Portability and Accountability Act of 1996 (HIPAA). Civil rights laws considered include the ADA, Section 504, and Title IX. State laws applicable to this research primarily included contract law given there is no federal contract law. Many states have adopted the Uniform Commercial Code (UCC) (White, 1995), which has served to standardize the legal rules binding sales transactions nationwide. The interpretation of non-sales contracts varies from state to state based on

the extent to which a specific state has codified a common law of contracts or relied on the Restatement (Second) of Contracts (1981). In addition to contract law, individual state civil rights laws were considered as applicable to specific legal cases.

Case law and adjudications were important sources for the analysis of the extraterritorial application of U.S. law to conduct occurring in an international jurisdiction. No independent law governs the application of U.S. laws to international conduct and thus the court system is challenged to determine whether an individual law should be applied extraterritorially. Case law, specific judicial decisions issued by individual courts of law, provide an application of U.S. and state law to specific situations. Adjudications refer to administrative agency materials used to enforce administrative agency rules. Administrative, or regulatory, law is important in the implementation of federal law. The United States Department of Education Office for Civil Rights (OCR) adjudications regarding Title IX, Section 504, and the ADA are pertinent primary sources that were considered in this dissertation.

Given the highly exploratory nature of this dissertation a focus on primary sources was necessary. Secondary sources, particularly academic commentary in published journals and law reviews, were reviewed to provide clarification on case law. Legal secondary sources also offer an efficient method for locating additional case law. These sources are not law and cannot be treated as legally binding precedent. An exception to this statement are Restatements, such as the Restatement (Second) of Contracts (1981). Restatements are distillations of common law prepared by the American Law Institute (ALI), an organization comprised of judges, professors, and lawyers. The ALI's goal is

to break down the “black letter law” from cases to indicate trends in the application of common law and to clarify existing law. Restatements are generally recognized by courts as authoritative texts and are frequently cited in opinions. Some treaties and law review articles may also rise to the level of a persuasive authority depending on the credential of the author and reputation of the publication.

Quantitative Research

The primary sources of information for data collection was individuals responsible for tracking critical incidences abroad (i.e., the target population). This role could be held by a variety of individuals depending on the institution, but tracking data regarding education abroad programs is likely an expectation of the international services or related department. Participants were recruited using a combination of direct email invitation as well as recruitment through the NAFSA: Association of International Educators (NAFSA) community message boards. Specifically, recruitment posts were submitted to the Research Connections, the TLS Research & Scholarship Community, and the Education Abroad Knowledge community. These open network communities are subscribed to by those individuals who would exhibit the most interest in completing the survey.

Using two methods for recruiting participants will increase the response rate and provide a larger and more diverse dataset for analysis. NAFSA is the world’s largest nonprofit association committed to international education and exchange. Membership is available on an institutional or individual basis and is renewed annually. NAFSA membership exceeds 10,000 individuals encompassing those employed by public and

private higher education institutions, administrators of nonprofit and for-profit education abroad agencies, elementary and secondary schools, governmental and nongovernmental organizations as well as post-secondary students and those organizations directly or tangentially related to international education.

An inherent limitation to using an Internet community for participant recruitment is the need for intervention to “bump” the thread to a more prominent location in the discussion board. Internet message boards involve the ongoing creation of new conversations and thus new topics will take precedence. This will have the effect of pushing the recruitment thread down in the discussion board list and out of eyesight of potential survey participants. Frequent intervention will be needed to maintain the thread’s visibility in the discussion community (Weslowski, 2014). This intervention can be in the form of refreshing the thread content to effectively move the last effective date of the message. Since message boards are typically sorted by date of involvement, additional interaction with the thread will continue to keep the thread near the top of the discussion board.

Ethical Considerations

Institutional representatives may have concerns in that survey questions will ask to report on potentially sensitive data with legal repercussions. Bubka and Coderre (2010) illustrate the impact a negative incident abroad can have on an institution’s overall health, “If a catastrophic loss occurs, the media coverage may affect the school’s reputation, posing a threat to future admissions, endowments and financial strength” (p. 2). Education abroad professionals have a strong inclination to closely guard institutional

data on critical incidents abroad. The Forum on Education Abroad Incident Database Pilot Project Evaluation (2010) indicated that confidentiality of the data reporting (63%) and reporting out (68%) was very important ($n = 19$). In addition, results indicated that future incident reports should be made so no connection could be made to a specific program or institution (74% yes, 26% no). There could be some concern regarding deductive disclosure. Generally, a greater concern within qualitative research, deductive disclosure occurs when the traits reported make the individual or institutional identifiable within a research report (Sieber, 1992). It is possible for confidentiality of the institution to be breached by deductive disclosure given the data collected in the survey. All data were analyzed and published in the aggregate to secure against deductive disclosure.

Data were collected using an online survey hosted on the Qualtrics software. Institution name is requested in the survey to protect against collecting multiple sets of data from the same institution. This information will be used to eliminate duplicate data and then removed from consideration for the greater analysis. Participants will be required to electronically sign the informed consent document prior to commencing the survey. The use of electronic informed consent (eIC) is accepted by the U.S. Department of Health and Human Services (HHS) Office for Human Research Protections (OHRP) and the Food and Drug Administration (FDA) (FDA Use of Electronic Informed Consent, 2016). Electronic informed consent allows for a timely collection of consent data when the investigator and study participant do not physically interact and increases participant control over the receipt of consent information (Simon, Klein, & Schartz, 2016). Participation may be withdrawn at any time and participants will have the right to

skip questions. A party other than the researcher will de-identify the data to further protect against disclosure. All results will be reported in the aggregate to further protect institutional privacy. Since results will be strictly de-identified, Institutional Review Board (IRB) exempt status will be requested.

Data Collection

Limited data are available regarding the occurrence of critical incidents abroad and/or the practices of education abroad program providers. Thus, no datasets specific to the research questions in this study exist. For this investigation, the data were collected using an online survey via Qualtrics software. Participants were recruited via email notification and message board thread each with an embedded website hyperlink directing interested individuals to the survey. Informed consent was requested within the survey prior to participation. Recruitment emails were sent at the midterm of the fall semester as defined by the Kent State University calendar with a follow-up email sent two weeks after initial communication.

Survey Questions

Survey questions covered the following topics: (a) institutional and global education department demographic information, (b) education abroad participant information, (c) critical incident information, and (d) adherence to the professional best practice information.

Institutional and global education department demographic information.

Demographic data were collected to identify the relationships between institutional type and the research questions. These data were collected and reported in the aggregate to

maintain individual and institutional privacy. Questions in this section include: institutional type (public or private), institutional enrollment, situation of the global education department (centralized or decentralized), reporting structure of the global education department, global education staffing, and risk management staffing.

Education abroad participation information. The purpose of this section is to ascertain general information about the students who elect to participate in abroad programs including the types of abroad programs available to undergraduate students, annual enrollment in education abroad, and the predominant locations of participation.

Critical incident information. Using the categories above and taken from the Forum on Education Abroad, respondents will be asked to report on the number of critical incidents by category for the past three to five years.

Professional best practices. Using the Forum on Education Abroad's *Standards of Good Practice for Education Abroad* (2015a) and *Advocating for Student Safety Abroad: Working Together at Home and Abroad* (2016a) as a template, this portion of the survey will query what actions institutions are putting into practice. The Standards from which good practices were drawn include: (a) Standard 4: Student Selection, Preparation, and Advising, (b) Standard 6: Policies and Procedures, and (c) Standard 8: Health, Safety, Security, and Risk Management.

Data Management

Data were collected using the Qualtrics survey software and downloaded into a Microsoft Excel spreadsheet. For use in data analysis, data from the Microsoft Excel spreadsheets were entered into an SPSS data file. Data obtained from the survey were

maintained in Excel files on a secure electronic storage device and on a computer hard drive. Both the Excel file and the computer had independent password protection to further secure the data. SPSS data files, while not password protected, were maintained on a secure electronic storage device and on a password protected computer. The dataset was accessible only by the researcher and the dissertation committee.

Data Analysis

The following section outlines the data analysis techniques used in this study. A different analytical technique was used for each research question and will be described in the paragraphs below.

Research Question 1

The most appropriate legal methodology to analyze the extraterritorial applications of U.S. laws is the doctrinal or black letter law methodology. This methodology takes a legalistic approach to the question and concentrates solely on the “letter of the law” rather than a more sociological approach that considers the “law in action.” While higher education institutions and international programming exist within the greater social and political context, for practical application purposes education abroad professionals need to be aware of how the law will be applied in the court rather than a more theoretical, academic commentary on the topic. Black letter law methodology focuses on the analysis of primary sources including case law and specific statutes. Academic commentary was considered at a secondary level to provide appropriate explanations for how the courts have applied the law to specific legal cases as available.

A doctrinal approach to RQ1 is appropriate given the presumption against the extraterritorial application of U.S law unless Congressional intent of application in a foreign context can be ascertained (*EEOC v. Arabian American Oil Company*, 1991). Thus, a doctrinal analysis will be used to review the wording of relevant American law coupled with an examination of case law and administrative decisions. Chynoweth (2009) describes doctrinal legal analysis as using the following format: major premise, minor premise, and conclusion. The major premise identifies the general rule of law without any specific context. One could consider the ADA or Section 504 as the specific major premise under which certain factual circumstances (lawsuits) would be considered. The minor premise enters the facts of the situation that would be analyzed under the major premise. Individual lawsuits and the resulting fact pattern would be considered the minor premise. The conclusion is the application of the major premise to the minor premise. Does the individual rule of law apply to the specific situation and in what manner? The legal outcome would be included in the conclusion part of legal research under this format. This format applies a deductive rather than an inductive reasoning pattern.

A sociological context of the law is relevant for legal experts to predict in what direction legislators may move as laws are updated. In terms of attempting to determine what actions may result in negative legal implications for an institution, attorneys and higher education professionals will be best served by basing actions on active case law rather than proposed legislation or legal theory. As specific proposed legislation gains

traction it will likely be important for legal practitioners to reconsider actions taken to mitigate legal liability.

Secondary sources, such as academic commentary, treatises, and practice materials were considered to provide clarity in the analysis of primary sources. The extraterritorial application of U.S. laws has largely been tested in court for cases involving commercial transactions, employment, and antitrust. Laws applied in these legal situations largely will not have a direct implication on potential lawsuits for education abroad. However, the legal analysis of these cases can inform the researcher as to what wording may infer a Congressional intent for extraterritorial application.

Legal research method. It is important to differentiate between the research methods and research methodology applied in this dissertation. Henn, Weinstein, and Foard (2009) define a research methodology as the overall strategy whereas the research methods refer to the techniques applied to derive an answer to the research questions. This research used the “one good case” research strategy as the primary method for identifying relevant case law. Traditionally a legal researcher may find cases on a specific legal issue is a full text search on an internet based legal research database such as Westlaw or Lexis-Nexis or using the print digests. Using this research method requires one to search for a topic using the Descriptive Word Index in any of the West digests. A digest is an indexing system to organize case law by subject matter and includes a summary of the opinions. West Publishing has prepared a variety of digests for individual states, regions of the United States, and individual courts or court systems (i.e., federal courts). A descriptive word or full text search is challenging if one does not

have a limited jurisdiction or individual topic to search. Such a broad search would prove inefficient. Application of the “one good case” research method helps to limit the search by providing a starting point.

This research approach involves identifying one applicable case on the topic of interest in the relevant jurisdiction. One can find the original “good case” by using secondary sources such as legal encyclopedias and law review articles. Once the first case has been identified then the researcher can refer to additional cases of laws cited in that specific case. The “one good case” also provides insight into the key numbers to the relevant issues and sub issues. A key number is a topical subdivision within the West Digest system. With the key number one can find a list of citations involving the same point of law or topic as the original case.

The use of online legal databases such as LexisNexis and Westlaw offer researchers a more accurate method of finding additional relevant case law and checking a case’s precedent. The use of KeyCite in Westlaw and the Shepard’s report in LexisNexis organizes pertinent information to the treatment of the decision in a case. Of greatest importance, KeyCite and the Shepard’s report notify the researcher if a case has been overturned or negative treatment of the decision has occurred. This action is often referred to as shepardizing. Shepardizing allows researchers to check on a case’s treatment to identify whether the case is still “good law”. The Shepard’s report in LexisNexis provides a list of other cases pertinent to the subject matter and all other secondary sources citing the specific case.

Research Question 2

This research question was addressed with a series of bivariate analyses including Pearson correlations, Independent t-Tests, and Analyses of Variance (ANOVAs). There are 13 independent variables representing aspects of best practices in education abroad program management. The dependent variable for each analysis is the number of critical incidents for undergraduate students abroad. Table 1 denotes the independent variable, control or main, and the bivariate analysis technique that will be used.

Table 1
Variables and Statistical Analysis for Research Question 2

	Variable	Scale	Analysis (RQ2)	Coding Values for SPSS Statistics
Statistical Control Variables	Institution Size	Numeric categories	Pearson or Spearman rank correlation	
	Institution Type	Public Private	Independent samples t-Test or Wilcoxon Sign Test	Public – 0 Private – 1
	Annual Education Abroad Enrollment	Numeric	Pearson or Spearman rank correlation	
	Education Abroad Staffing	Numeric	Pearson or Spearman rank correlation	
	Institutional Risk Management Staffing	Numeric	Pearson or Spearman rank correlation	
Main Independent Variables	Emergency Response Document	Yes - Formal Yes – Informal No	One-way ANOVA or Independent samples t-Test	Yes (Formal) – 1 Yes (Informal) – 2 No - 0
	Health Insurance Requirement	Yes – Purchased by the institution (Inst.) Yes – Purchased by the student, show proof (Std/P) Yes – Purchased by the student, no proof (Std/NP) No	One-way ANOVA or Kruskal-Wallis H test	Yes (Inst.) – 1 Yes (Std/P) – 2 Yes (Std/NP) – 3 No – 0

Table 1 (continued)

Variables and Statistical Analysis for Research Question 2

Variable	Scale	Analysis (RQ2)	Coding Values for SPSS Statistics
Evacuation Insurance Requirement	Yes – Purchased by the institution (Inst.) Yes – Purchased by the student, show proof (Std/P) Yes – Purchased by the student, no proof (Std/NP) No	One-way ANOVA or Kruskal-Wallis H test	Yes (Inst.) – 1 Yes (Std/P) – 2 Yes (Std/NP) – 3 No – 0
STEP Registration	Yes – Completed by the institution (Inst.) Yes – Completed by the student, show proof (Std/P) Yes – Completed by the student, no proof (Std/NP) No	One-way ANOVA or Kruskal-Wallis H test	Yes (Inst.) – 1 Yes (Std/P) – 2 Yes (Std/NP) – 3 No – 0
Dedicated Staff Abroad	Yes No	Independent samples t-Test	Yes – 1 No – 0
Waiver	Yes No	Independent samples t-Test	Yes – 1 No – 0

Table 1 (continued)

Variables and Statistical Analysis for Research Question 2

	Variable	Scale	Analysis (RQ2)	Coding Values for SPSS Statistics
	Background Check	Yes – Multiple options No	One-way ANOVA or Independent samples t-Test	Yes – 1 No – 0
				All -0 FBI/State-1 FBI/Local-2 State/Local-3 FBI-4 State-5 Local-6
	Home Judicial Clearance	Yes No	Independent samples t-Test	Yes – 1 No – 0
	Medical Training	Yes – Multiple choices No	One-way ANOVA or Independent samples t-Test	Yes – 1 No – 0
				All – 0 CPR/AED/FA – 1 CPR/AED/BBP – 2 FA/BBP - 3 First Aid – 4 CPR – 5 BBP – 6
	Travel Warnings	Yes No	Independent samples t-Test	Yes – 1 No – 0
Dependent Variable	Number of Critical Incidents	Numeric	-----	-----

Pearson correlations. Pearson correlations, symbolized by r , are the most commonly used correlation coefficient in the behavioral sciences (Hinkle, Wiersma, & Jurs, 2003). A correlation coefficient numerically describes the relationship between two sets of data. The value of a correlation coefficient ranges between -1.0 and +1.0 with the sign of the coefficient denoting the direction of the relationship and the absolute value of the coefficient indicating the degree of the relationship (i.e., magnitude). Prior to calculating Pearson correlations, four statistical assumptions should be examined. First, the two variables must be measured at an interval or ratio level. Second, there should not be any significant outliers. Outliers are individual data points that do not fit the pattern of the remaining data. Outliers were removed prior to calculation of Pearson's correlation coefficient. Third, the data must meet the Assumption of Linearity. Pearson correlations are a quantitative measurement of a linear relationship between two variables. If such a relationship does not exist, then the correlation coefficient is not the appropriate statistical test. Linearity can be determined using a histogram or a Q-Q Plot.

Fourth, the data must meet the Assumption of Normality. Correlation analysis assumes the data points are normally distributed and not skewed towards either end of the distribution. Variables that are highly skewed or have large outliers can distort the analysis. Skewness and kurtosis statistics, histograms, and the Shapiro-Wilk test of normality will be conducted using SPSS Statistics to test the normality of the variables. If the Assumption of Normality is not met, then Spearman rank correlations (Spearman's Rho) will be calculated. Spearman's Rho is the appropriate statistical test to identify a

relationship between two variables that are ordinal, interval, or ratio and do not display normal distributions (Hinkle, Wiersma, & Jurs, 2003).

Independent samples t-Test. The Independent samples t-Test (t-Test) compares the means between two unrelated groups on the same continuous dependent variable. Four assumptions must be met: (a) Independence, (b) Lack of significant outliers, (c) Normality, and (d) Homogeneity of Variance.

The Assumption of Independence refers to the requirement that no relationship exists within or between the individual independent variable groups. Data that do not meet the Assumption of Independence cannot be analyzed accurately using the Independent samples t-Test. This assumption should be addressed primarily within the study design (i.e., the methodology), rather than examined via a statistical analysis.

The presence of significant outliers in the data will reduce the validity of the analysis results. Outliers are individual data points that do not fit the overall pattern. These data points can be identified using multiple methods such as boxplots and descriptive statistics. Descriptive statistics provide quantitative information as to how much of a negative impact, if any, the outlier or outliers have on the analysis. With this information the individual case can be reviewed to determine if the outlier score is an error and whether the outlier should be removed from the analysis.

Normality is another assumption that refers to the normal distribution of the scores on the dependent variable within each independent variable group. Normal distribution refers to the values within a dataset arranged predominantly in the middle and the remainder of the values tapering symmetrically off towards either extreme.

Violations of normality have a small impact on a Type I Error or when the researcher rejects a true null hypothesis. Visually the researcher can look for violations of normality using histogram as well as skewness and kurtosis statistics. The Kolmogorov-Smirnoff (KS) or the Shapiro-Wilk (SW) test can be used to check for normality along with skewness and kurtosis statistics and histograms. Whether the KS or SW test for normality will be used is determined by the sample size with KS used more frequently for larger sample sizes and SW used for smaller sample sizes. If normality is violated, then the Wilcoxon Matched-Pairs Signed-Rank Test (Wilcoxon) will be computed. The Wilcoxon test requires the additional assumption of symmetry in distribution

Homogeneity of variance assumes that all groups of independent variables have similar variance. There is little effect to the analysis if this assumption is violated when the group sizes are equivalent. A Type I Error can occur when this assumption is violated by large sample variance and small group sizes. A Type II Error can occur when this assumption is violated by large sample variance and large group sizes. Homogeneity of Variance can be assessed using Levene's test.

Analysis of variance (ANOVA). One-way Analyses of Variance (ANOVAs) will be used to test for mean differences when the independent variable has more than two levels (Hinkle, Wiersma, & Jurs, 2003). This is appropriate rather than multiple *t* Tests as running a series of *t* Tests increases the Type I error rate. A Type I error is made when a true null hypothesis is rejected. A one-way ANOVA analysis compares the means between the groups of interest and identifies whether a significant difference exists.

Total variance can be portioned into two sources – the variation of scores within groups and the variation of scores between groups. Like the t Test, the significance (p) of the F ratio is assessed to determine whether to reject or accept the null hypothesis. It is important to note that ANOVA is an omnibus test statistic and specifies only that at least two levels of the independent variable are statistically significant, not which individual level or levels is statistically significant. To ascertain which level or levels of the independent variable is statistically significant one must use a post hoc test. Assuming homogeneity of variance, the Tukey honestly significant difference (Tukey's HSD) post hoc test will be used. If homogeneity of variance is not met, then the Games Howell post hoc test will be administered.

Three main assumptions must be met to receive an accurate F distribution in an ANOVA analysis. These assumptions are: (a) Independence, (b) Normality, and (c) Homogeneity of Variance. Independence refers to the random and independent nature of the observations within the population. The Assumption of Normality presumes a normal distribution of the dependent variable in each of the populations. Violations of normality can be determined by looking at a histogram as well as skewness and kurtosis data. Additionally, the Kolmogorov-Smirnoff (KS) or the Shapiro-Wilk (SW) test can be used to check for normality. A violation of the normality assumption can have an impact on the Type I Error rate. If normality is violated, then the nonparametric Kruskal-Wallis H test will be run. The Kruskal-Wallis H Test is a rank-based nonparametric used to test for statistically significant differences between an independent variable with two or more levels on a continuous or ordinal dependent variable.

