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REEXAMINING STUDENT PRIVACY LAWS IN RESPONSE TO THE VIRGINIA TECH TRAGEDY

MATTHEW ALEX WARD*

INTRODUCTION

The Spring 2007 Virginia Tech¹ tragedy garnered national attention and rejuvenated the debate over appropriately balancing privacy and safety in the collegiate setting. On April 16, 2007, a Virginia Tech student, Seung Hui Cho, murdered thirty-two of his fellow classmates and professors, wounded seventeen more, and then killed himself.² Soon after, the American Bar Association President implored the legal community to identify changes that could be made to prevent similar tragedies from occurring.³ Suggested changes in response to the Virginia Tech tragedy are vast and varied, ranging from reevaluating gun laws and properly

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1. Virginia Tech is the shorthand for the university's full name: Virginia Polytechnic Institute and State University. Va. Tech, <http://www.vt.edu> (last visited May 7, 2008).

2. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007, at 1 (2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport.cfm>. The Virginia Governor, Timothy Kaine, requested this report to fully investigate the mass shooting, the background leading to the shootings, and identify recommendations. Office of the Governor, Commonwealth of Va., Exec. Order No. 53 (Va. 2007), available at http://www.governor.virginia.gov/initiatives/executiveorders/pdf/eo_53.pdf. On April 11, 2008, Virginia Tech and a majority of the victims' families agreed to an \$11 million settlement offer, with \$100,000 offered to each family in exchange for the families waiving their rights to sue Virginia Tech and the Commonwealth of Virginia. Anita Kumar & Brigid Schulte, *Va. Tech Families Tentatively Back Deal*, WASH. POST, Apr. 11, 2008, at A1. Also, wounded students would be able to receive up to \$100,000 depending on their injuries. *Id.* If the families were to sue, their theories would be based on Virginia Tech's negligence for failure to: (1) timely respond to Cho's mental disorders, (2) quickly lock-down the campus after Cho's first shooting in a dorm room (two hours before Cho killed and wounded the majority of students), and (3) have an emergency response plan. Tim Craig, *Mediator Guiding Deal on Va. Tech*, WASH. POST, Mar. 26, 2008, at B1; Sue Lindsey & Dionne Walker, *Panel Recommends Reforms at Virginia Tech*, CHARLESTON GAZETTE (Charleston, W. Va.), Aug. 23, 2007, at C8.

3. Karen J. Mathis, *Time for Common Sense: Legal Lessons for Virginia Tech*, MONT. LAWYER, May 2007, at 28, 28.

treating mental illness, to evaluating disability and privacy laws.⁴ Specifically, this comment explores the long standing tensions between safety and privacy concerns,⁵ and offers possible solutions to the difficult problem of determining the timing and parameters of disclosing private health information about mentally ill persons to ensure safety in collegiate settings.

The legal mechanism for balancing safety and privacy in college is the Family Education Rights and Privacy Act, commonly referred to as FERPA.⁶ FERPA's two-fold aims are to provide students access to their educational records while protecting those records from being disclosed without the students' permission.⁷ Even while emphasizing a student's privacy, however, FERPA permits the

4. *Id.* In addition to privacy concerns, the Virginia Tech tragedy raised a number of other legal and non-legal issues which must be addressed to prevent another similar tragedy from occurring. However, these additional concerns are outside the scope of this comment. Specific legal issues include examining First Amendment implications for a student who creates violent writings for class, and determining what the educator's proper response should be upon reading such writings. *Id.*, Richard V. Blystone, *School Speech v. School Safety: In the Aftermath of Violence on School Campuses Throughout This Nation, How Should School Officials Respond to Threatening Student Expression?*, 2007 B.Y.U. EDUC. & L.J. 199; Mary Schmich, *Writing Can Reveal Darker Side of Psyche*, CHI. TRIB. Apr. 22, 2007, at C1. Additional legal issues include examining the Second Amendment to ask whether it is appropriate to permit mentally ill individuals to purchase assault rifles and large magazine clips. See U.S. DEP'T OF JUSTICE ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 10 (2007), available at http://www.usdoj.gov/opa/pr/2007/June/vt_report_061307.pdf; Jon S. Vernick et al., *The Ethics of Restrictive Licensing for Handguns: Comparing the United States and Canadian Approaches to Handgun Regulation*, 35 J. L. MED. & ETHICS 668, 675 (2007). Two articles specifically examine the gaps that permitted Cho to purchase weapons, despite his ineligibility to make such a purchase because of his prior mental health treatment. John P. Flannery, *Students Died at Virginia Tech Because our Government Failed to Act!*, 18 GEO. MASON U. CIV. RTS. L.J. 285, 288–94 (2008); Brian J. Siebel, *The Case Against Guns on Campus*, 18 GEO. MASON U. CIV. RTS. L.J. 319, 320 (2008). In November 2007, the U.S. Department of Justice reported that the Federal Bureau of Investigation (FBI) doubled the list of people prohibited from purchasing guns because of mental health problems from 175,000 to 400,000 names. Dan Eggen, *FBI's Gun Ban Listing Swells*, WASH. POST, Nov. 30, 2007, at A1. Further legal questions to explore relate to search and seizure questions under the Fourth Amendment. See generally Ronald Susswein, *The New Jersey School Search Policy Manual: Striking the Balance of Students' Rights of Privacy and Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527, 528 (2000) (discussing searches in the high school setting). Additionally, the legality and effectiveness of zero-tolerance prevention approaches should be examined. Scott R. Simpson, *Report Card: Grading the Country's Response to Columbine*, 53 BUFF. L. REV. 415, 433–43 (2005).