The Assumption of Homogeneity of Variance speaks to equal variance in the populations of each group. Violations of homogeneity of variance can lead to a conservative Type I Error rate for large sample sizes or an inflated Type I Error rate for small sample sizes. Levene's Test for Homogeneity of Variance will be used to test whether this assumption is met. If homogeneity of variance is violated, then Welch's ANOVA will be run. Welch's ANOVA is appropriate for parametric data of unequal variance.

Statistical power, or the probability of rejecting a false null hypothesis, will be calculated a priori (Hinkle, Wiersma, & Jurs, 2003). Computing an a priori power analysis identifies a target sample size. The independent, dependent, and control variables, and the selected data analytic strategy are needed to calculate the target sample size (for each analysis conducted). Thus, the anticipated sample size will vary based on the structure of inputs from above.

A priori power analyses for the aforementioned statistical tests were conducted in G*Power 3.1 to determine an anticipated sample size that will produce evidence of statistical conclusion validity. A medium effect size (.15) and a power of .80 were used for each power analysis. Target sample sizes are as follows: Pearson or Spearman rank correlation (84), Independent samples t-Test (128, 64 in each group), one-way ANOVA with 3 groups (159), one-way ANOVA with 4 groups (180), and one-way ANOVA with 7 groups (231).

Research Question 3

Multivariate analysis, specifically, multiple regression is needed to examine the influence of the individual best practices on the number of critical incidents. Linear regression is a group of statistical tests used to explain variance in a single, continuous dependent variable from one (i.e., simple linear regression) or more (i.e., multiple linear regression) independent variables of any measurement level (Dimitrov, 2013). Results from a multiple regression analysis include the overall statistical significance of the model, as well as the statistical significance, magnitude, and direction (i.e., positive or negative) of any independent variable in the model.

The general regression equation in multiple regression can be written as:

$$Y' = b_1X_1 + b_2X_2 + \dots b_zX_z + a$$

Overall model significance is reported by the *F*-statistic. The *F*-statistic identifies whether the collection of independent variables in the model are statistically significant predictors of the dependent variable (or the outcome). The amount of variance in the dependent variable (*Y'*) that can be attributed to the independent variables is determined by the coefficient of determination, or the *R*² value. *R*² values range from 0 to 1, with values closer to 1 representing a greater amount of variance in the outcome explained by the predictors (Keith, 2006).

Before conducting the Multiple Regression Analysis, several statistical assumptions are examined. The main statistical assumptions for Multiple Regression are: (a) Independence, (b) Normality, (c) Linearity, and (d) Homoscedasticity (Keith, 2006). The Assumption of Independence of Errors states that the value(s) for each independent variable are not related to each other. Keith (2006) suggests violations of the Assumption

of Independence of Errors would not affect the regression coefficient, but would affect standard errors. Methods to test for a violation of this assumption include boxplot graphing and calculating the intraclass correlation coefficient.

The Assumption of Normality is a statistical assumption common to most parametric tests. Multiple regression analysis assumes that errors are normally distributed and not skewed towards either end of the distribution. Variables that are highly skewed or have large outliers can distort significance tests. Violations of the Assumption of Normality can be testing by running a Kolmogorov-Smirnov or Shapiro-Wilk test, examining histograms, and reviewing skewness and kurtosis statistics.

The Assumption of Linearity is considered to be the most important of all assumptions (Keith, 2006) in Multiple Linear Regression. Linearity assumes a linear relationship between the independent and dependent variables. If the variables are non-linear then all the estimates presented from multiple regression analysis may be biased (Keith, 2006) and thus likely do not represent the population values. The linearity assumption can be tested with scatter plots.

The Assumption of Homoscedasticity examines the variance in values around the regression line to ensure that it is consistent and not the result of any one independent variable. This assumption can also be referred to as homogeneity of variance. Violations of this assumption impact the standard errors and thus the statistical significance. Reviewing a plot of standardized residuals compared to the predicted independent variables is the standard method used to evaluate this assumption (Keith, 2006).

Multicollinearity also must be examined along with testing for the four abovementioned assumptions. Collinearity refers to the presence of two or more independent variables that are closely correlated. This correlation introduces redundancy into the model and can impact the results. Variance inflation factors (VIF) can be calculated to test for collinearity, with a VIF of 10 or greater representing the presence of multicollinearity. Additionally, bivariate correlations between the independent variables can also be investigated, with high correlations (i.e., approaching 1.00) indicating multicollinearity. Independent variables that exhibit collinearity will be analyzed to identify whether the variables address the same construct. If it is determined the variables are, in fact, redundant then one will be removed from the analysis.

Variables and SPSS software. SPSS statistical analysis software was used to apply quantitative analysis methods to the data. It is important to consider the method in which predictors are loaded into the model. This study used hierarchical entry. Those predictors that are expected to impact the number or severity of critical incidences will be loaded using a hierarchical model. While there is no known previous research that has identified predictors, five variables were expected to inherently have an impact on the dependent variable. Based on previous research and theory along with the analyses from RQ2, the variables were entered into the model in two blocks. First the control variables were entered followed by the main variables of interest. The five control variables represent demographic data including, institution size, institution type (public versus private), annual undergraduate education abroad enrollment, education abroad administrative staffing, and institutional risk management staffing. The remainder of the

predictors were entered in the model in the second block, using a free entry method as there is no specific order in which the additional variables are entered.

The multiple regression analysis involved five statistical control variables and ten main independent variables. A medium effect size (.15) and power of .80 was used to calculate the anticipated sample size a priori. Using G*Power 3.1, a target sample of at least 119 is needed to have evidence of statistical conclusion validity.

The above statistical tests will be used assuming the data for both the independent and dependent variables meet certain specifications. The dependent variable should be continuous (i.e., interval and/or ratio level of measurement) and at least moderately normally distributed. If the data for the dependent variable are significantly skewed, then it may be necessary to consider other analytical options. One method for responding to significant skewness in the dependent variable is to dichotomize the outcome below a specified number (i.e., of critical incidents [0]) and above the same number (1). Dichotomizing the dependent variable renders the outcome no longer interval, but ordinal/nominal, and the appropriate statistical tests for both RQ2 and RQ3 will be different. As the dependent variable would have meaningful quantitative codes for the two categories (i.e., with a 0 representing the category of lesser quantity), the outcome is considered a dichotomous ordinal variable rather than nominal (i.e., categorical).

For the statistical control variables in RQ2 (i.e., institution size, institution type, and annual undergraduate education abroad enrollment) the appropriate analyses will be the Independent *t* Test, Chi-Square Test of Association, or the Mann Whitney *U* Test. To determine whether a relationship exists between the main independent variables and the

dependent variable in RQ2, the Chi-Square Test of Association rather than Analysis of Variance (ANOVA) will be used, rather than the Independent t Test or the Kruskal-Wallis H test. Similar to the original proposed analyses, those variables that are statistically significantly related in RQ2 will be used in RQ3 to determine which independent variables are the most influential in the regression model in predicting the impact on the dependent variable. For RQ3, Hierarchical Multiple Logistic Regression will be used instead of Hierarchical Multiple Linear Regression when the dependent variable is dichotomous.

Anticipated Limitations

Limitations of this study are presented below in the subsequent groups; (1) Conceptual, Methodological, and (2) Statistical.

Conceptual and Methodological

One conceptual limitation to the current study is the lack of published research in this area. The relationship between higher education institutions and students has dramatically adjusted since the end of the doctrine of the *in loco parentis* relationship in the 1970's. Colleges and universities are placed in the position of providing enough information to avoid negligence without providing so much information as to denote a legal relationship that skews towards parental. As it applies to education abroad, college and universities sponsor thousands of young students to live in an international setting oftentimes with little orienting. Whose responsibility is it to fully orient the student? Does this responsibility lie solely with the student or with the institution? Higher education institutions thus precariously balance on a ledge between doing too much and

not doing enough. The dangers that exist to students enrolled in coursework on American soil can be exacerbated by the international context, which sometimes involves a language change and almost always includes a cultural difference. Given the lack of published research it is anticipated that additional conceptual areas will need to be considered as this study proceeds.

Statistical

As mentioned previously, the data requested in this survey could be considered sensitive by some individuals and institutions. There is a potential for a small sample size, which would be limiting to the analysis. The necessary sample size is a function of the effect size, selected alpha, and desired power. Statistical power refers to the ability to correctly reject a false null hypothesis (Dimitrov, 2013). Commonly selected values for power are 0.8 or 0.9, which represents an 80% or 90% chance of rejecting a false null hypothesis of no effect (Keith, 2006). Sample size increases as power increase; thus, the more respondents equate to a lower chance of making an error. A low response rate could potentially limit the analyses available and subsequently limit the conclusions the researcher could draw.

Summary

This chapter put forth the methodological approach that was used in this study. Black letter law analysis will be used to answer RQ1: Which U.S. laws apply to conduct and incidences occurring outside of the U.S. territorial boundaries? Quantitative analysis methods were used to address RQ2: Does a relationship exist between the health and safety best practices for education abroad and the number of critical incidents occurring

to U.S. undergraduate students participating in abroad programs? and RQ3: Of the significantly predictive independent variables, which are the most influential in the model? Independent *t*-tests, Pearson or Spearman Correlation, One-way ANOVA, and multiple regression specifically will be applied to illuminate the relationships between adherence to the best practices and the number of critical incidents in undergraduate education abroad programs. This chapter also presented the context, procedure, and anticipated limitations of this research. The following chapters will present the results, analysis, and discussion.

CHAPTER IV: RESULTS

This study used black letter law analysis, parametric and non-parametric inferential statistics, and hierarchical multiple logistic regression to examine the complex interactions between legal responsibility, best practices, and the occurrence of critical incidents to undergraduate students participating in education abroad. Chapter IV will outline the qualitative analysis of the extraterritorial application of American laws and the quantitative analysis of the survey data gathered on the number of critical incidents and application of best practices in undergraduate education abroad programs. Three main research questions directed the study:

- Research Question 1 (RQ 1): What does United States (U.S.) law require and allow for conduct that occurs outside of the U.S. territorial boundaries?
- Research Question 2 (RQ 2): What are the relationships between the education abroad health and safety best practices and the number of abroad program critical incidents among United States (U.S.) undergraduate students?
- Research Question 3 (RQ 3): Which education abroad health and safety best practices are the most influential in predicting the number of abroad program critical incidents in the model?

Research Question 1

Administrators of undergraduate study abroad programs must manage the health and safety of students far outside the physical boundaries of the United States. In the event a negative incident occurs to a student, international education administrators are tasked with managing the student's needs while considering the institution's legal

liability for potential damages. Operational logistics aside, the international setting introduces a significant layer of potential liability for the institution, as administrators must take into consideration the extraterritorial application of American laws as well as the host country's laws. The legal cases in Chapter II present the data that will be analyzed to answer Research Question One (RQ 1), "Which United States (U.S.) laws apply to conduct and incidences occurring outside of the U.S. territorial boundaries?" With this information in hand, higher education administrators can more effectively support student academic travel and decrease their institution's legal risk.

Most reported litigation involving education abroad and institutions of higher education is brought under issues of state tort or contract law, although several cases against institutions have been brought under federal laws, predominantly Title IX of the Education Amendment Act of 1972 (Title IX), the Americans with Disabilities Act of 1990 (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504). It is important to note that this dissertation refers to civil (as opposed to criminal) legal issues. U.S. criminal law has little space for conduct that does not occur within the United States' sovereign borders. Criminal litigation would need to occur in the country of the incident as governed by the host country's laws. There are some instances in which criminal activity abroad could be litigated under U.S. law as covered by The Alien Tort Statute, but this application is very narrowly defined.¹ Incidents related to undergraduate

¹ The Alien Tort Statute (ATS), also referred to as the Alien Tort Claims Act (ATCA), establishes jurisdiction for federal courts to hear lawsuits filed by non-U.S. citizens that allege violations of international law. This law provides non-U.S. citizens with a venue to seek recompense for human-rights violations that occur outside of the United States.

education abroad are unlikely to meet the requirements for litigation allowed under the ATS. This analysis will focus on civil litigation; the U.S. criminal legal system does not extend to extraterritorial conduct and incidents related to U.S. undergraduate education abroad is unlikely to rise to the requirements established under the ATS.

Jurisdiction

Whether conduct abroad can be litigated within the U.S. under U.S. laws is a question of jurisdiction (the authority of the court to hear a legal claim). Three types of jurisdiction are accepted within the U.S. legal system: subject matter, personal, and territorial. Subject matter jurisdiction refers to the authority of a court to hear a case of a specified type; for example, a bankruptcy court would dismiss, for lack of subject matter jurisdiction, a case regarding a domestic matter. Subject matter jurisdiction cannot be waived, but a case dismissed for lack of subject matter jurisdiction can be refiled in the appropriate court.

The second type of jurisdiction is personal jurisdiction (the power the court has to make a decision regarding the party, either a person or entity, against which a claim is brought). Personal jurisdiction is most commonly connected to the location in which the case is filed. In *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016), for example, the case was originally brought in the State of New York and dismissed for lack of personal jurisdiction. Neither Duke University nor the Organization for Tropical Studies, Inc. (OTS) are physically located or legally incorporated in the State of New York. Lawyers for the plaintiff argued that New York had personal jurisdiction as the student and family signed contracts for the education

abroad program at their personal residence in New York. The District Court dismissed the case finding that Duke University's activity within the State of New York was not enough to establish the University as "at home" within the State. This finding is in line with the rulings in *Richards v. Duke University* (2007) and *Scherer v. Curators of University of Missouri and Law School Admission Council* (2001/2002), both of which established that higher education institutions are not subject to general personal jurisdiction when the contact with the forum state consists of activities typical to those of a nationally prominent institution such as recruiting students, raising funds, and maintaining an alumni association branch. The Appellate Court in *Thackurdeen v. Duke University et al.* (2015/2016) ruled against the Trial Court's original decision to dismiss the case for lack of personal jurisdiction and instead ordered the case transferred to the North Carolina courts for further litigation. This case was confidentially settled in mediation on August 1, 2018 (*Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2018)).

Schulman v. Institute for Shipboard Education, Anchorage Hotel Ltd., Global Citizens Travel, LLC. and Fountaine-Pajot (2015) is another example of a case in which claims were dismissed due to lack of personal jurisdiction. Fountaine-Pajot is the French company which manufactured the catamaran that struck and killed Casey Schulman while Casey was participating in a Semester at Sea program. The catamaran company is a French company and sought to dismiss both claims based on lack of jurisdiction. Lawyers for the estate of Casey Schulman claimed Fountaine-Pajot marketed and sold its goods within the U.S. and was thus liable for the injuries to Casey Schulman under U.S.

law. Specifically, jurisdiction could be established under Florida's long-arm statute or under Federal Rule of Civil Procedure 4(k)(2). A long-arm statute allows a state court to exert jurisdiction over an out-of-state defendant on the basis that the defendant maintains adequate contact with the state. Individual states' long-arm statutes functionally define the requirements for minimum contacts in that state as established by *International Shoe Company v. Washington* (1945). Federal Rule of Civil Procedure 4(k)(2) refers to the "Territorial Limits of Effective Service" and, more specifically, a federal claim for an out-of-state court to establish jurisdiction. This rule of civil procedure establishes that serving a summons or filing a waiver of service is enough to establish personal jurisdiction, assuming exercising jurisdiction is constitutional and allowed under U.S. law. In *Schulman v. Institute for Shipboard Education et al.* (2015), the courts established that Fountaine-Pajot's affiliation with the State of Florida was not so continuous and systematic as to allow the State general jurisdiction. While Fountaine-Pajot engaged in print marketing, attended boat shows, and made its boats available for sale in the State of Florida, the preponderance of its business, including the actual purchase, manufacture, and sale/shipping of individual boats, occurred in France. This is consistent with the ruling in *Daimler AG v. Bauman* (2014) in which the U.S. Supreme Court established that a court cannot exert jurisdiction over an international company based on the presence of a subsidiary company within the forum state. Fountaine-Pajot, Ltd. established it had connections with Florida boat dealers for distribution, but argued these relationships were far less than the standards required under Florida's long-arm statute or the Federal Rules

of Civil Procedure to allow jurisdiction. The courts agreed with Fontaine-Pajot and dismissed the claims for lack of personal jurisdiction.

Solomon v. John Cabot University (2018) is an example in which personal jurisdiction was established outside of the state in which the defendant institution is located. The district court found that personal jurisdiction exists for John Cabot University (JCU) in the State of Wisconsin and that a wrongful death suit can move forward against the University. JCU is an American institution, incorporated in Delaware, that operates a campus in Rome, Italy to provide education abroad programs to American students. Beau Solomon (Solomon), a University of Wisconsin student, was murdered in Rome, Italy while participating in an education abroad program at JCU. The parents of Solomon (Parents) allege JCU was negligent in failing to warn students about the safety and security around the campus in Rome. An Italian citizen is currently facing criminal prosecution in Italy for Solomon's death. JCU filed for dismissal of the case citing either lack of personal jurisdiction or under the doctrine of *forum non conveniens*.² Alternately, if personal jurisdiction is established, JCU requested a transfer of the case to the United States District Court for the District of Delaware. The District Court denied both motions and the case will move forward in Wisconsin. In establishing personal jurisdiction for the State of Wisconsin, the District Court found that the behavior the Parents allege led to Solomon's death was a result of JCU's negligence in recruitment

² Forum non conveniens is a legal doctrine that allows courts to dismiss a case or refuse jurisdiction of a case if another court is a more appropriate court (forum) for the case (Garner, 2014). A dismissal of a case under forum non conveniens does not stop the plaintiff from filing the case in the court identified as more appropriate.

and orientation. The recruitment and orientation in question occurred in Wisconsin, not Delaware or Italy. Additionally, the formal contract between the University of Wisconsin (UW) and JCU as well as JCU's employees' personal recruitment of UW students in Wisconsin meet the standard for purposeful availment in the State of Wisconsin. In establishing not to transfer the case to the District of Delaware, the Court identified no overriding connection between the State of Delaware and the facts of the case other than the defendant is incorporated in Delaware. All of the conduct for which the Parents have brought the lawsuit occurred in Wisconsin, the plaintiffs reside in Wisconsin, and Wisconsin is the home of potential witnesses. For these reasons the Court elected to deny the request to transfer the case to Delaware. Courts take into consideration several characteristics of the litigation when determining whether to establish jurisdiction.

Establishing jurisdiction. Four major categories are used to assist in determining whether personal jurisdiction exists in a case: *presence*, being physically present in the forum state and properly served with a copy of the court summons and complaint; *domicile or place of business*, maintaining a residence or place of business in the forum state; *consent*, when a party voluntarily appears before the court;³ and *minimum contacts*. The courts used the minimum contacts test to establish the lack of personal jurisdiction in *Schulman v. Institute for Shipboard Education et al.* (2015).

³ The courts can also assume implied consent. A common example of implied consent occurs when an individual drives on the road of the forum state and thus has given implied consent to the forum state's traffic laws. Thus, if one has a car accident on the forum state's roads then the court has personal jurisdiction.

Established in *International Shoe Company v. Washington* (1945), the minimum contacts test sets forth that the court may not exercise jurisdiction over a nonresident party unless the defendant has “minimum contacts” with the forum state. *International Shoe Company v. Washington* (1945) was a landmark case in that it established, for the first time, a set of rules to better identify when personal jurisdiction can be applied. The International Shoe Company was incorporated in Delaware, with its primary place of business in Missouri, and approximately one dozen salesmen employed in Washington to sell shoes. The salesmen were all residents of the State of Washington and paid by commission. International Shoe Company did not own property or have a permanent location in Washington to purposefully restrict the company’s physical presence to the state of Missouri. Company records indicated that the International Shoe Company earned approximately \$30,000 annually from clients in Washington. The State of Washington served a notice of assessment on the International Shoe Company for a state tax. This tax was enacted on all companies doing business in the state and acted as a mandatory contribution to the State’s Unemployment Compensation Fund. Service of process was completed on one of the resident salesmen and by registered letter to the company’s Missouri headquarters. The International Shoe Company argued for dismissal based on lack of personal jurisdiction. All levels of the state court found in favor of the State of Washington and against the International Shoe Company. The result of the ruling in *International Shoe Company v. Washington* (1945) was the establishment of the minimum contacts requirement, which refers to actions taken by the party in question purposefully directed towards the forum state such as selling goods in the state, visiting

the state, and bringing property to the state, amongst others. The court typically looks for continuous, systematic contact between the party(ies) and the forum state. Personal jurisdiction is permissible when the defendant has continuous, systematic contact with the forum state and the lawsuit is related to the contact within the state.

It is also possible for the court to allow personal jurisdiction over a party for lawsuits unrelated to the contact(s) the party has with the state assuming the party has continuous and systematic contact. *Goodyear Dunlop Tires Operations v. Brown* (2011) held that general jurisdiction exists over an international corporation when the corporation's affiliation with the State in question is so "continuous and systematic" so that the corporation is functionally "at home" in the forum state. This aspect of establishing jurisdiction is called purposeful availment. *Hanson v. Denckla* (1958) expanded on the minimum contacts test to include a more specific explanation of purposeful availment and how it applies to personal jurisdiction. In *Hanson v. Denckla* (1958), the Supreme Court held that for personal jurisdiction to apply there must be some act in which the defendant purposefully avails itself of the privilege of doing business within the forum State, and thus takes advantage of the benefits and protections of the forum State's laws. If one expects to reap the benefits from State laws, then one also must adhere to the laws of the forum state. Establishing personal jurisdiction is a key component of a lawsuit moving forward, as without jurisdiction the case will be dismissed regardless of the merits of the case.

The third type of jurisdiction is territorial jurisdiction, or whether a court has the authority to hear a case based on where the behavior in question occurred. Federal laws

are generally applicable only within U.S. sovereign territory. The presumption against extritorial application of U.S. law was first introduced in *American Banana Company v. United Fruit Company* (1909) when the American owner of the American Banana Company located in current-day Panama (then Columbia) sued rival United Fruit Company in U.S. court under the Sherman Antitrust Act of 1890 for actions that occurred in Panama. The lawsuit stems from United Fruit Company's hostile takeover of American Banana Company using the Costa Rican military. American Banana Company was then eventually legally transferred to United Fruit in a Costa Rican Court. United Fruit argued lack of jurisdiction to hear the case when American Banana sued in U.S. court under the Sherman Antitrust Act. The Supreme Court affirmed the trial court's dismissal of the case for lack of personal jurisdiction as the alleged acts did not occur in the United States. In this seminal lawsuit, the Supreme Court initiated the "conduct test" in which Supreme Court Justice Holmes noted that U.S. law only applies to conduct occurring within the United States.

Since *American Banana Co. v. United Fruit Co.* (1909), the definition of territorial jurisdiction has been adjusted by the courts to better mirror the jurisdictional realities of the United States and other countries. In *Schoenbaum v. Firstbrook* (1967), the plaintiffs, all shareholders of Banff Oil Limited (Banff) took legal action against Banff and its individual directors (Aquitaine Company of Canada, Limited (Aquitaine), Banff's controlling stockholder, and the Paribas Corporation of New York (Paribas)) under the Securities Act of 1933 and the Securities Exchange Act of 1934. The plaintiffs alleged that the defendants used inside information in three transactions involving the

sale of Banff stock for the purpose of enriching themselves. In *Schoenbaum v. Firstbrook* (1967), the Second Circuit of the U.S. Court of Appeals replaced the “conduct test” presented in *American Banana* (1909) with the objective territorial principle, or the effects test. Upon reviewing the federal securities laws, the Second Circuit did not find any specific expression of Congressional intent for the laws to apply outside the U.S. territory. However, the Second Circuit concluded Congress must have intended the federal securities laws to apply extraterritorially when necessary to protect American investors who have purchased foreign securities on American securities exchanges and to protect the American securities market from inappropriate foreign transactions. Opposite of the earlier analysis of extraterritorial application, the “effects test” looks to identify whether the conduct that occurred outside of the U.S. territories had a significant effect in the U.S. or on a American citizen(s) regardless of whether the initial conduct occurred within the U.S. territory. This approach was further edited in *Itoba Limited v. LEP Group PLC* (1995) in which the Second Circuit Court of Appeals combined the “conduct” and “effects” tests to create the “conduct-and-effects test.” Using the conduct-and-effects test as the analytic lens, the Second Circuit held that U.S. laws could be applied extraterritorially if either the original conduct or the effects of said conduct were territorial. *Itoba Limited v. LEP Group PLC* (1995), like *Schoenbaum v. Firstbrook* (1967), involved litigation over federal securities fraud. In this case, Itoba Limited (Itoba) sued LEP Group PLC (LEP), alleging that LEP artificially inflated its stock price without appropriately informing potential investors. The district court dismissed Itoba’s claims of security fraud for lack of subject matter jurisdiction. The Second Circuit reversed and

remanded the case for a new trial, finding that subject matter jurisdiction was applicable under a combination of the conducts and effects tests. In its ruling, the Second Circuit stated that combining applicable principles of both tests better allows the courts to identifying whether enough U.S. involvement is present to justify the application of a U.S. court on extraterritorial behavior. Viewing extraterritorial jurisdiction through a conduct-and-effects lens provides a broad allowance for the application of U.S. laws to conduct outside the U.S. borders.

However, *Morrison v. National Australia Bank* (2010) eliminated the “conduct-and-effects” test, abrogated *Schoenbaum v. Firstbrook* (1967), and reaffirmed the initial presumption against extraterritorial application. In *Morrison v. National Australia Bank* (2010), a group of Australian investors brought a class action lawsuit under the Securities and Exchange Act of 1934 (SEA) against an Australian banking corporation alleging deception about the value of an American subsidiary’s assets. The U.S. Supreme Court ruled unanimously against the plaintiffs, affirming the Trial Court’s dismissal. Unlike *Schoenbaum v. Firstbrook* (1967) and *Itoba Limited v. LEP Group PLC* (1995), the purchase of the securities in question occurred on a foreign stock exchange rather than the American stock exchange. The Supreme Court held that the Securities and Exchange Act does not provide a cause of action for foreign plaintiffs to sue foreign and domestic defendants for securities transactions that occurred on a foreign stock exchange. Justice Scalia, writing for the majority, stated that the legislation of Congress, unless otherwise specifically stated, applies only to the territorial jurisdiction of the United States. Furthermore, the section of the Securities and Exchange Act in question in *Morrison v.*

National Australia Bank (2010) referred to domestic transactions of securities listed on domestic exchanges. Both the transactions and the exchanges in *Morrison v. National Australia Bank* (2010) were foreign and thus did not meet the domestic criteria stipulated in the Securities and Exchange Act (SEA). The decision in *Morrison v. National Australia Bank* (2010) is written broadly so as to apply to all federal legislation and introduces a two-part test to determine extraterritorial application. First, the court must establish whether there was Congressional intent for the law to apply extraterritorially. Second, the court must establish whether the specific facts of the case can be characterized as extraterritorial. The Plaintiffs in *Morrison v. National Australia Bank* (2010) failed on both aspects of the test as the Supreme Court could not identify Congressional intent that the SEA was meant to govern conduct abroad. In addition, the connection between the alleged conduct by the Australian banking corporation and the United States was too slim to claim personal jurisdiction. Due to the comprehensive nature of the decision in *Morrison v. National Australia Bank* (2010), this case has since been used as a guidepost when identifying territorial jurisdiction.

Kiobel v. Royal Dutch Petroleum (2013) further affirmed the presumption against extraterritorial application of federal law. Unlike *Schoenbaum v. Firstbrook* (1967), *Itoba Limited v. LEP Group PLC* (1995), and *Morrison v. National Australia Bank* (2010), *Kiobel v. Royal Dutch Petroleum* (2013) does not include foreign securities transitions and instead sought to apply the Alien Tort Statute (ATS) to violence in Nigeria. The petitioners, all citizens of Nigeria, alleged that they or their relatives were subjected to violence and forced into exile by the Nigerian government. Additionally, the petitioners

alleged that foreign oil companies engaging in oil exploration in Nigeria were complicit with the Nigerian government and therefore liable for the Government's human rights abuses. The Supreme Court delivered a unanimous opinion affirming that the Second Circuit's finding the Alien Tort Statute does not apply extraterritorially. Specific to the Alien Tort Statute, the Court found that the facts of the claim would have to concern a territory of the United States with sufficient force to warrant application of the statute. *Kiobel v. Royal Dutch Petroleum* (2013) applied the test crafted in *Morrison v. National Australia Bank* (2010) to non-securities litigation.

Any individual attempting to institute legal proceedings against a higher education institution or education abroad organization under federal law will first have to present evidence why the claim qualifies under territorial jurisdiction. A party can waive personal or territorial jurisdiction and allow a court case to move forward despite the opportunity to have the case dismissed on jurisdictional grounds. It is expected that jurisdiction defenses will be mounted at the outset of a case rather than after time has passed. The assumption is that barring the need for discovery to identify jurisdiction, the defense should raise lack of jurisdiction before spending the court's time and money. A party may elect to waive personal jurisdiction and allow a case to move forward despite having that defense available if the party believes the lawsuit is inevitable and the forum state is convenient enough. Typically, however, a defendant will not elect to waive jurisdiction if the opportunity presents.

Effective service of process is an important component of a lawsuit that involves international parties. Service of process is the procedure at which a party to a lawsuit

gives the requisite notice to additional parties to the lawsuit in order to gain jurisdiction. Process is the legal term referring to the court summons and copy of the plaintiff's complaint (Garner, 2014). The due process clauses of the United States Constitution bar courts from asserting personal jurisdiction over a defendant unless said defendant has been properly notified. State civil procedure rules delineate the specific procedures allowed within that jurisdiction for proper service of process. Plaintiffs that do not follow the rules of civil procedure regarding service of process should anticipate negative treatment of their lawsuit to include dismissal of the lawsuit. In *Sobel v. Institute for Shipboard Education et al.* (2017), lack of service against a foreign defendant resulted in the dismissal of all claims against the defendant without prejudice. A complaint that is dismissed without prejudice is dismissed temporarily and the plaintiff can elect to re-file the complaint. In *Sobel v. Institute for Shipboard Education et al.* (2017), the plaintiff, Molly Sobel, was assaulted by a tour guide during an Institute for Shipboard Education (ISE) sponsored field trip to Agra and Varanasi (India) organized by Abercrombie and Kent India. The defendant, Shailesh Tripathi, was an employee of Abercrombie and Kent India and a foreign national. Service of process on a party in a foreign country is governed by Rule 4(f) of the Federal Rules of Civil Procedure. For countries that are signatories on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the Hague Convention), service of process occurs through the country's central authority. The Hague Convention does allow for alternative methods of service such as postal channels and directly to parties abroad if permitted by the individual signatory country. India is a signatory on the Hague Convention and has an established

Central Authority of India for the purpose of effecting service of process for foreign plaintiffs. However, India objects to service of process through mail and private process servers. In *Sobel v. Institute of Shipboard Education et al.* (2017), the plaintiff used certified mail to complete service of process on Tripathi and such service was deemed ineffective by the court.

Plaintiffs have a greater challenge if they wish to effect service on individuals in countries that are not signatories of the Hague Convention or other internationally agreed upon means of service of process. Rule 4(f) of the Federal Rules of Civil Procedure indicate the following options are available for prospective litigants: (1) service of process methods allowed by the foreign country's laws in the relevant court, (2) as the foreign country dictates in response to a letter rogatory or letter of request, (3) by delivering a copy of the court summons and plaintiff's complaint directly to the individual, (4) using any form of mail that requires a signed receipt and is both addressed and sent by the clerk, and (5) any other means not prohibited by international agreement as ordered by the court (Fed. R. Civ. P. 4(f)). While the majority of postsecondary institutions will not have concerns regarding effective service of process on foreign parties, it is wise for institutions to be aware of such legal requirements.

Litigation under federal laws must first overcome the broad presumption against extraterritorial jurisdiction before the case will be heard on its merits. The most common federal laws under which litigation will be brought against a higher education institution for conduct occurring during education abroad are Title IX, the ADA, and Section 504. Litigation under the Family Educational Rights and Privacy Act (FERPA) and the Health

Insurance Portability and Accountability Act of 1996 (HIPAA) is not available as individuals do not have a private right of action under FERPA or HIPAA. Since FERPA was enacted under a spending clause the U.S. Department of Education ensures compliance through the threat of the discontinuation of federal funding. *Gonzaga University v. Doe* (2002) affirmed that no private right of action is available under FERPA. Similar to FERPA, individuals do not have a private cause of action under HIPAA. Individuals who desire to bring a civil action against a higher education institution in violation of FERPA or HIPAA would need to consider state privacy or negligence laws that may allow a private cause of action. The HIPAA Privacy Rule provides federal protection for individuals' private health information (PHI) when that information is retained by a covered entity (or an associate of the covered entity). Unless a specific exemption applies, individual state laws that hinder the objectives of the HIPAA Privacy Rule are preempted by HIPAA. A recent decision from the Connecticut Supreme Court in *Byrne v. Avery Center for Obstetrics and Gynecology* (2014) found that claims of negligence brought by individuals against health care providers under state laws in the event of breaches of private health information is not preempted by HIPAA. This decision may lead states to consider HIPAA as the standard of care when considering civil cases involving the release of individual private health information.

Given that neither FERPA nor HIPAA allows a private cause of action, the following analysis of federal laws will focus on Title IX, the ADA, and Section 504. Higher education legal experts can apply the logic used in cases citing the above laws to

determine how other federal laws would be considered in light of conduct occurring abroad.

Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681-1688

Title IX is a federal civil rights law that applies to all educational institutions that receive federal funds, including federal financial aid programs used by enrolled students and disbursed by the institution. The relevant portion of Title IX to this dissertation is “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” The Office for Civil Rights (OCR) is responsible for enforcing Title IX and providing guidance on its application. Title IX has been applied twice in situations regarding undergraduate education abroad, first in *King v. Board of Control of Eastern Michigan University* (2002) and later in *Phillips v. St. George’s University* (2007). Both lawsuits center around sexual harassment which occurred during an international education program. The law does not specifically address sexual harassment, but after Title IX claims on the grounds of sexual harassment were first brought against an academic institution in *Alexander v. Yale University* (1980), the ruling in this case by the 2nd U.S. Circuit Court of Appeals established that sexual harassment could be identified as discrimination on the basis of sex. A subsequent policy memo published by the Office for Civil Rights in 1981 formally broadened the application of Title IX to include sexual harassment.

Enacted under Congress’ Spending Clause powers, compensatory relief under Title IX was originally limited to equitable compensation. The most commonly

considered relief available under Title IX was termination of federal financial assistance, backpay, or an injunction. Plaintiffs were therefore required to pursue civil tort litigation against institutions to receive individual financial relief. *Franklin v. Gwinnett County Public Schools et al.* (1992) established that monetary damages are available under Title IX in cases of intentional violations of Title IX. In this lawsuit, petitioner Christine Franklin was a minor student when she was sexually harassed by a teacher at her public high school. Administration at the high school took limited action despite Franklin reporting the harassment to teachers and school administrators. The teacher, Andrew Hill, resigned under the condition that all pending matters regarding the harassment be dropped by the school. District and Appellate courts found Franklin could not pursue monetary damages under Title IX and the plaintiffs petitioned the U.S. Supreme Court to determine whether monetary relief could be available under Title IX. The Supreme Court ruled in favor of Franklin because individuals in positions of authority at the school district were aware of the harassment and at times attempted to dissuade Franklin from pursuing action against the teacher. In its decision, the Supreme Court identified that monetary damages are available in situations that involve intentional violations of Title IX when backpay and prospective relief are not sufficient remedies. Additionally, the Supreme Court discussed the issue of monetary damages in the event of unintentional violations of Title IX. The Court noted that unintentional discrimination under Title IX is a different legal matter than what was presented in *Franklin v. Gwinnett County Public Schools et al.* (1992) and that monetary relief may not be available.

With the understanding that Title IX not only applies to sexual harassment in academic settings, and that monetary relief may be available, study abroad administrators must focus on how to effectively respond to reports of sexual harassment. Taking swift action both looks to protect the affected student(s), but also decreases institutional liability in a potential lawsuit. *Gebser v. Lago Vista Independent School District* (1998) established a three-prong standard for schools in determining liability for sexual harassment directed from a teacher to a student. First, the sexual harassment must rise to a level that impedes access to educational activities; second, an individual in authority must have “actual knowledge” of the behavior; and third, such authority must be “deliberately indifferent” in responding to the harassment. In *Gebser v. Lago Vista Independent School District* (1998) the plaintiff alleged that her secret sexual relationship with a teacher equated to harassment in violation of Title IX. The District and Appellate Courts found in favor of the Lago Vista Independent School District as the District was unaware of the relationship until the student and teacher were discovered having sexual intercourse in a public setting. Upon being discovered, the teacher was arrested and fired. Furthermore, the Texas Education Agency revoked the teacher’s teaching license. The decisions in *Gebser v. Lago Vista Independent School District* (1998) differs from the decision in *Franklin v. Gwinnett County Public Schools et al.* (1992) because of the differences in actual notice in the two cases. Unlike the Gwinnett County Public Schools, the Lago Vista Independent School District was wholly unaware of the sexual relationship between the student and the teacher. Once the School District was notified of the improper behavior between the student and teacher the School District took swift,

corrective action. Actual notice is an important piece in establishing liability for an institution in a case alleging violations of Title IX.

Moving forward from *Gebser v. Lago Vista Independent School District* (1998), *Davis v. Monroe County Board of Education* (1999) established the standard that institutions can also be held accountable for peer harassment. In its decision, the Supreme Court put forward a four-part criterion for courts to use in identifying whether an educational institution can be held liable for peer-to-peer sexual harassment. First, the institution must have “actual knowledge” of the harassment. Second, the institution must have responded or failed to respond with deliberate indifference. Third, the institution must have substantial control over both the student engaging in the harassing behavior and the context in which the harassment occurs. Fourth, the harassment must have been severe, pervasive, and objectively offensive to the point that the student victim of the harassment is denied education opportunities. In this lawsuit, the petitioner sued the Monroe County Board of Education alleging the severe and systemic sexual harassment of her daughter by a peer denied her daughter academic benefits. Both the District and Appellate Courts found that Title IX provides no private cause of action for peer harassment. The Supreme Court in *Davis v. Monroe County Board of Education* (1999) found that a school board can be held liable under Title IX for peer sexual harassment.

The decisions in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999) established similar criterion for identifying liability for sexual harassment under Title IX. The key difference between the two lawsuits is that *Gebser v. Lago Vista Independent School District* (1998) focuses

on teacher-on-student harassment and *Davis v. Monroe County Board of Education* (1999) discusses student-on-student (peer) sexual harassment. The criterion established in *Davis v. Monroe County Board of Education* (1999) draws on the criterion set forth in *Gebser v. Lago Vista Independent School District* (1998) with the additional requirement that the institution must have substantial control over both the student engaging in harassing behavior and the context in which the harassment occurs. Thus, a school would not likely to be liable for harassment occurring off campus or perpetrated by a student not enrolled in the school.

Title IX has been applied in two major legal cases involving education abroad: *King v. Board of Control of Eastern Michigan University* (2002) and *Phillips v. St. George's University* (2007). *King v. Board of Control of Eastern Michigan University* (2002) is of great importance to understanding the extraterritorial application of Title IX. The plain language of Title IX indicates no Congressional intent for the law to apply extraterritorially. However, in *King v. Board of Control of Eastern Michigan University* (2002), the court found that Title IX applied to students at Eastern Michigan University (EMU) who participated in a five-week study abroad program in South Africa. The court based its decision on the Title IX language prohibiting discrimination “under any education program” (Id. at 788). In the case of *King v. Board of Control of Eastern Michigan University* (2002), the educational program, while located in South Africa, was wholly under the control of Eastern Michigan University rather than a foreign academic institution or a private tour company. In reviewing the language of Title IX, the court focused on the fact that education programs are operations of the University, which are

covered by Title IX, and that the nature of education abroad requires students to leave the United States to pursue said program. If the literal reading of the words “no person in the United States” of Title IX is accepted, then students participating in education abroad programs would be significantly exempted from Title IX protections. In contrast, a broad reading of Title IX includes education abroad programs supported by §§ 1681 and 1687 ensuring *every* educational program should be afforded protection against discrimination under Title IX. This broad reading is the one accepted by the courts.

The rulings in *King v. Board of Control of Eastern Michigan University* (2002) and *Phillips v. St. George’s University* (2007) display the difference in education abroad programs and how specific program characteristics impact application of federal law. *Phillips v. St. George’s University* (2007) provides a significant contrast to *King v. Board of Control of Eastern Michigan University* (2002) in that the courts found Title IX did not apply to the extraterritorial behavior. Plaintiff Erika Phillips, a student directly enrolled in the Saint George’s University School of Veterinary Medicine (SGU) alleged discrimination on the basis of sex in violation of Title IX. Phillips claimed she was sexually harassed by an employee of the University and that administrators at the University did not take her claims seriously. Her specific request for remedy under Title IX was for failure to take corrective action. SGU filed for dismissal based on lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of service of process, and *forum non conveniens*. SGU is an international University located in Grenada, West Indies. Lawyers for the Plaintiff in *Phillips v. St. George’s University* (2007) argued Title IX applied because she was recruited by SGU in New York and paid

SGU tuition in New York and thus subject matter jurisdiction applies under the concept of purposeful availment. Specifically, SGU availed itself of the American territory by recruiting Phillips for admission through U.S. Mail, by accepting U.S. currency for payment in New York, and by receiving federal student loan funds, which were made payable to SGU. The court found that while SGU maintains an office in New York, this fact was insufficient to establish jurisdiction for Title IX. The Court based its decision to dismiss the case against SGU predominantly on the lack of Congressional intent for Title IX to apply extraterritorially and the absence of facts presented by the defendant to support a claim otherwise.

A third case, *Mattingly v. University of Louisville* (2006), also sought to apply Title IX protection to a student participating in an international program. The plaintiff, Amanda Mattingly, sued the University of Louisville and the faculty coordinator, Shawn Parkhurst, after she was sexually assaulted on an education abroad program in Portugal. Claims were brought under Title IX, state negligence, and breach of implied contract of security law. The Title IX claim against Defendant Parkhurst was dismissed as individuals cannot be held personally liable under Title IX. The courts did not comment on the extraterritorial application of Title IX and instead focused on whether the institution is liable under Title IX for actions of an individual unrelated to the institution. In the case of *Mattingly v. University of Louisville* (2006), the perpetrator of the sexual assault was a private citizen of the host country (Portugal), unaffiliated with the education abroad program or the University. Since the assault was a singular event with no

precedent history, the court concluded the University did not act with deliberate indifference in creating a safe environment for the students.

King v. Board of Control of Eastern Michigan University (2002), *Phillips v. St. George's University* (2007), and *Mattingly v. University of Louisville* (2006) represent three separate legal interpretations of the extraterritorial application of Title IX. The major contributing difference between the facts in *King v. Board of Control of Eastern Michigan University* (2002) and *Phillips v. St. George's University* (2007) is the enrollment status of the affected student(s). Eastern Michigan University is a domestic institution located in Ypsilanti, Michigan while St. George's University is an international university located in Grenada, West Indies. Students enrolled in the EMU education abroad program were enrolled in a program that was wholly administered by the domestic institution. This fact played heavily into the Court's decision to apply Title IX extraterritorially. The student enrolled in SGU was not enrolled in an education abroad program but was directly enrolled as an international student for the purposes of earning an entire degree. Applying Title IX to the behaviors of an international institution was established to be out of the jurisdiction of the United States legal system. Unlike *King v. Board of Control of Eastern Michigan University* (2002) and *Phillips v. St. George's University* (2007), the court in *Mattingly v. University of Louisville* (2006) elected to not address the issue of territorial jurisdiction and looked solely at the facts of the case. The University was not responsible for the behavior of unrelated individuals in which the assault on the student was unforeseen and the student was provided appropriate warning as to safety precautions in the area. Little additional litigation is available to

further direct international education administrators in the anticipated application of Title IX to incidences outside the U.S. territorial jurisdiction.

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

The Americans with Disabilities Act of 1990 (ADA) is a federal civil rights law that prohibits discrimination on the basis of disability. Titles I (employment), IV (telecommunications), and V (miscellaneous provisions) cover issues of the law not readily applicable to the question regarding education abroad and higher education. This dissertation will review the application of Titles II (public entities and public transportation) and III (public accommodations and commercial facilities) to education abroad. Individuals who wish to file an ADA claim would file under either Title II against a public institution or Title III against a private institution. Section 504 of the Rehabilitation Act of 1973 (Section 504) is a federal civil rights legislation to prohibit discrimination on the basis of disability. Under Section 504, higher education institutions are required to make their programs accessible to qualified students with disabilities. In line with other federal laws such as Title IX, The Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, and the Family Educational Rights and Privacy Act of 1974 (FERPA), institutions that receive federal financial assistance, including federal student aid programs, are required to comply with Section 504 regulations.

The presumption against the extraterritorial application of U.S. federal law extends to Title II and Title III of the Americans with Disabilities Act of 1990 (ADA). Title I of the ADA was expanded to apply to overseas conduct in the 1991 Civil Rights

Amendments, which were enacted after the landmark *EEOC v. Arabian American Oil Company* (1991) (Aramco) ruling. The petitioner in *Aramco* (1991) sued his former employer (the Arabian American Oil Company), claiming he was discriminated against based on his race, religion, and national origin, which is prohibited under Title VII of the Civil Rights Act of 1964. While the Arabian American Oil Company was a Delaware corporation, the petitioner worked in Saudi Arabia. In ruling against the petitioner, the Supreme Court found a lack of subject matter jurisdiction based on the protections of Title VII not extending to U.S. citizens employed abroad by American employers. Supreme Court justices stipulated in their decision that the legislature was welcome to pass new laws or amend current laws to extend the reach of Title VII to include conduct that occurs abroad. Congress responded to the suggestion of the Supreme Court by passing the 1991 Civil Rights Amendments that amends the definition of employee in Title VII of the Civil Rights Act and Title I of the ADA to include U.S. citizens working outside of the U.S. for U.S. companies. This extension did not apply to Section 504 or Titles II or III of the ADA.

The lack of extension of Section 504 and Titles I and II of the ADA to include extraterritorial conduct further solidifies the presumption against extraterritorial application of the laws. However, there are some characteristics of education abroad programs that may suggest students are afforded some of the protections of those laws while participating in abroad programs.

Bird v. Lewis & Clark College (2000/2002) and *Tecza v. University of San Francisco* (2010/2013) are two court cases in which the plaintiffs alleged discrimination

as prohibited under the ADA and Section 504 while participating in an education abroad program. Arwen Bird was an American undergraduate student who required substantial accommodations for a physical disability that required her to rely on a wheelchair for mobility. Bird participated in a Lewis & Clark College program in Australia taught by American faculty from the institution. While the college made several significant accommodations to the program, there were some parts of the program that were not accessible due to the nature of the student's disability and the curricular nature of the program. When an individual field trip was not able to be made accessible to the student, such as a tour exploring tidal pools or a hike that included multiple stream crossings, the institution arranged alternate activities. The student brought a suit against Lewis & Clark College alleging nine separate causes of action, including violation of Section 504 and Title III of the ADA. The district court specifically addressed the extraterritoriality issue in its ruling, emphasizing that Bird was an American student, participating in an American institution's study abroad program taught by American faculty. Given the close involvement of the American institution, the district court found the presumption against extraterritorial application should not apply. Additionally, the court warned that if Section 504 and the ADA did not apply to study abroad programs then students would be at risk of discrimination with no recourse. After resolving the jurisdiction issue, the court determined Lewis & Clark College was not in violation of Section 504 or Title III of the ADA as the program as a whole was deemed to be readily accessible to individuals with disabilities. On appeal, the Ninth Circuit declined to comment on the district court's ruling on extraterritorial application of the laws. The Ninth Circuit also found for Lewis

& Clark College on the causes of action brought under Section 504 and Title III of the ADA.

Tecza v. University of San Francisco (2010/2013) is the second major litigation regarding the ADA and university education abroad. Tecza was a law student with a documented disability of Attention Deficit Hyperactivity Disorder (ADHD). In this case, Jason Tecza, alleged several violations of the ADA and Section 504 during his education abroad program in Dublin and Prague. First, Tecza alleged that the University of San Francisco (USF) did not accommodate his disability while abroad citing a testing incident during which a custodian indicated Tecza needed to leave his isolated room 45-minutes prior to the end of Tecza's accommodated time. Second, Tecza alleged the University violated his privacy by disclosing his documented disability and accommodations to other students participating in the abroad program. Tecza also filed claims under individual State of California privacy laws. The court rejected Tecza's claims and stated that the program, when viewed as a whole, was accessible to the student. On appeal, the Appellate Court reversed the District Court's dismissal of Tecza's breach of contract, common-law invasion of privacy, and invasion of privacy under the California Constitution claims. Although the court in *Tecza v. University of San Francisco* (2010/2013) did not address the extraterritorial aspect of the case, the court did cite *Bird v. Lewis & Clark College* (2000/2002) as an informative court case. It is important to note that both Section 504 and the ADA require colleges and universities to provide reasonable accommodations to individuals with a qualified disability; however, neither law requires the institution to fundamentally alter its program. This is relevant as the

courts in both *Bird v. Lewis & Clark College* (2000/2002) and *Tecza v. University of San Francisco* (2010/2013) found the education abroad programs to be accessible to the students when viewed as an entire program.

Although not involving conduct occurring during education abroad, *Archut v. Ross University School of Veterinary Medicine* (2012/2014) sheds additional light on the court's treatment of the ADA and Section 504 to extraterritorial behavior. Katherine Archut alleged violation of the Rehabilitation Act, the Americans with Disabilities Act, and the New Jersey Law Against Discrimination (NJLAD) after she was dismissed from Ross University School of Veterinary Medicine (Ross) for poor academic performance. Ross is a veterinary school located in the Federation of St. Kitts and Nevis with an administrative office in New Jersey. The New Jersey office assisted with some administrative support for the university, but decisions regarding reasonable accommodations for students were made at the university on St. Kitts. Unlike the courts in *Bird v. Lewis & Clark College* (2000/2002) and *Tecza v. University of San Francisco* (2010/2013), the courts directly addressed the issue of territorial jurisdiction when determining the outcome. Citing *Morrison v. National Australia Bank* (2010), the court found that Section 504, the ADA, and the NJLAD do not apply extraterritorially. The court found no indication in either of the federal laws to suggest Congress intended for the ADA or Section 504 to apply extraterritorially. Additionally, the court noted that it would go against the rationale of the presumption against extraterritoriality to interpret the text in a manner than requires international institutions to apply U.S. standards for reasonable accommodations. The likelihood that U.S. requirements for reasonable

accommodations would be discordant with the relevant law(s) of other countries is high and provides supplementary support for the presumption against extraterritorial application of the ADA or Section 504. As it applies to the NJLAD, the courts also found against Archut stating that the NJLAD does not apply to conduct occurring outside of New Jersey, to include international locations. While Ross does maintain an administrative office in New Jersey, the decisions regarding reasonable accommodations for Archut occurred at the school in St. Kitts and therefore were not covered by the NJLAD. The courts granted Ross' motion for summary judgment because the laws allegedly violated do not have extraterritorial application to conduct occurring in St. Kitts. The dismissal was affirmed on appeal.

In addition to litigation, some direction has been provided by the Office for Civil Rights (OCR) regarding the extraterritorial application of the ADA and Section 504 to education abroad programs. In *Arizona State University* (OCR Region VIII, November 29, 2001), the OCR investigated a complaint against Arizona State University (ASU) for denying the request for a sign language interpreter for a student who is deaf and desired to participate in an exchange program with the University College Cork in Ireland. The OCR concluded that neither Section 504 nor Title II of the ADA protections extend to extraterritorial behavior and that ASU had not discriminated against the student by denying the request for a sign language interpreter. However, other OCR decisions, such as *Husson College*, 31 Nat'l Disability L. Rep. P 180 (OCR 2005) and *St. Louis University*, 1 Nat'l Disability L. Rep. 259 (OCR Region VII 1990), suggest that Section 504 or the ADA do apply abroad. The complaint in *Husson College* (OCR 2005) was

based on a faculty member allegedly discriminating against the complainant in admission to a nursing education abroad program in Honduras. This complaint failed due to a lack of evidence to demonstrate discriminatory behavior. The University prevailed in *St. Louis University* (OCR 1990) as the Department of Education determined the University complied with the statute for the student's request for an auxiliary aid during an education abroad program in Spain. In separate circumstances, such as in *College of St. Scholastica*, 3 Nat'l Disability L. Rep. 196 (OCR Region V 1992), the OCR avoided ruling on the extraterritorial application of Section 504 or the ADA and merely ruled on the facts of the case setting jurisdictional questions aside. The University was held accountable in *College of St. Scholastica* (OCR 1992) as the Department of Education determined the school had not acted to make sure the student was limited from participating in education abroad as a result of not having the appropriate auxiliary aids. Additionally, the Department of Education determined the College did not have an established grievance procedure available for students. This contradictory information from the OCR presents a challenge for higher education institutions in determining the application of the ADA and Section 504 to extraterritorial behavior on education abroad programs.

Tort Law

Tort and contract law, unlike federal law, is governed by individual states, and thus not covered within the established wide-ranging presumption against extraterritorial application of United States laws. A tort is an act or omission that results in injury or harm to another party for which the courts can impose a legal liability. Tort law is meant

to make the injured party whole, typically through the provision of monetary relief and/or the imposition of a liability on the injurious party(ies). Additionally, tort litigation's intention is to deter other individuals from engaging in the harmful behavior. Since tort law varies from state to state, individual judges have broad leeway in determining whether an alleged behavior rises to the level of a tort and what damages are appropriate; many state courts, however, are guided by the Restatement (Second) of Torts (1979), which provides some commonality in the application of tort law despite the lack of national tort law. The Restatement (Third) of Torts revised portions of the Restatement (Second) of Torts (1979) and brings additional clarity to Liability for Physical and Emotional Harm (2010/2012), Apportionment of Liability (2000), and Products Liability (1998). The most common legal remedies for tort claims are monetary compensation, injunctions, or restitution. An injunction is a judicial order to either not engage in a specific action or to cease an action in motion. There are three general categories of torts: intentional torts, negligent torts, and strict liability torts. An intentional tort is one in which the defendant engages in actions the defendant knew or should have known would occur based on the completed actions or lack thereof. Negligent torts are those actions that are unreasonably unsafe. Strict liability torts are those actions for which a defendant is held legally responsible for the consequences of an action even if there is no fault or criminal intent. Litigation against higher education institutions for wrongdoings related to education abroad generally fall under the intentional and negligent tort categories.

Product liability cases are the most common tort litigated under the strict liability category and thus rarely applied against higher education institutions. *Schulman v.*

Institute for Shipboard Education, Anchorage Hotel Ltd., Global Citizens Travel, LLC. and Fountaine-Pajot (2015) involved an alleged strict liability tort in the death of Casey Schulman while participating in a study abroad program. Ms. Schulman was struck by a catamaran propeller while snorkeling as part of a Semester at Sea program. The estate of Casey Schulman brought a strict liability claim for design defect against Fountaine-Pajot, S.A., and a failure to warn claim against the Anchorage Hotel Limited. Fountaine-Pajot, S.A. was the manufacturer of the catamaran that struck the deceased. Claims against Fountaine-Pajot, S.A. and the Anchorage Hotel Ltd. were dismissed for lack of jurisdiction and lack of fact to support the claims. While these claims were filed as part of a lawsuit in an education abroad related death, they were not filed against the higher education institution. Claims against the institution were brought under legal theories of negligence and directed at the non-profit education abroad provider Semester at Sea, which at the time was sponsored by the University of Virginia. Criminal charges were filed against the boat's captain, Andrew Armour, by the Dominican Republic. Additional information regarding the case is not publicly available as the case was confidentially settled.

Important to the litigation of critical incidents under state tort laws is the statute of limitations for the legal claim. A statute of limitations is the period of time during which one can bring a lawsuit to court. Filing a lawsuit outside the statute of limitations will result in the claim being dismissed and the litigant not having the right to recover compensation for his or her damages. The date upon which the tort occurred or the date at which an individual knew or reasonably should have known is established as the

beginning of the statute of limitations. Each state will have a specific statute of limitations for individual legal claims (for example, negligence versus intentional infliction of emotional distress) as determined by state law. Certain circumstances exist that can delay the start of the statute of limitations regardless of when the original injury occurred. Examples include injuries to an individual who lacks mental competence and later gains competence, concealment by the alleged at-fault party, or the existence of medical symptoms that occur significantly after exposure to certain chemicals (for example, asbestos, chromium, or chemical defoliants).

Two cases at which negligence causes of action were dismissed due to statute of limitations include *Sobel v. Institute for Shipboard Education et al* (2017) and *Grasis v. WIN Access, Inc.* (2017). In *Sobel v. Institute for Shipboard Education* (2017), the defendant Sobel brought a personal injury claim against the Institute for Shipboard Education (ISE) after she was sexually assaulted during a field excursion. The assault occurred in March of 2013 and the lawsuit was filed in March of 2015. ISE filed a motion for summary judgment noting a provision in the Ticket Contract between Sobel and ISE that stated participants had one-year after the injury to file claims for bodily injury or death and six-months after the completion of the voyage for claims other than bodily injury or death. The United States District Court for the Western District of Virginia granted summary judgment for ISE after finding the limitation provision in the Ticket Contract to be valid and that Sobel was significantly outside the time limitation. A subsequent appeal was voluntarily dismissed. Similar results occurred in *Grasis v. WIN Access, Inc.* (2017) in which the plaintiff (Grasis) brought personal injury claims against

the defendants (WIN) after a sexual assault during an education abroad program.

However, in this case the higher education institution sponsoring the program, Worcester Polytechnic Institute (WPI), was a third-party defendant brought into the lawsuit by co-defendant Consejo de Titulares Condominio Ashford Imperial (Consejo), the owners' association of the condominium complex at which Grasis resided during the education abroad program and at which she was assaulted by a private security guard hired by WIN Access, Inc. WIN Access, Inc. (WIN) was the security agency hired by Consejo to provide security services for the condominium complex. The security guard was tried and convicted under Puerto Rican criminal law. Consejo brought WPI into the lawsuit alleging that WPI's lack of supervision of Grasis was contributory to the sexual assault and as such WPI held a portion of the liability. WPI submitted a motion for summary judgment on the basis that since Grasis did not file a claim against WPI within the one-year statute of limitations for tort actions in Puerto Rico then Consejo's third-party contribution claims against the institution were also time barred. The court agreed with WPI and the lawsuit against WPI was dismissed (Report and Recommendation, *Grasis v. WIN Access, Inc.* (2017)).

Negligent torts in education abroad litigation. Litigation against institutions of higher education for torts related to education abroad predominantly are filed for alleged actions of negligence. Negligence involves either doing something which a reasonable person would *not* do, or not doing something a reasonable person *would* (Garner, 2014). Four elements must be met for an action to be successful in being labeled negligent: (1) duty, (2) breach, (3) causation, and (4) injury. First, the offending party must hold a duty

to protect the damaged party from foreseeable risks of the negligent behavior. Duty is defined as a legally recognized relationship between two parties leading to one party having a responsibility to act in a certain fashion toward the other. The identification of the duty required from an institution of higher education to a student is one that has been litigated many times over with varying results based on the specific circumstances of the case. *Bradshaw v. Rawlings* (1979/1979), which established that post-secondary institutions are not an assumed insurer of student safety and do not have an inherent duty in the manner of a parent or guardian to insure student safety, is especially important to understanding the application of tort law to higher education institutions. Similar rulings were found by the courts in *Beach v. University of Utah* (1986) and *Whitlock v. University of Denver* (1987).

Unlike the rulings in *Beach v. University of Utah* (1986) and *Whitlock v. University of Denver* (1987), the court in *Furek v. University of Delaware* (1991) found that the University did owe a duty to the plaintiff. In this case it was identified that the injurious conduct was known to the institution and the institution had disciplinary control over the offending party (fraternity). Additionally, the University was in the process of exerting disciplinary control over the offending party for conduct similar to that which caused the injury. The Supreme Court in *Nova Southeastern University, Inc. v. Gross* (2000) also found the University owed a duty of care to the adult student in the context of placement for off-campus academic experiences. This case is relevant to education abroad as the court found that while the institution does not owe a duty of supervision to students those same students should be able to trust institutional offices to not place them

in a physical location with known dangers without warning or with inadequate warning. Institutions that specifically identify a duty of care owed to student participants in education abroad should anticipate upholding said duty in the event of a critical incident occurring to a student. In *Katz v. United Synagogue of Conservative Judaism* (2012/2014/2016), Julie Katz (Katz) brought a personal injury action against the United Synagogue of Conservative Judaism (Synagogue) after suffering a knee injury while participating in an education abroad program run by the Synagogue. Katz alleged that her knee injury was exacerbated by the Synagogue not arranging for physical therapy appointments as prescribed by the physician in Israel. The Synagogue argued that a duty of care was not owed to the adult student and if such a duty existed that the Synagogue met said duty by arranging for and accompanying Katz to medical appointments not to include physical therapy. The Synagogue did not deny the assertion by Katz that they agreed to supervise her medical care. Initially the Civil Court of the City of New York granted the Synagogue's motion for summary judgment. On appeal, the New York Supreme Court, Appellate Division reversed the Civil Court's granting of summary judgment to the United Synagogue of Conservative Judaism indicating that the evidence presented by Katz withstood summary judgment and should proceed to trial. While the courts considered the lack of application of the doctrine of *in loco parentis*, the student's lack of fluency in Hebrew, the general remoteness of the program, and the transportation difficulties for the student were crucial in ascertaining whether a duty of care existed from the Synagogue to Katz. These issues were enough for the Appellate Court to

consider the relationship between the two parties when determining whether the Synagogue was liable for the damages incurred by Katz.

The specific facts of the case are highly relevant to whether a duty of care is established between a higher education institution and a student participating in an education abroad program. In *Boisson v. Arizona Board of Regents, State of Arizona, and Nanjing American University, L.L.C.* (2013/2015), the district court dismissed a wrongful death negligence claim brought by the mother of Morgan Boisson after her son died from altitude sickness while traveling to Tibet. This judgment was affirmed by the Arizona Court of Appeals, Division I, based on the court finding no duty of care owed by the defendants to the decedent. Lawyers for the estate of Morgan Boisson argued that The Restatement (Third) of Torts: Physical and Emotional Harm §(b)(5) (2010/2012) identifies “a school with its students” as a special relationship that gives rise to a duty of care. Since the deceased was a student at the time participating in a school education abroad program, the plaintiff’s argued a duty of care was established. The district and appellate courts disagreed, instead identifying that the student passed away while participating in a student organized field trip that was not associated directly with the education abroad program. Since the field trip was an off-campus non-school activity the school did not owe a duty of care to the student. A similar ruling was found in *McNeil v. Wagner College* (1996/1998) in which the student, Eileen McNeil, was injured while participating in an education abroad program in Austria. The injured student alleged negligent supervision of medical care after the student suffered permanent damage after breaking an ankle. The courts found against McNeil both at the district and appellate

level, stating the College did not owe the student a specific duty to supervise medical care given McNeil was a legal adult. Additionally, no evidence was presented by McNeil that the College official negligently withheld information that led to the injury. The alleged negligent conduct of the Wagner College official not acting as an interpreter was dismissed, as the treating physician spoke fluent English. There is no presumption that a duty exists between a postsecondary institution and students who hold legal adult status. Whether the court finds a duty exists between the student and the college or university will be based on the individual facts of the case.

The second component of a negligence claim is breach of duty. This element occurs when a party breaks a previously established duty of care by not exercising reasonable care. The third element of a negligence claim is causation; was the breach of the duty of care the cause of the injury? This breach of duty must also be defined as either the actual or proximate cause of the injury. Actual cause occurs when the breach of duty directly leads to the injury in question. For example, a driver of an automobile that strikes a pedestrian while driving under the influence would be the actual cause of the injuries to the pedestrian. Alternately, if the same driver strikes a tree that falls and the tree injures a pedestrian, then the driver would be the proximate cause of the pedestrian's injuries. Proximate cause exists when the breach of duty is reasonably related to the injury. Lawyers for the plaintiff in *Downes v. Oglethorpe University, Inc.* (2017/2018) alleged the defendant, Oglethorpe University (Oglethorpe), was the proximate cause of the death of Erik Downes (Downes). Downes was a participant in a University sponsored education abroad program to Costa Rica when he drowned while swimming. The parents

of Downes brought a wrongful death suit against Oglethorpe alleging negligence and gross negligence. Oglethorpe argued that Downes, a competent adult, assumed the risk of drowning when he elected swim in the ocean. The District Court granted Oglethorpe's motion for summary judgment given the student's assumption of risk. This ruling was affirmed on appeal and the Superior Court declined to review the case.

A major component of cause is whether the injury was foreseeable. Foreseeability is defined as whether the party causing the injury should have reasonably foreseen the consequences of his or her actions. If the general consequences of the conduct were unforeseeable, then the offending party is unlikely to be found liable for the injury. The fourth component of a negligence claim is injury. For a negligence claim to move forward, the plaintiff must prove that he or she was injured by the breach of duty and that the injury(ies) can be rectified by financial compensation. For a negligence claim to move forward these four conditions must be met or face dismissal. The court will then review the case on the merits of the allegation.

Institutions may have some shielding from liability due to state immunity laws as was seen in *Mattingly v. University of Louisville* (2006), in which the plaintiff, Amanda Mattingly, alleged the defendant university had a duty to protect its students from harm, and that negligence led to the sexual assault of the plaintiff. Lawyers for the University argued the claim was barred by sovereign immunity. The courts affirmed the faculty coordinator and institution were eligible for sovereign immunity from the negligence claim as the defendants were acting in their official capacity as a state office. Sovereign immunity protects the state as well as the state's agencies from litigation arising from

common law or specific state law claims. Individual states may have modified the allowed use of the sovereign immunity as a defense by case law, state legislation, or a combination of the two. Additionally, sovereign immunity is generally only available as a defense when the litigated action is a governmental function or occurs during the course of a governmental action. Private institutions would be barred from raising sovereign immunity as a defense but may assert a charitable immunity defense to specified tort actions. Charitable immunity, like sovereign immunity, protects charitable organizations from liability while acting within the scope of the charitable organization's mission. This form of immunity has been largely made defunct by individual state's legislation and case law; however, there remains some application of the doctrine in a limited number of states. Immunity of a state and its agencies from monetary damages resulting from federal law claims is guaranteed under the Eleventh Amendment to the Constitution.

Intentional torts in education abroad litigation. Few cases have been litigated against institutions of higher education for intentional torts related to undergraduate education abroad. Common intentional torts include battery, trespass, assault, offensive battery, false imprisonment, and intentional infliction of emotional distress. Most intentional torts are violations litigated under the criminal, rather than civil, law system. One case in which an institution of higher education was sued for an intentional tort is *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016/2018). *Thackurdeen v. Duke University et al.* (2015/2016/2018) involves a claim of intentional infliction of emotional distress against Duke University and the private education abroad program provider Organization for Tropical Studies,

Incorporated (OTS). Ravi Thackurdeen was a Duke University student who drowned while swimming in Costa Rica on a University sponsored education abroad program. Claims of negligence and wrongful death against the University and the education abroad program provider, OTS, have been dismissed for valid waiver and release documents. The claim for intentional infliction of emotional distress will have to meet four elements to rise to the level of a tort: (1) the defendant must act intentionally or recklessly, (2) the defendant's conduct must be extreme and outrageous, (3) the conduct must be the cause of (4) the alleged emotional distress. A confidential settlement was reached between the two parties in August 2018.

Strict liability torts in education abroad litigation. Strict liability tort claims typically fall into one of three categories: keeping wild animals, ultra-hazardous activities, and consumer product liability. Examples of ultra-hazardous activities include the transportation, storage and use of explosives (including dynamite), radioactive materials, or certain hazardous chemicals. The defendant does not have to have engaged in negligent or intentionally harmful behavior to be found liable for a strict liability tort. Instead, the defendant can be held liable if someone is harmed or injured because of the defendant's product or actions. The court is holding the defendant to a level of legal accountability since the defendant is engaging in actions that are inherently dangerous and thus require the defendant to act under a higher level of personal and professional responsibility. To be successful in a strict liability case the plaintiff must display (1) proof of injury, (2) proof that the defendant's actions or product(s) caused the injury, and

(3) proof that the defendant's actions were unreasonably unsafe or that the defendant had control over the product in question.

Four counts of strict liability tort were brought in *Schulman v. Institute for Shipboard Education et al.* (2015); a claim of design defect and a claim of failure to warn against Fountaine-Pajot and a claim of design defect and a claim of failure to warn against the Anchorage Hotel. The Anchorage Hotel in Dominica was associated with the snorkel tour boat during which the accident occurred; it provided the catamaran, crew, and captain for the excursion. All four of the strict liability claims were dismissed for lack of jurisdiction or lack of evidence. While the lawsuit in which these claims were brought was in relation to an education abroad program, none of the strict liability claims was leveraged against a higher education institution or the education abroad program. Instead the claims were brought against companies associated with the injuries sustained by Casey Schulman that led to her death. It is unlikely that a higher education institution or education abroad program provider would have to defend against a strict liability claim for injuries sustained during an education abroad program given the narrow circumstances that qualify for such a lawsuit.

Contract Law

Legal challenges to waivers of liability are the most common contractual law claims to be brought in lawsuits involving education abroad programs. The use of waivers of liability or similar legal documents are common in education abroad as a means of decreasing institutional liability. In *Fay v. Thiel College* (2001), the College argued that Amy Fay's claims should be dismissed due to the student signing a "Waiver

of Liability” and a “Thiel College Consent Form,” both of which acted to shield the institution from liability in the event of a variety of negative circumstances. The court denied the College’s request for summary judgment after its finding that the “Waiver” was a contract of adhesion, or one in which a power differential between the two parties executing the document leads to a “take it or leave it” situation. In the case of *Fay v. Thiel College* (2001), students were required to sign the “Waiver of Liability” or not participate in the education abroad program. The court in *Thackurdeen v. Duke University et al.* (2018) dismissed claims of negligence and wrongful death against the University on the basis of a signed waiver of liability. These waivers must be carefully constructed by legal counsel so that they hold up to scrutiny if applied in court.

Breach of contract claims may also be brought against a higher education institution for incidences occurring abroad. One of three claims in *Mattingly v. University of Louisville* (2006) was a breach of implied contract of security. Functionally, Mattingly sued the institution for violating an unwritten contract that the institution would maintain the security of the student participating in the education abroad program. This claim was barred by sovereign immunity. *Bird v. Lewis & Clark College* (2000/2002) represents an additional case in which an institution is sued for breach of contract. The plaintiff, Arwen Bird, alleged breach of contract in that the student paid tuition, expenses, and fees and the College did not provide the necessary accommodations as contractually promised. Lewis & Clark College and Bird disagreed as to whether the accommodations made available to Bird were reasonably satisfactory. A trial by jury found the College not liable for breach of contract. Many aspects of the relationship between a student and

university or college are contractual and thus could be litigated in the event of an adverse event during an education abroad program.

As identified above there is a risk of colleges and universities being sued by undergraduate students or the estates of said students who are harmed or injured during an education abroad program. The benefits of international education, however, must outweigh the risk if higher education institutions continue to engage in sending undergraduate students abroad. Compiling and analyzing data regarding the quantitative nature of the prevalence of critical incidents abroad further provides institutional legal counsel, international education administrators, and risk management administrators with information to make decisions about how to best manage international education programs. Research Questions 2 and 3 explored the prevalence of critical incidents abroad as well as the relationship between adherence to the best practices as defined by the Forum on Education Abroad and the number of critical incidents. It is anticipated that critical incidents will occur to undergraduate students abroad. How administrators address program creation and management leads to the institution being protected in the event a critical incident occurs that leads to legal action against the institution. The following quantitative data further supplements the qualitative data so that higher education administrators can best understand the nature of risk management in undergraduate education abroad.

Research Question 2

Data were collected from higher education institutions regarding critical incidences that occurred to undergraduate students participating in education abroad

programs. This data formed the basis for a quantitative analysis of the relationship between the number of critical incidents and the adherence to professional best practices as defined by the Forum on Education Abroad.

Descriptives

Participant institutional data were collected regarding risk management actions taken by the institution and the number of undergraduate student critical incidents that occurred while completing education abroad programs within the last three to five years. Of the total number of respondents, 56 cases were removed due to missing data. The total valid participant sample equaled ($N = 124$). However, there were missing data on other variables as well, resulting in smaller total sample sizes for participant primary role ($N = 123$), time in position ($N = 122$), and time in international education ($N = 123$). Of the sample, 55 (44.7%) participants reported their primary role to be the Education Abroad Director. The second most frequently selected primary role for respondents was International/Global Office Administrator ($n = 23$, 18.7%). Table 2 displays the remaining frequencies for respondent primary role. Participants ($N = 122$ and 123) were employed in their respective positions for an average of 5.61 years ($SD = 5.61$; $Mdn = 4.00$, $IQR = 6.00$) and in higher education as a profession, on average, for 11.55 years ($SD = 7.72$; $Mdn = 10.00$, $IQR = 10.00$).

Not all participants chose to answer the questions regarding institution public or private status or the institution's highest degree awarded resulting in 123 and 122 for the total sample sizes, respectively. Participants were employed slightly more by private institutions ($n = 63$; 51.2%) compared to public institutions ($n = 60$; 48.8%). Most

individuals were employed by institutions whose highest degree awarded is either a Master's ($n = 40$; 32.8%) or Doctoral degree ($n = 45$; 36.9%). Twenty-one (17.2%) of the institutions reported the highest degree awarded was a professional degree (J.D., M.D., D.V.M., etc.), while 8.2% ($n = 10$) awarded Baccalaureate degrees and 4.9% ($n = 6$) awarded Associate's degrees.

Of the total sample ($N = 124$), one participant elected not to answer either the question on institution size or Forum on Education Abroad membership resulting in 123 for the total sample size. Data were collected from institutions of varying total enrollment with 25 (20.3%) enrolling 5,000 to 9,999 students. Most individual respondents were employed by institutions that held membership in The Forum on Education Abroad ($n = 73$, 59.3%). Twenty-four-point four percent ($n = 30$) of the respondents were employed by institutions who have never held membership, and 8.1% ($n = 10$) of the respondents were employed by institutions that do not currently hold membership and may or may not plan to pursue membership in the future.

Table 2

Summary Table of Variables, Classification, and Coding Values

Variables	Scale	Analysis	Code
Statistical Control Variables			
Institution Size	Interval	Welch's <i>t</i> Test	--
Institution Type			
Public	Nominal	Chi-Square	0
Private			1
Annual Education Abroad Enrollment	Ratio	Mann Whitney <i>U</i>	--
Independent Variables			
Emergency Response Document			
No	Nominal	Chi-Square	0
Formal (Yes)			1
Informal (Yes)			2
Health Insurance			
No	Nominal	Chi-Square	0
Purchased by Institution (Yes)			1
Purchased by Student with/without Proof (Yes)			2
Evacuation Insurance			
No	Nominal	Chi-Square	0
Purchased by Institution (Yes)			1
Purchased by Student with/without Proof (Yes)			2
STEP Registration			
No	Nominal	Chi-Square	0
Completed by Institution (Yes)			1
Completed by Student with Proof (Yes)			2
Completed by Student no Proof (Yes)			3
Dedicated Staff Abroad			
No	Nominal	Chi-Square	0
Yes			1
Background Check			
No	Nominal	Chi-Square	0
Yes			1
Home Judicial Clearance			
No	Nominal	Chi-Square	0
Yes			1
Medical Training			
No	Nominal	Chi-Square	0
Yes			1
Travel Warnings			
No	Nominal	Chi-Square	0
Yes			1

Table 2 (continued)

Summary Table of Variables, Classification, and Coding Values

Variables	Scale	Analysis	Code
Dependent Variable			
Number of Critical Incidents			
0-5	Ordinal	--	0
6+			1

The Dependent Variable

Ninety-five ($n = 95$) participants from the total ($N = 124$) responded “Yes” to retaining records of critical incidents or provided responses to the items querying the number and type of critical incidents. Some participants indicated that their institution does not keep a record of the number or type of critical incidents, but recorded responses for the survey questions asking for these data. Data were included from those participants whose total number of critical incidents matched the number of critical incidents by type of incident. The individual responding on behalf of the institution may have been aware of these data even though the institution does not keep formal records. Cases with no responses on the Dependent Variable were not included in the analyses. Thus, the total sample for RQ2 and RQ3 equaled 95. Based on the abovementioned inclusion/exclusion criteria, the final outcome variable contained the total number of critical incidents in the past three to five years.

Across all participants, the average number of critical incidents was 42.81 ($SD = 155.79$). When calculated as a continuous variable, the data were not normally distributed (Skewness = 5.518, $SE = .247$). The number of critical incidents variable was significantly and positively skewed, with a large number of cases having zero critical

incidents ($Mdn = 6$, $IQR = 18$). To address the issue of severe skewness, the data were coded into a binary variable with those institutions reporting zero to five critical incidents coded as “0” and those institutions reporting six or more critical incidents coded as “1.” Using these codes, 46 (48.4%) of respondents were coded “0” and 49 (51.6%) of respondents were coded “1.”

Statistical Control Variables

As the sample size decreased from 124 to 95, the descriptive statistics for the institution size variable were reanalyzed prior to conducting any inferential tests. Table 3 provides the frequencies of each group size coded from zero to eight on an ordinal Likert scale. The average size of the higher education institutions was between approximately 3,000 to 9,999 students ($M = 3.55$, $SD = 2.09$). The data were normally distributed (Skewness = .081, $SE = .247$). Levene’s Test was completed to determine whether the assumption of Homogeneity of Variance (HOV) was met. The variances were statistically not equivalent ($p = .026$). Institution size was normally distributed within each critical incident group; Group 0 (Skewness = -.121, $SE = .346$) and Group 1 (Skewness = -.269, $SE = .340$). A Welch’s Independent t Test was completed as the institution size variable was normally distributed and the HOV assumption was violated. There were statistically significant differences between the critical incident groups on institution size ($t[87.547] = -3.472$, $p = .001$). Institutions with more critical incidents (i.e., critical incident group 1) were larger in size ($M = 4.22$, $SD = 2.26$) than institutions with less critical incidents (i.e., group 0; $M = 2.83$, $SD = 1.64$).

Table 3

Institution Size (N = 95)

Code	Institution Size	<i>n</i>	%
0	0-999	6	6.3
1	1,000-1,999	16	16.8
2	2,000-2,999	9	9.5
3	3,000-4,999	13	13.7
4	5,000-9,999	19	20.0
5	10,000-19,999	14	14.7
6	20,000-29,999	11	11.6
7	30,000-39,999	4	4.2
8	> 40,000	3	3.2

Participation in undergraduate education abroad greatly varied for the represented institutions with a range of two to 4,000 students ($M = 446.96$, $SD = 701.36$).

Undergraduate education abroad participation was not normally distributed as an individual variable (Skewness = 2.851, $SE = .247$; $Mdn = 175$, $IQR = 430$).

Additionally, the variable was skewed across both levels of the dependent variable (Group 0: Skewness = 1.644, $SE = .350$); Group 1: Skewness = 1.921, $SE = .340$). A Mann-Whitney test was conducted, and there were significant differences between the critical incident groups on the annual undergraduate enrollment in education abroad ($U = 403.500$, $Z = -5.391$, $p = .000$). Annual education abroad enrollment was higher for critical incident Group 1 with a mean participation of 744.02 individuals ($SD = 872.34$, $Mdn = 400$, $IQR = 825$) compared to an average participation of 130.52 ($SD = 131.88$, $Mdn = 90$, $IQR = 156$) for Group 0.

Forty-four (46.3%) of the respondents were employed by a public institution with 20 (43.5%) in group 0 of the dependent variable and 24 (49.0%) in group 1. Fifty-one

(53.7%) of the respondents were employed by private institutions with 26 (56.5%) in group 0 of the critical incident variable and 25 (51.0%) in group 1. A Chi-Square Test of Association was used to examine the relationship between public and private institutions and the number of critical incidents. The Chi-Square Test showed that there was no significant relationship between the institution type and the number of critical incidents ($\chi^2 = .289$, $df = 1$, $p = .591$). That is, the number of critical incidents does not depend on whether the institution is public or private.

Main Independent Variables

A series of Chi-Square Tests of Association were computed to examine the relationship between the main individual independent variables and the dependent variable. Chi-Square Tests were used rather than the Linear-by-Linear Association, given that the variables do not have equal and ordered intervals between categories (Kendall & Stuart, 1979). Goodman and Kruskal's gamma was used to measure the effect size of each statistically significant relationship. Goodman and Kruskal's gamma was selected over Phi and Cramer's V as the variables are of an inherent, ordinal nature rather than nominal (Sirkin, 2005).

The majority of respondents ($n = 80$; 84.2%) reported their institution had an emergency response (ER) document for education abroad. Of the institutions that maintained a document, 50 (52.6%) had a formal document and 30 (31.6%) had an informal document. Formal documents were delineated as those documents that had been approved by legal counsel, institutional board, or a similar leadership level in the organization. Informal documents were described as those held internally within the

education abroad office, but not formally approved by the greater institution. Fifteen (15.8%) reported that their institution did not currently maintain an emergency response document for education abroad.

A Chi-Square Test of Association was conducted. The Chi-Square test showed that there was a statistically significant relationship between the number of critical incidents and the ER document groups ($\chi^2 = 6.512$, $df = 2$, $p = .039$). A Goodman and Kruskal's gamma of .437 ($p = .008$) suggests that ER document has a medium effect on the number of critical incidents. Specifically, institutions with a formal ER document were more likely to report higher numbers of critical incidents ($n = 25$) as compared to those institutions with no ER document ($n = 4$) or an informal ER document ($n = 20$; $p < .05$). Significant differences were also displayed within levels of the independent variable. Institutions without an ER document were also more likely to report lower numbers of critical incidents ($n = 11$) than higher numbers of critical incidents ($n = 4$; $p < .05$). Additionally, institutions with informal ER documents were more likely to report a higher number of critical incidents ($n = 20$) than a lower number of critical incidents ($n = 10$; $p < .05$).

The survey inquired about any requirements for an international health insurance policy for undergraduate education abroad participants (i.e., health insurance). There were three categories: (1) No policy regarding health insurance (No Insurance), (2) Institution purchases health insurance directly for the student (Institution Insurance), and (3) Institution requires the student to independently purchase health insurance (Student Insurance). The majority of respondents ($n = 62$; 65.3%) reported an institutional policy

of directly purchasing health insurance for student participants. Thirty (31.6%) of the respondents indicated requiring students to independently purchase health insurance, and three (3.2%) respondents noted that their institutions do not require international health insurance for student participants.

A Chi-Square Test of Association was conducted. The results showed that there was a statistically significant difference in the number of critical incidents between the health insurance groups ($\chi^2 = 6.434$, $df = 2$, $p = .040$). There was a weak correlation that was not statistically significant between international health insurance requirement and critical incidents as demonstrated by Goodman and Kruskal's gamma ($\gamma = -.197$, $p = .333$). A z-test with a Bonferroni adjustment established that institutions that purchased international health insurance were more likely to report a greater number of critical incidents ($n = 37$) than institutions that did not require international health insurance ($n = 0$) or required students to purchase the insurance independently ($n = 12$; $p < .05$). Institutions that purchased insurance directly for students were more likely to report a higher number of critical incidents ($n = 37$) than a lower number of critical incidents ($n = 25$).

Most institutions ($n = 91$; 95.8%) required evacuation insurance for students participating in undergraduate education abroad programs, with 73 (76.8%) purchasing the insurance directly for the student participants. Eighteen (18.9%) of the respondents reported that their institution requires students to independently purchase evacuation insurance and four (4.2%) institutions stated that they do not require any evacuation insurance. A Chi-Square Test of Association was conducted to examine the relationship

between the evacuation insurance variable and number of critical incidents. The results showed that there were no statistically significant differences in the number of critical incidents between the evacuation insurance groups ($\chi^2 = 4.581$, $df = 2$, $p = .101$).

For enrollment in the Smart Traveler Enrollment Program (STEP), one respondent elected not to answer the question ($N = 94$). Most institutions require the students to enroll in STEP, but do not require the student to submit proof of completion ($n = 36$; 38.3%). There were 10 (10.6%) institutions that mandate students to enroll in STEP and also require proof of completion. Twenty-five (26.6%) institutions directly enrolled their students in STEP, and 23 (24.5%) selected that they have no requirement.

A Chi-Square Test of Association was used to examine the relationship between STEP enrollment and the number of critical incidents. Using the nonparametric Chi-Square Test, there were statistically significant differences on critical incidents between the two groups ($\chi^2 = 15.904$, $df = 3$, $p = .001$). There was a weak correlation between STEP enrollment and the number of critical incidents that was not statistically significant as determined by Goodman and Kruskal's gamma ($\gamma = .277$, $p = .063$). A z -test with Bonferroni adjustment established that institutions that required students to enroll in STEP, but did not require proof were more likely to report a greater number of critical incidents ($n = 23$) than institutions that had no STEP enrollment requirement ($n = 7$), enrolled the students directly ($n = 17$), or those institutions that required the student to enroll and display proof of enrollment ($n = 1$).

Additionally, there were statistically significant differences within three out of four levels of the independent variable. Institutions that did not have a STEP enrollment

requirement were more likely to report less critical incidents ($n = 16$) than more critical incidents ($n = 7$; $p < .05$). The opposite was seen for institutions that directly enroll students in STEP where higher numbers of critical incidents were reported ($n = 17$) than lower numbers ($n = 8$). Institutions that require students to enroll in STEP and show proof of enrollment reported lower numbers of critical incidents ($n = 9$) than higher numbers ($n = 1$). No statistically significant difference between reported between critical incident groups for those institutions that required students to personally enroll in STEP, but did not require students to show proof of enrollment.

Of the total participants, 50 (52.6%) reported that they do not have and 45 (47.4%) reported that they do have staff abroad dedicated to undergraduates. A Chi-Square Test of Association was used to analyze the differences in the means. There were statistically significant differences on critical incidents between the groups ($\chi^2 = 3.878$, $df = 1$, $p = .049$). A Goodman and Kruskal's gamma of .389 ($p = .044$) suggests a small effect size indicating that whether or not an institution supports dedicated staff abroad has an impact on the number of critical incidents. A z -test with a Bonferroni adjustment established that institutions with no dedicated staff abroad were more likely to report five or less critical incidents annually ($n = 29$) as compared to six or more critical incidents ($n = 21$). Institutions that did have dedicated staff abroad were more likely to report six or more critical incidents ($n = 28$) as compared to five or less critical incidents annually ($n = 17$).

For the survey item inquiring about background checks for undergraduate student participants in education abroad, one respondent did not answer the item ($N = 94$). Most

respondents ($n = 91$; 96.8%) reported their institutions do not require student participants to have background checks. Inferential statistics were not computed because there were only two groups of respondents, and the overwhelming majority required no background checks.

One respondent elected not to answer the question regarding judicial clearance from the students' home institution ($N = 94$). The majority of respondents ($n = 73$; 77.7%) were employed by institutions that require students to submit judicial clearance from their home institution, and 21 (22.3%) do not have that requirement. A Chi-Square Test of Association found no significant differences between groups on the number of critical incidents ($\chi^2 = .128$, $df = 1$, $p = .720$).

One respondent did not answer the question pertaining to medical training prior to leading an undergraduate education abroad program ($N = 94$). Eighty-five (90.4%) of respondents reported that their institution lacked a requirement for staff to have medical training compared to nine (9.6%) who do have a requirement. A Chi-Square Test of Association was conducted to determine if there are differences in critical incidents based on institutional medical training policy. There were no statistically significant differences between the groups ($\chi^2 = .970$, $df = 1$, $p = .325$).

Of the total, the majority ($n = 62$; 65.3%) reported allowing students to participate in undergraduate programs located in countries with active United States Department of State (DOS) Travel Warnings, and 33 (34.7%) do not allow participation. During data collection, the DOS instituted a new travel warning system using levels for travel advisories. All countries are assigned a numerical travel advisory under the new system

ranging from Level 1 (Exercise Normal Precautions) to Level 4 (Do Not Travel).

Respondents either answered the survey question based on institutional policy under the new travel warning system or interpreted their new policy under the previous travel warning system. The Chi-Square Test of Association found statistically significant differences on critical incidents between the two groups ($\chi^2 = 6.740$, $df = 1$, $p = .009$). A Goodman and Kruskal's gamma of .520 ($p = .007$) suggests a large effect size indicating that whether an allows students to participate in education abroad programs in countries with an active travel warning impacts the number of critical incidents. A z -test with a Bonferroni adjustment established that institutions that did not allow students to travel to countries under a travel warning were more likely to report five or less critical incidents ($n = 22$) than six or more incidents ($n = 11$). Additionally, for those institutions that did allow students to participate in countries with active travel warnings there was a greater likelihood of six or more critical incidents annually ($n = 38$) than five or less critical incidents annually ($n = 24$).

Research Question 3

Using the results from Research Question 2, several variables were identified as having an impact on the Dependent Variable – Number of Critical Incidents. These variables are institution size, annual undergraduate education abroad enrollment, international health insurance, emergency response document, STEP registration, dedicated staff abroad, and travel warnings.

Outlier Detection

Outliers should be identified and considered for removal prior to conducting the regression as outlying points may influence the model. Cook's Distance (D), Mahalanobis Distance, and leverage values were used to detect potential outliers. The (centered) leverage values did suggest a problematic case as the minimum centered leverage value was .046 and the maximum was .270. Stevens (2002) recommends reviewing leverage values that are greater than three times the average leverage value ($> .288$).

Cook's D , an overall measure of the influence of a datapoint on a regression model, indicated that all values were close to zero. Cases with values closer to one or two may exert undue influence on the model (Cook & Weisberg, 1982). The minimum was .000 and the maximum was 2.05. One individual case was flagged as potentially problematic. Mahalanobis Distance, a measure of the distance from each value to the mean of the independent variable, was calculated for the remaining cases. This statistic is evaluated using the Chi-Square distribution with the degrees of freedom equivalent to the number of predictors in the model ($df = 9$). Using an alpha level of .05, the critical value was 16.919. The minimum value was 4.245 and the maximum was 24.842. Four cases had values exceeding 16.919; however, only one of those cases was the same participant with the high Cook's D value. Thus, the case with both a high Cook's D and Mahalanobis Distance value was removed before running the regression analysis. Descriptive statistics for the adjusted data are presented in Table 4.

Table 4

Summary of Variables in the Analysis Sample for Research Question 3

Variables	Coding	<i>n</i>(%)
Institution Size	-----	92(100)
Annual Education Abroad Enrollment	-----	92(100)
International Health Insurance	No (0)	3(3.2)
	Institution Purchase (1)	62(65.3)
	Student Purchase (2)	30(31.6)
Emergency Response Document	No (0)	15(16.3)
	Formal (1)	48(52.2)
	Informal (2)	29(31.5)
STEP Enrollment	No (0)	23(25)
	Institution Enroll (1)	24(26.1)
	Student Enroll/Proof (2)	10(10.9)
	Student Enroll/No Proof (3)	35(38)
Dedicated Staff Abroad	No (0)	48(52.2)
	Yes (1)	44(47.8)
Travel Warning	No (0)	33(35.9)
	Yes (1)	59(64.1)

Note. Percentages of *n* appear in parentheses next to frequencies for all variables.

Assumptions of Logistic Regression

The basic assumptions of logistic regression were investigated before analyzing the regression model. These assumptions include: (1) independence of errors, (2) linearity, and (3) noncollinearity. The sample size for the logistic regression analysis was 92.

The assumption of independence of errors was tested graphically using scatterplots of the standardized residuals against the main independent variable in the study. Values for all variables fell between -2.0 and +2.0 indicating the assumption was met. The assumption of linearity was not tested as none of the variables is a continuous

variable. Tests for multicollinearity included examining a correlation matrix, variance inflation factors (VIFs), tolerance, and condition index values. The correlation matrix did not display multicollinearity as there were no unusually high correlation coefficients between unrelated variables (i.e., all $r_s < .771$). VIFs were less than ten and tolerance values were greater than .10 for all variables. Condition index values were less than 30 for all variables as well. Thus, there was no evidence of multicollinearity.

Correlations

Spearman's rho Correlations were run to examine the relationships among the independent variables and the dependent variable. For the independent variables, the highest positive correlation was between institution size and annual undergraduate education abroad participation ($r_s = .603, p < .01$). This result suggests that larger institutions send larger numbers of undergraduate students to study abroad annually. The highest negative correlation between two levels of different independent variables was between STEP Institution Enrollment and Health Insurance Student Enrollment ($r_s = -.255, p < .05$). This correlation suggests that institutions that directly register students into the STEP program are less likely to require students to independently purchase international health insurance.

The highest positive correlation with the dependent variable was Annual Education Abroad Enrollment ($r_s = .537, p < .001$) and the highest negative correlation with the dependent variable was STEP Registration (Dummy 2; $r_s = -.279, p < .05$). The large, positive correlation signified that those institutions with larger undergraduate education abroad enrollment reported more critical incidents. The small, negative

correlation indicated that institutions requiring students to complete STEP registration with submitting proof reported fewer critical incidents. A summary of all correlation coefficients can be found in Table 5.

Table 5

Summary of Correlations for Research Question 3

Variables	1	2	3	4	5	6	7	8	9	10	11	12
1 Institution Size	-	.603***	.087	.064	.008	-.116	.202	-.111	.150	.139	-.118	.299**
2 Annual Education Abroad Enrollment		-	.197	-.006	-.110	-.116	.233*	.138	.496***	.193	-.217*	.537***
3 Emergency Response (Dummy 1)			-	-	-.026	.195	-.012	-.042	.101	.282**	-.216*	-.044
4 Emergency Response (Dummy 2)				-	.076	-.087	-.002	.053	-.029	-.175	.177	.211*
5 STEP Registration (Dummy 1)					-	-	-	.075	-.020	.289**	-.255*	.198
6 STEP Registration (Dummy 2)						.207*	.466***					
7 STEP Registration (Dummy 3)						-	-.274**	-.125	-.176	-.103	.130	-.279**
8 Dedicated Staff Abroad							-	.057	.026	.026	-.067	.201
9 Travel Warning								-	.126	-.010	.030	.218*
10 Health Insurance (Dummy 1)									-	.102	-.157	.249*
11 Health Insurance (Dummy 2)										-	-.930***	.204
12 Critical Incidents (DV)												-.0139

Note. Correlation coefficients for all variables are Spearman's rho correlation coefficients. * $p \leq .05$, ** $p \leq .01$, *** $p \leq .001$

Hierarchical Multiple Logistic Regression

Logistic regression analysis was run to establish if a relationship exists between the previously identified statistically significant education abroad best practices and the number of critical incidents. Two blocks of independent variables were used – the statistical control variables and the main independent variable. The statistical control variables included in block one are institution size and annual education abroad enrollment. International health insurance, emergency response documentation, STEP enrollment, dedicated staff abroad, and travel warning were the five main independent variables included in block two. These five independent variables were selected based on their statistical significance in RQ2.

Block One (institution size and annual education abroad enrollment) was statistically significant ($\chi^2 = 33.633$, $df = 2$, $p < .001$) and the Hosmer and Lemeshow Test was not significant ($\chi^2 = 8.830$, $df = 8$, $p = .357$), indicating the model is a good fit. Cox and Snell pseudo- R^2 equaled .306 and the Nagelkerke pseudo- R^2 equaled .408 suggesting small effect sizes (Cohen, 1988). Institution size was not a significant contributor to the variance in the dependent variable (Wald = .330, $df = 1$, $p > .05$). However, annual education abroad enrollment was a significant predictor of the variance in the dependent variable ($z^2 = 11.532$, $df = 1$, $p = .001$). Additionally, the odds of a critical incident occurring increased as annual education abroad enrollment increases (OR = 1.006; 95% CI: 1.002-1.009).

Block Two (Institution Size, Annual Education Abroad Enrollment, International Health Insurance, Emergency Response Document, STEP Registration, Dedicated Staff Abroad, and Travel Warning) was statistically significant ($\chi^2 = 70.930$, $df = 11$, $p < .001$). A significant likelihood ratio test in logistic regression indicates that a minimum of one of the main independent variables is a significant predictor of the dependent variable. A nonsignificant result

on the Hosmer and Lemeshow Test demonstrated the goodness of fit of the model ($\chi^2 = 13.833$, $df = 8$, $p = .086$). Medium effect sizes (Cox and Snell pseudo- $R^2 = .537$; Nagelkerke pseudo- $R^2 = .717$; Cohen, 1988) suggested the predictors in their entirety have a medium association with the dependent variable. In this second model, Annual Education Abroad Enrollment, one of the two statistical control variables remained statistically significant (Wald = 11.852, $df = 1$, $p = .001$). The odds of a critical incident occurring as annual education abroad increases is positive (OR = 1.011, 95% CI: 1.005-1.017). That is, Annual Education Abroad Enrollment is positively predictive of the dependent variable ($\beta = .011$, $SE = .003$). Additionally, a statistically significant relationship was identified between Institution Size and the dependent variable (Wald = 4.330, $df = 1$, $p < .05$). The control variable Institution Size is negatively predictive of the number of critical incidents ($\beta = -0.557$, $SE = .268$) with the odds of a critical incident 42.7% less likely to occur as institution size increases (OR = .573, 95% CI: .339-.968).

Of the main independent variables, Emergency Response Document ($z^2 = 6.287$, $df = 3$, $p < .05$) and STEP Registration ($z^2 = 9.512$, $df = 3$, $p < .05$) were significant. Neither individual level of the Emergency Response Document variable was statistically significant despite the statistically significant omnibus result. For the STEP Registration variable, the levels “STEP Enrollment by Institution” (Wald = 9.049, $df = 1$, $p < .01$) and “STEP Enrollment by Student, no proof required” (Wald = 7.776, $df = 1$, $p < .05$) were significant. Both levels of STEP Enrollment were positively predictive of the dependent variable with STEP Enrollment by Institution having a greater impact ($\beta = 3.711$, $SE = 1.233$) than STEP Enrollment by Student, no proof required ($\beta = 3.134$, $SE = 1.124$). The odds ratio for both variables were positive for the dependent variable with STEP Enrollment by Institution (OR = 40.878, 95% CI: 3.644-458.592; $p < .01$) having a higher odd for a critical incident occurring as compared to STEP Enrollment by Student, no

proof required (OR = 22.974, 95% CI: 2.538-207.968; $p < .05$). An institution that enrolls students in STEP is 40.878 times more likely to report at least six or more critical incidents than an institution that requires the student to enroll (proof required or proof not required).

In total, the logistic regression model accurately predicted 89.1% of the institutions in the sample. The value of Press' Q was calculated and was statistically significant ($\chi^2 = 56.348$, $df = 1$, $p < .001$). This indicates the collection of independent variables can be used to accurately predict the number of critical incidents is statistically significantly beyond chance. Results for all variables can be viewed in Table Six.

Table 6

Summary of Logistic Regression Analyses for Research Question 3

Variables	<i>B</i>	<i>SE</i>	Wald	Exp(B)	95% CI for Exp(B)	
					Lower	Upper
Institution Size	-0.557	.268	4.330*	.573	.339	.968
Annual Education Abroad Enrollment	.011	.003	11.852***	1.011	1.005	1.017
International Health Insurance			.072			
Health Insurance (Dummy 1)	23.405	19702.901	.000	--	.000	
Health Insurance (Dummy 2)	23.628	19702.901	.000	--	.000	
Emergency Response			6.287*			
Emergency Response (Dummy 1)	-.862	.966	.797	.422	.064	2.803
Emergency Response (Dummy 2)	1.522	.960	2.512	4.580	.698	30.077
STEP Registration			9.512*			
STEP Registration (Dummy 1)	3.711	1.233	9.049**	40.878	3.644	458.592
STEP Registration (Dummy 2)	-7.450	31.205	.057	.001	.000	--
STEP Registration (Dummy 3)	3.134	1.124	7.776**	22.974	2.538	207.968
Dedicated Staff Abroad	-.002	.713	.000	.998	.247	4.035
Travel Warning	.160	.850	.035	1.173	.222	6.213

Note. * $p \leq .05$, ** $p \leq .01$, *** $p \leq .001$.

CHAPTER V: DISCUSSION

International study is a major component of higher education and one that comes with the potential for risk to the participants and to the institution. The purpose of this study was to explore the application of U.S. federal and state laws to student conduct which occurs extraterritorially and to quantitatively investigate the relationship between an education abroad program's adherence to accepted best practices and the number of critical incidents abroad. To this end, this study's guiding research questions were:

Research Question 1 (RQ1): Which United States (U.S.) laws apply to conduct and incidences occurring outside of the U.S. territorial boundaries?

Research Question 2 (RQ2): What are the relationships between the education abroad health and safety best practices and the number of abroad program critical incidents among United States (U.S.) undergraduate students?

Research Question 3 (RQ3): Which education abroad health and safety best practices are the most influential in predicting the number of abroad program critical incidents in the model?

The first section of this chapter contains a summary of findings for the legal research question (RQ1), and the second section contains a summary of findings for the quantitative research questions (RQ2 and RQ3). An examination of the limitations of the study, potential implications of the results, and recommendations for further research follows the summary of results.

Legal Research (RQ1)

Higher education institutions in the U.S. would be wise to consider the application of U.S. law to conduct which occurs while undergraduate students participate in international education programs as students may have legal recourse against an institution despite the behavior having occurred outside U.S. territorial boundaries. Several federal and state laws have applicability to education abroad programs as denoted by the statutory language and by judicial treatment. The following discussion will consider the application of the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), Title IX of the Education Amendment Act of 1972 (Title IX), The Family Educational Rights and Privacy Act (FERPA), The Health Insurance Portability and Accountability Act of 1996 (HIPAA), civil tort, and contract law to conduct that occurred abroad.

The Americans with Disabilities Act, Section 504, and Extraterritorial Behavior

The text of the ADA does not explicitly support extraterritorial application in that there is no language in the law stating ADA protections are to be extended to conduct outside U.S. territorial boundaries. However, the courts have noted that public (Title II) and private (Title III) colleges may not discriminate against the disabled and must make their programs and activities accessible to the disabled, including those available in international settings. The first indicator that the ADA and Section 504 protections are extended to education abroad can be found in the statutory language of both laws. Title II of the ADA prohibits discrimination on the basis of disability by public entities. As such, all public colleges and universities must make accommodations so that individuals with a disability can access the “services, programs, or activities” (Subpart B, Sec. 35.130

(a)). In Title III, the ADA specifically denotes the following as places of public accommodations (which would therefore be covered under the requirements): “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education” (Subchapter III, Sec. 12181, 7(J)). The extension of the ADA Title III to (an) “other place[s] of education” should be read to include all aspects of U.S. academic institutions, public or private, that offer educational opportunities, including field work, internships, and education abroad. Similarly, while Section 504 also does not specifically address extraterritorial application, it does include language that speaks to the extension of Section 504 protections to individuals with a qualified disability who participate in education abroad. Like the ADA, Section 504 indicates the term “program or activity” is meant to represent all of the operations of postsecondary institutions (2A). This description of programs or activities extends the reach of Section 504 protections to education abroad as these study programs are clearly educational activities.

ADA compliance is required of almost all institutions with limited exemptions, including an exemption for institutions run by religious entities. Unlike the ADA, Section 504 protections apply to all institutions that are direct or indirect recipients of federal financial assistance. Section 504’s requirements for recipient institutions spreads the protections for individuals with a disability to private religious institutions that receive federal financial assistance but may be exempt from obeying the ADA. The Civil Rights Act of 1987 (1988) broadens Section 504 protections to the entire institution, not solely the office in which federal funding is received. Thus, any institution that

distributes federal financial aid to students is required to comply with Section 504 and Title IX even if no other federal funding is received by the institution.

The second indicator that the ADA and Section 504 are meant to protect students participating in international education is the judicial treatment of two cases, *Bird v. Lewis & Clark College* (2000/2002) and *Tecza v. University of San Francisco* (2010/2013). In both lawsuits, the institutions were found not to be in violation of either the ADA or Section 504 as the international programs in question, when viewed in the whole, accommodated the plaintiffs and allowed equal access to the programs. Had territorial jurisdiction even been questioned, the respective courts would have addressed that issue prior to ruling on the sufficiency of the accommodations. If the extraterritorial application of the ADA and Section 504 been rejected, the court could have disposed of the claims through summary judgment or directed verdict. Attempting to dispose of a case pre-trial through the use of an affirmative defense such as lack of jurisdiction is a common action for defendants given the high financial and reputational cost of litigation.

It is important to clarify which aspects are more likely to be excluded because of the lack of U.S. institutional control with the understanding that education abroad programs fall under ADA and Section 504 protection. U.S. laws do not apply to international institutions, thus students who participate in an exchange program cannot expect an international institution to be held to the same accessibility and accommodation requirements as a U.S. institution. Take for example the OCR decision in *Arizona State University* (OCR Region VIII, November 29, 2001). In this investigation, the OCR determined that Arizona State University (ASU) did not discriminate against the student

for denying a request for a sign language interpreter for the student who is deaf to study at the University College Cork in Ireland. In this decision, the OCR specifically stated that Section 504 and Title II (of the ADA) do not apply extraterritorially and that neither law prohibits discrimination on the basis of disability in international programs.

However, in contrast to the OCR decision in *Arizona State University* (OCR Region VIII, November 29, 2001), the OCR concluded that Section 504 and the ADA do apply to education abroad programs in *College of Saint Scholastica* (OCR Region V, September 15, 1992). One difference between the two decisions is that the education abroad program in *Arizona State University* was an exchange program in which instruction was provided by an international institution in Ireland (University College Cork) whereas in *College of Saint Scholastica*, instruction was provided in Ireland by the College of Saint Scholastica, a U.S. institution. The locus of control of the instruction was with the U.S. institution in the case where OCR determined Section 504 and the ADA apply. The greater management power a U.S. institution has of the education abroad program, the greater the responsibility the institution has to make sure that reasonable accommodations are provided to students with a qualified disability so that the student(s) can participate fully in education abroad.

Institutions and students should take into consideration that accommodations for a student with a disability that are reasonable in a domestic setting might not be reasonable in an international location. Section 504 and the ADA require institutions to provide reasonable accommodations to qualified students with a disability. The U.S. Department of Education describes reasonable accommodations as those modifications to the physical

environment, required task(s), or the way the required tasks are completed so that people with a qualified disability can participate in the employment or academic opportunity (U.S. Department of Education, 2007). Similar to domestic study programs, education abroad programs can include specialized curricula unique to the international location. Travels to Costa Rica may include time spent in a rainforest to study biological diversity whereas studies in Italy may include significant foot travel over cobblestone streets. ADA and Section 504 requirements do not require the institution to accommodate an individual with a disability by altering the location's terrain. As such, accommodations may involve adjusting the curricula to include more accessible locations or finding alternative arrangements for an individual with a disability to have an equal, but not the same experience. This understanding formed the crux for why the Court found no violations of the ADA or Section 504 in *Bird v. Lewis & Clark College* (2000/2002). While the plaintiff alleged 22 of the program travel locations were not wheelchair accessible, both the District and Appellate Courts held that the program as a whole was accessible despite not all locations being available to the student.

While institutions are required to make reasonable accommodations, they are not required to make accommodations that would fundamentally alter the program or result in an undue burden on the institution. Undue burdens are those that create significant difficulty or expense to the institution. An institution can consider an alternative accommodation that is less expensive than the student's preferred accommodation, assuming the alternative is effective. A consideration of available outside funding for a higher cost resource can be required under the law. Those accommodations available to

students in the U.S. might not be available in an education abroad program, or the burden on the institution may be greater than in the U.S. and thus the accommodation may no longer be considered “reasonable.” International education administrators should partner with institutional offices of accessibility to determine how student needs may or may not be met internationally before a student enrolls in an education abroad program. This collaboration will help students successfully select an international program.

Education abroad administrators must take into consideration the application of the ADA and Section 504 when assisting students with a qualified disability participate in education abroad as both laws can be extended to international study. This requires close contact with both the institution’s legal and accessibility services offices to craft program literature, policies, and procedures in a manner that is compliant with the laws.

FERPA and Extraterritorial Behavior

The Family Educational Rights and Privacy Act of 1974 (FERPA) is another area that higher education institutions need to consider when responding to a critical incident in undergraduate education abroad. FERPA is a federal law enacted to protect the privacy of student education records and is applicable to all recipient educational institutions including postsecondary schools. FERPA provides eligible students with the right to (a) review education records maintained by the student’s school(s); (b) request corrections to the student’s record if the FERPA rights-holder believes it to be inaccurate or misleading; and (c) place a statement in the educational record setting forth an opinion regarding information that the FERPA rights-holder believes to be inaccurate or misleading. Additionally, FERPA requires institutions to obtain written permission from the student

to release information from the education record except under the following certain specified conditions: (a) to school officials with legitimate educational interest, (b) to institutions to which a student is transferring, (c) to specified officials for audit or evaluation purposes, (d) to accrediting organizations, (e) to organizations conducting studies for or behalf of the school, (f) to comply with a judicial order or a lawfully issued subpoena, (g) in the event of health or safety emergencies, (h) to state or local authorities within a juvenile justice system under specific state law, and (i) to the parents or guardians of an underage student who is in violation of alcohol or controlled substance policies. Disclosure without consent is also allowed for directory information assuming students are notified about the disclosure and are allowed to request the information not be disclosed.

Students do not have a private right of action under FERPA per *Gonzaga University v. Doe* (2002). Since FERPA was enacted under a spending clause, the U.S. Department of Education ensures compliance through the threat of the discontinuation of federal funding. Repeated violations of FERPA without completion of stipulated U.S. Department of Education remedial efforts could result in the loss of federal funding. Individuals who look to take legal action for a privacy violation would need to file in state court under state privacy laws. The plaintiff in *Tecza v. University of San Francisco* (2010/2013) included claims against the defendant for disclosure of private facts related to his accommodations under the relevant state privacy laws; the California Information Practices Act of 1977 and the California Public Records Act. All of the claims in this case were dismissed for failure to state a claim under which relief is available.

FERPA was brought to the legislature as an amendment to a bill extending the Elementary and Secondary Education Act of 1965 that was not brought forward for Committee consideration. Consequently, legislative history is not available for FERPA in the law's first iteration. Although FERPA does not specifically refer to the disclosure of student academic record information in an international context and no legislative history exists to provide clarity, FERPA is specific to the protection of student records. Accordingly, any disclosure of the academic record, regardless of location, would be considered a violation of FERPA, assuming the individual disclosing the information is an employee of a U.S. recipient institution.

HIPAA and Extraterritorial Behavior

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) has five titles of which one, Title II (Preventing Health Care Fraud and Abuse; Administrative Simplification; Medical Liability Reform) has some potential to impact higher education institutions. Title II of HIPAA contains the Standards for Privacy of Individually Identifiable Health Information (1996) (Privacy Rule), which regulates the use and disclosure of Protected Health Information (PHI) held by covered entities. Since higher education institutions regularly have medical services available to students it is possible that the Privacy Rule could be considered in a higher education setting. HIPAA directs individuals who suspect that the Privacy Rule has been violated to file a complaint with the Department of Health and Human Services (HHS) Office for Civil Rights (OCR). Violations of HIPAA can result in monetary penalties ranging from \$100 to \$1.5 million per violation. Some violations can result in criminal penalties such as

imprisonment from one to 10 years. Similar to FERPA, however, there is no private cause of action for violations of HIPAA. Nonetheless, in addition to filing a complaint with OCR, individuals who believe they have been injured could file a claim against an institution under state negligence or other civil tort laws to receive compensation for their damages.

Title IX and Extraterritorial Behavior

The statutory language of Title IX states that “*no person in the United States*” is to be denied access or discriminated against on the basis of sex. If narrowly read, this language excludes individuals physically outside of the U.S. from protection under Title IX. However, Title IX statutory language specifies that Title IX protections are to be required of “*any education program or activity*” of a recipient institution. Since education abroad is an educational program or activity, Title IX protections are to be extended to students participating in education abroad programs managed by a recipient institution. The Civil Rights Act of 1987 (1988) extends Title IX protections to the entire institution, not solely the program in which federal funding is received. Therefore, any institution that directly or indirectly receives federal financial aid is required to comply with Title IX in all programs and activities. Despite the language indicating physical presence in the U.S. is needed for protection, judicial treatment of Title IX and the legislative history of Title IX support application of Title IX to extraterritorial conduct occurring during education abroad as these programs are undoubtedly an educational program or activity.

The only legal case that applied Title IX to education abroad is *King v. Board of Control of Eastern Michigan University* (2002), which successfully argued that the definition of education programs implies that Title IX is applicable to extraterritorial behavior. The district court established that as continuing students at Eastern Michigan University (EMU) the plaintiffs were to be considered *persons in the United States* and thus eligible for protection under Title IX. However, in subsequent lawsuits *Phillips v. St. George's University* (2007) and *Harbi v. Massachusetts Institute of Technology* (2017) the respective courts found that the plain language in Title IX did not support the application of Title IX to extraterritorial behavior. Several differences exist between *King v. Board of Control of Eastern Michigan University* (2002), *Phillips v. St. George's University* (2007), and *Harbi v. Massachusetts Institute of Technology* (2017) that explains why only one of three cases was successful in applying Title IX to international behavior. When comparing *King v. Board of Control of Eastern Michigan University* (2002) and *Phillips v. St. George's University* (2007), the most important distinction is that Eastern Michigan University is a U.S. recipient postsecondary school while St. George's University is not a U.S. institution. No connection existed between the conduct that led to the Title IX claim and the U.S. other than the student was an American national. Between *King v. Board of Control of Eastern Michigan University* (2002) and *Harbi v. Massachusetts Institute of Technology* (2017), both institutions are U.S. institutions and the behavior in both lawsuits that led to the Title IX claims occurred outside U.S. territorial boundaries. The student in *Harbi v. Massachusetts Institute of Technology* (2017), however, was physically located in France and the alleged

harassment occurred solely on the Internet through email, Facebook, and video calls. In *Harbi v. Massachusetts Institute of Technology* (2017) the judge considered the plain language of Title IX and dismissed the Title IX claim given that the student was not a person of the United States (the plaintiff was a French student physically located in France with connection to MIT and the U.S. only through enrollment in a free online course).

The decision in *Harbi v. Massachusetts Institute of Technology* (2017), which is a significantly more recent case, suggests a stricter reading of Title IX to exclude non-U.S. behavior. This case, while centering on an American institution and an international location, involved a massive open online course (MOOC) rather than an education abroad program. A recently filed lawsuit in the South Carolina Court of Common Pleas Fifth Judicial Circuit, *Dunavant v. The University of South Carolina, The International Center for the Arts, LLC, David W. Voros, and Harris Pastides* (2018), alleging violation of Title IX amongst other civil wrongs may provide additional insight into the extraterritorial application of Title IX to behavior during education abroad programs. This case represents an American citizen alleging violation of Title IX for behavior that occurred during an education abroad program in Italy. No court decisions have been made regarding the claims of the case as of January 2019.

The legislative history of Title IX does not explicitly refer to extraterritorial behavior but does illuminate the intention of the law's drafting parties. Remarks by the chief sponsor of the amendment, Senator Birch Bayh, are considered by the U.S. Supreme Court to be an authoritative guide to the development of Title IX (*North Haven*

Board of Education v. Bell, 1982). Remarks by Senator Bayh in the legislative history combined with the language in the Code of Federal Regulations and OCR guidelines support an extraterritorial application of Title IX in education abroad settings. Simply put, to meet the requirements set forth in Title IX to provide equality of opportunity, Title IX must have some extraterritorial application to include education abroad programs. The exclusion of education abroad programs from Title IX protection would create the very situation that Title IX was enacted to remedy, loss of access to educational opportunities due to discrimination on the basis of sex. Comments from Senator Bayh in the legislative history describes the expected impact of Title IX to be “broad” and “far reaching” (*Id.* at 5804-08), that exceptions to Title IX would be limited (*Id.* at 5812), and that accepted exceptions would be defined within the law itself. The *Code of Federal Regulations* (34 CFR § 106 et seq.) denotes that Title IX prohibits discrimination on the basis of sex in “any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives federal financial assistance” (§106.31). Furthermore, the regulations allow for participation in international aid programs that may be restricted to members of a single sex and offer opportunities for study abroad (§106.31) assuming similar opportunities are made for members of the opposite sex. Title IX guidelines from the Department of Education Office for Civil Rights state that “Title IX protects students in connection with all the academic educational, extracurricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere” (*Revised Sexual*

Harassment Guidance: Harassment of Students by School Employees, their Students, or Third Parties. 65 Fed. Reg. 66092, 66099 (2000)). The legislative history and the judicial treatment speak to the applicability of Title IX to education abroad programs.

Similar to the application of the ADA and Section 504 to extraterritorial behavior, the locus of control of the education abroad program is relevant to the application of Title IX to international conduct. First, Title IX applies to the education programs or activities of U.S. institutions that receive federal financial assistance. Thus, international institutions, non-recipient higher education institutions, and non-recipient education abroad providers are not required to comply with Title IX regulations. This provides students who participate in education abroad programs implemented by a U.S. recipient institution with Title IX protections. Students who participate in education abroad through an international institution (i.e., international exchange or direct enrollment) cannot expect the same Title IX protections as those participating in a recipient institution's program. This division explains the difference in the judicial treatment of Title IX in *King v. Board of Control of Eastern Michigan University* (2002) versus *Phillips v. St. George's University* (2007). The students in *King v. Board of Control of Eastern Michigan University* (2002) were enrolled students in a recipient U.S. institution participating in the institution's education abroad program. In contrast, the student in *Phillips v. St. George's University* (2007) was directly enrolled in an international institution. Despite the broad presumption against extraterritorial application of U.S. law, the statutory language, legislative history, and judicial treatment supports the extension of

Title IX protections to conduct occurring outside the U.S. territorial boundaries during education abroad programs implemented by U.S. recipient institutions.

Civil Tort, Contract Law, and Extraterritorial Behavior

Unlike the aforementioned federal laws, civil tort and contract laws are governed by individual states and not bound by strict territorial jurisdiction. Civil tort and contract laws also apply to all institutions regardless of the institution's recipient status unlike Section 504 and Title IX. Thus, there is no question that civil tort and contract laws can be applied to conduct occurring outside U.S. territorial boundaries. Nonetheless, plaintiffs seeking redress for violations of civil tort or contract laws are still required to meet jurisdictional rules when filing a lawsuit. The most appropriate forum for civil tort and breach of contract lawsuits would be in the home state of the institution responsible for the education abroad program. While the site of the original injury would be outside of this forum, the institution's physical and business presence would be sufficient to establish personal jurisdiction in the home state. *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016) represents a lawsuit in which personal jurisdiction was established in the home state of the defendant university despite the original injury occurring in Costa Rica. Originally the plaintiffs filed the lawsuit in the State of New York as that was the home state of the decedent and where the study abroad contracts were signed by the decedent and his family. The District Court dismissed the case for lack of jurisdiction and the lawsuit was instead transferred to the North Carolina court system on appeal. Negligence and wrongful death claims were

dismissed by the North Carolina court due to the signature of valid waiver and release contracts by the decedent and the decedent's parent.

Contracts releasing institutions from liability for injuries to students while participating in education abroad are common aspects of program management. These documents are heavily scrutinized by the courts to ensure the documents are enforceable. While Duke University was successful in using a release of liability to shield itself from negligence and wrongful death claims in *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016), a similar contract in *Fay v. Thiel College* (2002) was found to be a contract of adhesion and unenforceable in court. The difference in the judicial treatment of the two waivers rises from the language used to release the educational institution from liability. To be deemed enforceable, a contract must be presented in a manner that allows for consideration from both parties. The language in the releases signed in *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016) is written in a manner that suggests joint benefits; the student was given the right to participate and Duke University received the promise not to bring a lawsuit. Additionally, the signed release with Duke University and the separate signed release with the Organization for Tropical Studies (OTS) included reference to the student's acknowledgment of the risk of injury involved in a travel program. In contrast, the language in *Fay v. Thiel College* (2002) was nonspecific and written in a manner that displayed lack of consideration for the student participant, thus making it a contract of adhesion. A separate signed medical consent form in *Fay v. Thiel College* (2002) was determined not to indemnify the institution as it lacked language in which the plaintiff

waived the right to file a claim against the institution for negligence. It is important for contracts used by education abroad programs be drafted with care so the terms of the contract can be upheld in court in the event of adverse litigation.

An effective waiver of liability will include language in which the participant acknowledges the known and unknown risks of the activity. In the event of litigation, this language will support the use of an assumption of risk (AOR) defense. An AOR defense denotes the student was aware that participating in education abroad involves inherent risk of injury and in choosing to participate, accepts these risks. The release of liability signed by the student in *Thackurdeen v. Duke University and Organization for Tropical Studies, Inc.* (2015/2016) included such language, which resulted in claims of negligence and wrongful death being dismissed. Many states, such as Ohio, have subsumed the assumption of risk defense into the doctrine of contributory negligence. This doctrine looks to reduce or absolve the responsibility of the defendant based on the plaintiff's own negligence leading to the injury. An AOR defense is an affirmative defense, similar to lack of jurisdiction, that is brought prior the lawsuit being decided on its merits. If the assumption of risk language does not result in the case being dismissed, it may result in a reduction of damages based on the negligence of plaintiff. Waivers of liability should include the types of risk that are assumed including the worst-case injuries a student may sustain (i.e., permanent disability or death). Additionally, waivers should include language that acknowledges potential hazards of the host region and language that encompasses all aspects of the education abroad program including travel to and from the destination.

A well drafted waiver of liability is a common use of contract law to indemnify an institution from negligence claims and to allow for use of the assumption of risk defense in a civil tort lawsuit. Effective language must be used so that the contract is enforceable in the event of adverse litigation. An example of effective waiver language is as follows:

- I understand and accept that participation in international study programs involves potential threats, dangers, and risks inherent in, connected with, or coming from the activity, transportation to and from the international program, actions by related or unrelated third parties, events and activities not organized by Higher Education Institution that are in addition to and not associated with the international study program (hereafter referred to as Risks). These Risks may include, but are not limited to transportation to and from the study country, traveling to countries outside the study country, traveling to and from cities and towns inside or outside the United States of America, the consumption of food and living outside of the United States of America, civil unrest, and living, working, and studying in a country and culture that is different from those in my home country and culture. Additionally, these Risks may be compounded by the difference in social practices and values from my home country as well as the local attitudes regarding foreign individuals. I acknowledge that these Risks could result in illness, injury (including permanent injury), personal property or monetary loss, or death).
- In consideration of being allowed to participate in Higher Education's Specific Education Abroad Program I assume all responsibility and liability for these

Risks, whether known or unknown, direct or indirect. On behalf of myself, my family, my heirs, assigns, and personal representatives, I release, waive, discharge, and hold harmless Higher Education Institution, its governing board, officers, faculty, agents, employees, subcontractors, and/or students employed by Higher Education Institution (hereafter referred to as Higher Education Institution) from any and all liability, claims, and demands which arise or may arise from my participation in the Education Abroad Program.

- I hold harmless and release Higher Education Institution from any claims, causes of action, damages, and/or liabilities that arise or may later arise from first-aid treatment or other medical services rendered to me or to my companions in the event of an emergency or healthcare problem during my participation in the Education Abroad Program.
- I hereby expressly and specifically assume the risk of injury, harm, or loss of personal property during my participation or arising from my participation in the Education Abroad Program and release Higher Education Institution from all liability for injury, illness, death, monetary loss, or property damage resulting from such circumstances whether incurred by myself or by my companions. I agree to indemnify and hold harmless Higher Education Institution from any loss, liability, damages, or costs, including court costs and attorney fees whether my injury or damage is resultant from or related to my negligence, the negligence of Higher Education Institution, or the negligence of any third party.

- I understand that my participation in Education Abroad Program indicates that I will assume the risk of injury and damage from the Risks and from risks and damages that are innate to any activity.
- I acknowledge that in signing this document I represent that I have carefully read the Waiver of Liability and understand its contents. Furthermore, I state that I am signing this document of my free will, that I am at least 18 years of age, and that I am fully competent to sign this document.

The above waiver language was modeled on the International Study Release and Waiver Liability from Johns Hopkins University (Johns Hopkins University International Study Release and Waiver Liability, n.d.) and the Release and Waiver of Liability and Assumption of Risk document from Thomas University (Thomas University Release and Waiver of Liability and Assumption of Risk, n.d.).

Students alleging violations of civil tort or contract law related to education abroad sponsored by program providers other than U.S. academic institutions can look to establish personal jurisdiction through individual state's long-arm statutes, the minimum contacts test, or purposeful availment. Personal jurisdiction was established in the State of Wisconsin under Wisconsin's Long-Arm Statute (2007-08) and under the purposeful availment test in *Solomon v. John Cabot University* (2018). The defendant in this case, John Cabot University (JCU), is an American university with a physical presence in Rome, Italy and while the institution is incorporated in the State of Delaware, there is no physical academic institution in the United States. Wisconsin was an appropriate forum as (a) the student was enrolled at the University of Wisconsin, (b) JCU recruited the

student in Wisconsin, and (c) the student received orientation for the international study program from JCU in Wisconsin. Once jurisdiction is established civil tort and breach of contract lawsuits for education abroad related injuries will be decided on their merits.

Higher education institutions may elect to use a contract or a Memorandum of Understanding (MOU) to formalize the relationship between itself and international partner institutions that provide education abroad. These documents stipulate the terms of collaboration between the two institutions and can be used to outline the expectations of the education abroad program. U.S. institutions can use contracts or MOU's to provide provisions to U.S. students that might otherwise not be required under the international institution's country's laws. An example would be the use of the contract or MOU to specify available accommodations for participants with a qualified disability. While these contracts would not require the host institution to act under U.S. law, they would provide a contracted agreement between the two institutions as to what would be available to U.S. students participating in the program.

Summary of Legal Research

The risk of injury to a student as well as potential related litigation are important concerns of higher education institutions and their administrators. Preventative risk management is a significant aspect of an institution's operation not only because of the potential financial and reputational ramifications of a critical incident involving a student, but also because care for students is at the core of an academic institution's mission. Maintaining legal practices in all areas of daily business as well as continual review of policies and procedures to insure compliance is a key area of preventative risk

management. A primary component of maintaining compliance is being aware of the U.S. laws applicable to international conduct. Education abroad programs managed by recipient institutions are required to comply with the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, The Family Educational Rights and Privacy Act, The Health Insurance Portability and Accountability Act of 1996, and Title IX of the Education Amendments Act of 1972. Additionally, education abroad programs can be held legally responsible for damages to students under civil tort and contract laws. Knowledge of the applicable laws must be used when developing and implementing education abroad programs to protect the rights of students and to provide protection to the institution in the event of adverse litigation.

Maintaining compliance with the law is not the only important component of preventative risk management in education abroad. Initiatives taken by higher education administrators to reduce individual areas of risk is another element of preventative risk management in education abroad. May and Koski (2013) discuss the requirement of specific actions as well as provision of information to participants as effective methods of risk mitigation. The Forum on Education Abroad's best practices provides a list of actions that are expected of effectively run international education programs. While the best practices were rigorously created and regularly reviewed, these actions are not supported by research as mechanisms for increasing student health and safety during education abroad. This study sought to explore the relationship between some of The Forum on Education Abroad's best practices for participant health and safety and the number of critical incidents occurring to undergraduate students participating in

education abroad. The analysis below reviews the quantitative results and suggests how these outcomes along with the legal analysis can be best utilized to optimize education abroad risk management.

Quantitative Research (RQ2 and RQ3)

Sample Demographics and Descriptives

The sample for Research Question Two and Research Question Three contained 95 ($N = 95$) respondents from predominantly small to medium sized institutions with total enrollments of under 9,999 students ($n = 63$; 66.3%). Forty-six-point three percent of the respondents were employed by public institutions and 53.7% of respondents were employed by private institutions. This demonstrates a higher percentage of respondents employed by public institutions as compared to the national statistics for numbers of degree granting public and private institutions in the United States. According to the NCES (2017) Digest of Education Statistics, 35% of U.S. Title IV degree granting institutions are public institutions and 65% are private (for- and non-profit) institutions. The overrepresentation of public institutions as compared to the national percentage may be based on the relative size of public versus private institutions. Private institutions tend to be smaller as compared to public colleges and universities and may not have education abroad offices with sufficient staffing to respond to the request for data in this survey.

Research Question 2

A series of inferential statistical tests including Welch's t Test, Mann Whitney U , and Chi-Square Test of Association were completed to determine the relationship between the individual independent variables and the dependent variable. The

independent variables were institution size, institution type, annual undergraduate education abroad enrollment, emergency response document, health insurance, evacuation insurance, STEP registration, the existence of dedicated staff abroad, background check, home school judicial clearance, medical training, and travel warning. The dependent variable was the number of critical incidents which involved undergraduate students participating in education abroad over the past three to five years. Data for the dependent variable were divided into a binary variable of zero to five critical incidents coded as “0” and six or more critical incidents coded as “1.” Two of the three statistical control variables demonstrated a significant relationship with the dependent variable – institution size and annual undergraduate education abroad participation. No significant relationship was found between institution type and the number of critical incidents.

Results from a Welch’s Independent t Test identified a statistically significant relationship between institution size and the number of critical incidents. Institutions reporting larger student enrollment also reported larger numbers of critical incidents in their undergraduate education abroad population. Similarly, a significant, positive correlation was found between institutions with larger undergraduate education abroad programs and the number of critical incidents. These two variables, institution size and annual undergraduate education abroad programs, were used as statistical control variables in the hierarchical multiple logistic regression analysis in Research Question 3. In addition to the two control variables, five of the main independent variables were found to have statistically significant relationships with the dependent variable when

analyzed independently – emergency response document, health insurance requirement, STEP registration, dedicated staff abroad, and travel warnings. Those variables identified as statistically significant in Research Question 2 were further analyzed in Research Question 3.

Research Question 3: Hierarchical Multiple Logistic Regression

A Logistic Regression was completed to identify which of the education abroad best practices were the most influential in predicting the number of critical incidents when controlling for institution size and annual education abroad enrollment.

International health insurance, emergency response documentation, STEP enrollment, dedicated staff abroad, and travel warning were the five main independent variables that had a statistically significant impact on the dependent variable as calculated in RQ2. The two control variables, institution size and annual education abroad enrollment, were contained in the first block of the logistic regression while the remaining independent variables were in block two of the model.

The Logistic Regression determined that while not all of the predictors were significant, the combination of variables was predictive of the dependent variable using the Likelihood Ratio Test. The nonsignificant Hosmer and Lemeshow Test demonstrated that the model was a good fit and the logistic regression accurately classified 89.1% of the cases in the sample. This suggests that the model's predictions are statistically better than chance.

Both of the two statistical control variables, institution size and annual undergraduate education abroad enrollment, were statistically significant. The finding of

a positive relationship between annual undergraduate education abroad enrollment and the number of critical incidents was not unanticipated. This finding is similar to statistics for collision frequency as reported by the Federal Highway Administration. An increase in miles driven coincides with an increase in insurance claim frequency for collisions (Hartwig, Lynch, & Weisbart, 2016). More driving is correlated with more collisions. It was expected that larger education abroad populations resulted in a larger number of critical incidents as there are simply more students with the potential to be involved in a critical incident.

The finding of a negatively predictive relationship between institution size and the number of critical incidents was unexpected. This result may be a result of the small sample size or potential collinearity between the institution size and annual undergraduate education abroad variables. Institution size and annual undergraduate education abroad enrollment displayed the largest positive correlation between unrelated variables ($r_s = .603, p < .05$). This high correlation between the two variables may have impacted the regression analysis results. The p -value (Wald = 4.330, $df = 1, p = .037$) and the standard error ($\beta = -.0557, SE = .268$) were higher for the institution size variable compared to p -value (Wald = 11.852, $df = 1, p = .001$) and standard error for annual undergraduate education abroad enrollment ($\beta = .011, SE = .011$). With this in mind, there is greater confidence in the result for the annual undergraduate education abroad enrollment variable as compared to institution size. While collinearity diagnostics did not present evidence for multicollinearity, future research could use different criteria for exclusion or inclusion of variables.

Two of the five main independent variables were statistically significant in the logistic regression model – emergency response documentation and STEP registration. Despite a statistically significant omnibus result for emergency response documentation in the logistic regression analysis, the levels of the variable were not individually statistically significant. This result was unexpected as generally a significant omnibus result leads to a finding of statistical significance in one of the levels (Keith, 2006). A significant omnibus result indicates that the type of emergency response document held by an institution is associated with changes in the number of critical incidents. However, an omnibus result speaks to the variable in its entirety and does not specify which level or levels of the variable differed significantly. The emergency response document variable was composed of two levels: formal document and informal document. For the logistic regression analysis both levels of the variable were compared to those institutions that had no emergency response document. The small sample used for the hierarchical multiple logistic regression is a potential explanatory factor for the lack of an individual significant level or levels of the emergency response document. Long (1997) suggests logistic regression analysis should be completed with sample sizes of 500 cases or more and that logistic regression analysis with less than 100 cases is “risky”. A sample size of 92 cases was used for hierarchical logistic regression analysis, which falls below the aforementioned recommendation and may have impacted the results.

Two of the three levels of the STEP Registration variable were positively predictive of the dependent variable – STEP Registration by Institution and STEP Registration by Student/No Proof Required. Both of these levels of the variable represent

either an action that is taken for the student by the institution, or one that is required of the student but not verified by the institution. Verified, individual registration in STEP represents an additional training method regarding health and safety while traveling abroad. Research in occupational safety suggests that education is effective in decreasing risk-taking behaviors (Nykänen, Sund, & Vuori, 2018) and increasing safety attitudes and behaviors (Nathai-Balkissoon, 2018). Individuals who are not receiving additional safety training through STEP registration may be missing a crucial opportunity to prevent critical incidents to themselves and others.

The main independent variables of international health insurance, dedicated staff abroad, and travel warning were all nonsignificant in the logistic regression analysis. Little data exists to provide additional evidence as to why these variables had no impact on the number of critical incidents. The correlations established on the Chi-Square Test of Association were weak as measured by Goodman and Kruskal's γ for both the international health insurance and dedicated staff abroad variables. These weak variable relationships may have been dominated by the other, more influential, variables in the logistic regression model (Keith, 2006).

The independent variable of Travel Warning had a positive correlation with the dependent variable and did have a large effect size as measured by Goodman and Kruskal's γ (.520) from the Chi-Square Test of Association. Despite the significant result from the Chi-Square test, the travel warning variable was not significant in the logistic regression model. No additional academic evidence is available to provide more support as to why this variable was not significant. The small sample size may have impacted the

correlations and, thus, the logistic regression analysis. Analysis of this variable would benefit from additional research using a larger sample size.

Implications

Education abroad administrators are a crucial component for decreasing the risk of both (1) individual students being exposed to a critical incident and (2) an institution being engaged legally for incidents that occur abroad. The research on the extraterritorial application of U.S. law and the preponderance of critical incidents presents information with far reaching implications for education abroad administrators and higher education institutions. The implications include a greater consideration of U.S. laws in the creation and implementation of education abroad as well as the need for consistent, inclusive evaluation of the preventative risk management steps taken to decrease institutional liability in education abroad.

Research Question 1 identified a division in the application of U.S. law to extraterritorial behavior which cements the importance of close collaboration between education abroad administrators and institution legal counsel. State laws related to contract disputes and civil torts have regularly been applied to events occurring outside of the U.S. territorial jurisdiction assuming personal jurisdiction can be established. U.S. federal laws such as the ADA, Section 504, and Title IX clearly apply to all educational programs. Since education abroad programs are educational programs, those institutions managing education abroad programs are held responsible to comply with the ADA, Section 504, and Title IX. Education abroad programs managed by non-recipient institutions, international institutions, and non-academic program providers are not

required to comply with ADA, Section 504, or Title IX regulations in the same manner as recipient higher education institutions. FERPA and HIPAA regulations apply to education abroad programs but will not be litigated under those laws given the lack of a private cause of action. Higher education institutions may be held liable under relevant state laws for injuries related to FERPA and HIPAA violations. Education abroad administrators should maintain close contact with legal counsel to effectively manage education abroad programs in compliance with state and federal law. It is also important for education abroad administrators to work closely with relevant campus offices such as accessibility services to maintain compliance with Section 504, the ADA, and Title IX. Individuals from these offices should be included in conversations regarding the development of and management of education abroad programs so that the combined knowledge of all departments can be applied to student access and student protection during education abroad.

In the same vein, higher education institutions would be wise to engage in a comprehensive analysis of institutional risk in international education. Results for RQ1 show that contracts and hold harmless agreements can be effective means of reducing institutional legal liability in the event of adverse legal action against the institution as a result of a critical incident occurring to a student participant. Given the relationship between the student and the institution in the education abroad process, however, the court system has upheld a high standard governing the application of such documents. Institutions are wise to engage in continuous, comprehensive risk assessment of all aspects of education abroad programming from the initial aspects of program creation

through the return of the students. The Association of Governing Boards of University and Colleges and United Educators (2014) survey of institutional acceptance and use of enterprise risk management (ERM) continues to note the importance of structured risk assessment and planning for higher education boards and administrators. Institutions, however, continue to view risk management from an “ad hoc” perspective, acting when the institution or another institution faces a crisis. This focus on treatment law, taking legal or administrative action when threatened, is used by more than 40% of institutions surveyed (AGB & UE, 2014). The National Association of College and University Business Officers (NACUBO) suggest a formal risk management process that extends to all areas of the institution and allows for a balanced perspective of risk. This view of risk looks to minimize threats to the institution and constituents while maximizing opportunities (Cassidy, Goldstein, Johnson, Mattie, & Morley, Jr., 2003). The prospect of critical incidents occurring to undergraduate students participating in education abroad could frighten institutions away from offering such programs. Instead, institutions should participate in ongoing risk assessment so that institutional liability is managed and engaging international opportunities are afforded to the institutional community.

Results from RQ2 and RQ3 display that the number of students who participate in education abroad is most strongly correlated with the number of critical incidents. Thus, preventative risk management actions may not necessarily lower the number of students who encounter a critical incident while participating in education abroad programs. However, ensuring that institutions have considered all aspects of the program will best shield the institution from legal liability if an incident occurs. Research Questions 2 and

3 examine the relationship between established best practices in education abroad and the occurrence of critical incidents. Gaining a greater understanding of any relationships between individual best practices can guide administrators in the management of education abroad programs.

Results displayed the strongest relationship was between an institution's annual education abroad enrollment and the number of critical incidents. Simply, the more students an institution sends to participate in an international program, the likelihood of having more critical incidents to report increases. While this result is consistent with the basics of probability, it does solidify that international education does inherently come with risk and that institutions should be prepared to handle such incidents when they occur.

The significant results for Emergency Management Documents and STEP registration also provides some direction for education abroad administrators. May and Koski (2013) suggest the importance of providing information and the importance of prior planning to decrease potential risk. These suggestions are in line with the recommendations of the Association of Governing Boards of Universities and Colleges and United Educators (2014) in their summary of the current state of enterprise risk management at higher education institutions. Both May and Koski (2013) and AGB and UE (2014) recommend comprehensive planning and information provision as means to decrease risk. These steps are consistent with preventative measures of decreasing institutional legal liability (Kaplin & Lee, 2013). Having an institutional emergency

management document for education abroad was found to have a statistically significant relationship with the number of critical incidents on the omnibus test.

Logistic regression found a statistically significant relationship, but no specific correlation between either level of the variable and the dependent variable. STEP registration was positively correlated with the number of critical incidents for institutions that either: (1) register students, or (2) require students to register but do not require verification. Giving the responsibility of STEP registration directly to students provides a greater opportunity for those individuals to gain information regarding health and safety risks during education abroad. Requiring student participants to register in STEP is in alignment with the recommendation of May and Koski (2013) to require individuals to take specific actions as a means of risk mitigation. Education abroad administrators should look to engage student participants regularly in the logistic aspects of the education abroad program as a means of preventative risk management.

Limitations

A large challenge to analysis of education abroad incident rates is the lack of commonality in incident reporting. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) represents the most comprehensive incident reporting requirement for recipient institutions that is regulated by the federal government. Regulations under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) apply to some, but not all education abroad programs and reporting under the Clery Act does not encompass all categories identified as critical incidents by the Forum on Education Abroad. Significant differences in data

are to be expected without a consistent mechanism for incident reporting or an industry accepted criterion for what constitutes a critical incident. Results from Turner, Leno, and Keller's (2013) pilot study on the causes of mortality among American college students addressed the lack of a standardized methodology for tracking and reporting student death as a limitation to their study. When institutions are not maintaining data in a similar manner this impacts the ability to analyze greater trends within the data between institutions. Attempting to draw conclusions across institutions that do not share reporting mechanisms inserts some variability into the research.

The greatest limitation faced by this study was the relatively small sample size, which impacted the choice of statistical analyses and the power of the results. Based on a calculated *a priori* power analysis with a medium effect size (.15) and a power of .80, target sample sizes ranged from 84 to 231 for the different statistical analyses completed for RQ2 and RQ3. A target sample of at least 119 was calculated for the multiple linear regression planned for RQ3 using the same effect size and power as RQ2. This research analyzed data from a total sample of 122 or 123 for Research Question 2 and a total sample size of 92 for Research Question 3. Thus, several of the completed statistical tests used a smaller sample size than needed for the aforementioned effect size and power. The smaller sample size significantly limits the conclusions that can be drawn from the statistical tests.

An additional limitation of the data was the skewness of the data for the dependent variable "number of critical incidents." The original plan included conducting a hierarchical multiple linear regression for RQ3 to analyze the quantitative relationship

between adherence to education aboard best practices and the number of critical incidents. However, the dependent variable was significantly and positively skewed as a continuous variable. The large number of responses with zero critical incidents contributed to the significant skewness. This is because the variable is considered a “count variable” and is not truly a continuous variable. A count variable is a variable that denotes the discrete number of times an event occurs during a specific time frame. Since a count variable can take only positive integer values or a zero value, count data tends to be significantly positively skewed with a larger proportion of zeros as compared to other types of data (Tüzen & Erbaş, 2017). Linear regression models of a count variable can be inefficient, rendering linear regression no longer the best statistical model for this study (Long, 1997).

The data in this study also exhibited overdispersion, an occurrence when the observed variance is greater than expected and the variance surpasses the mean. A Poisson Regression model is a more appropriate statistical model for a count variable that displays overdispersion. Given the abundance of zeros in the data set, a Zero-Inflated Negative Binomial (ZINB) model is a more appropriate zero-inflated statistical model than the zero-inflated Poisson (ZIP) model when the data are overdispersed (Garay, Lachos, & Bolfarine, 2015). Zero inflated models allow for an excessive number of outcome zeros in the data. The results of a ZINB model not only identify the impact of the independent variables (predictors) on the dependent variable, but also the impact of the predictors on whether the outcome data point would belong to the structural or sampling zero group.

Given the severe skewness and small sample size, the data were coded into a binary variable instead of the previously planned continuous variable. The binary variable used “0” for institutions reporting zero to five critical incidents and “1” for institutions reporting six or more critical incidents. Due to the preponderance of zeros in the data, it was determined that the ZINB model was the most appropriate statistical model. As the sample size narrowed from 123 for RQ2 to 92 for RQ3, this dramatically impacted the ability to use ZINB as this specific statistical model produces spurious results for small samples. Logistic Hierarchical Multiple Regression was applied to the dataset to address the skewness in the dependent variable when it was determined ZINB was not an appropriate statistical test.

Areas of Future Research

This study represents an exploratory look at risk management in undergraduate education abroad. Future research should look to further explore the quantitative relationships between best practices and critical incidents. Several of the limitations to this study stem from the small sample available for analysis. A larger dataset that encompasses a broader swath of institutions that sponsor education abroad would greatly improve the ability to draw conclusions from quantitative analysis. Not only would a larger dataset provide additional statistical analysis options, but a larger dataset would also increase the statistical power of the analyses that can be completed. Greater statistical power increases the conclusions researchers can make regarding the research questions. In addition to greater options for statistical analyses, a larger dataset also increases the diversity in institutions and education abroad programs represented. There

are a multitude of policies and procedures through which institutions can manage education abroad programs. A more diverse pool of respondents provides a richer pool of those administrative mechanisms from which conclusions can be made about education abroad risk management. Collaboration with the international education professional organization (NAFSA) may be beneficial to increasing participation in future research.

Additional research in education abroad risk management would also greatly benefit from consistent data collection of critical incidents between institutions. This recommendation would require engaging of international education administrators on a national level. The Critical Incident Database (CID) prepared by the Forum on Education Abroad is available to member institutions only, which includes only a small portion of higher education institutions that support education abroad for their students. A larger conversation is needed amongst education abroad administrators to move toward common data collection so that institutions can better work together as a field of education abroad rather than individual institutions engaged in education abroad. The need for such a conversation is compounded by calls for greater transparency in education abroad by advocacy groups such as Protect Students Abroad (PSA) and actions by individual states and the federal government to legislate education abroad incident reporting. Further research will need commonality in incident reporting and that will require the larger professional field of education abroad to unite in creating and implementing such a process.

Conclusion

This study explored the area of legal risk management and the relationship between established program management best practices and critical incidents in undergraduate education abroad. It was determined that civil tort and contract laws will regularly be applicable to education abroad programs regardless of the territorial status of the conduct leading to the lawsuit. Federal laws such as the ADA, Section 504, Title IX, HIPAA, and FERPA apply to education abroad programs executed by U.S. educational institutions

Awareness of the U.S. laws under which litigation can be brought against an institution for injuries sustained during undergraduate education abroad is one piece of the risk management puzzle. Preventative risk management requires institutions to utilize best practices in the implementation of education abroad in order to avoid critical incidents as often as possible. Hierarchical logistic regression analysis results demonstrated that annual undergraduate education abroad enrollment has the most predicative capability of the number of critical incidents. This result suggests that education abroad inherently includes potential physical risk to participants and thus, legal risk to the institution. Additional results suggest that the presence of an emergency response document and STEP registration by institution or student (lacking institutional verification) are correlated with greater numbers of critical incidents. Integrating these results into program management can assist education abroad administrators in decreasing the number of critical incidents despite the fact that international study may demonstrate an increased risk to participants and the institution. Education abroad professionals can use this exploratory study to better manage international programs in a

manner that limits the numbers of critical incidents that occur to participating students. Additionally, education abroad professionals can use results from this study to minimize institutional risk of litigation in the event an incident occurs by following research-based practices.

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