There is a similar laundry list of non-legal topics which also must be addressed to help minimize the likelihood of another tragedy, including increasing the capacity of on-campus mental health services, improving the relationship between local and campus police, and developing an emergency alert system. Nick Miroff, *A Year Later, Va. Tech is Still Healing*, WASH. POST, Apr. 16, 2008, at A1.

5. As noted in the REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY, "states and local communities are carefully considering whether they have properly addressed and balanced the fundamental interests of privacy and individual freedom, safety and security" U.S. DEP'T OF JUSTICE ET AL., *supra* note 4.

6. Pub. L. No. 93-380, § 513, 88 Stat. 571, 571–74 (codified at 20 U.S.C. § 1232g (2000 & Supp. V 2005)). This paper only examines federal privacy law. State or tort laws that might provide other grounds for determining Virginia Tech's legal obligations are beyond the scope of this comment.

7. *Id.*

disclosure of a student's educational record in several situations without the student's permission.⁸

This paper explores how FERPA balances safety and privacy, and suggests ways for Congress and the Department of Education to improve FERPA in response to the Virginia Tech tragedy. As discussed below, FERPA's current balance between safety and privacy overly restricts educators and needs to be amended to permit educators to address their concerns about their students. Part I of this paper explores Seung Hui Cho's documented warning signs and the communication gaps between Virginia Tech faculty, as well as the media reports about them. Part II details FERPA and its permitted disclosures, with particular emphasis on the health and safety emergency provision. Part III of the paper examines modifications to FERPA that will encourage communication among educators to prevent such events from occurring. Specifically, this section reviews the privacy-safety balance and how FERPA was modified in response to student suicides. In addition, this section proposes incorporating a hold harmless provision to protect educators, and explores methods to bridge the communication gap between high school and college. Finally, Part III examines a current bill to amend FERPA and the new Department of Education guidelines issued in October 2007 to address educators' concerns about FERPA.

This comment recognizes the limitations inherent in the case study of the Virginia Tech massacre. Those examining the Virginia Tech shooting had the advantage of looking backward at a complete record of events. Today, readers can assess the specific warning signs that Cho's faculty and resident advisors missed. Yet, it is doubtful that those educators could have predicted that those warning signs would eventually result in such a massive tragedy. In addition, the Virginia Tech Report notes that even with the gaps in the mental health and legal system, the underlying fault belongs to Cho.⁹ Seung Hui Cho "ultimately . . . is the primary person responsible for April 16, 2007; to imply otherwise would be wrong."¹⁰ Finally, even if the entire mental health and legal system properly functioned, it is not clear whether the shootings could have been prevented. This comment suggests ways to improve the legal system with the aim of preventing similar incidents from occurring in the future.

8. These exceptions, discussed in Part II, are typically for administrative, legal, or safety purposes. Most relevant to the Virginia Tech situation are the health or safety emergency exceptions, 34 C.F.R. § 99.36(a) (2007), although this provision is to be strictly construed. *Id.* § 99.36(c).

9. VA. TECH REVIEW PANEL, *supra* note 2, at 53

10. *Id.*

I. BACKGROUND

A. *Cho's Mental Health and Exhibited Warning Signs*

The basic facts of the Virginia Tech tragedy are chilling. On April 16, 2007, Seung Hui Cho, "an angry and disturbed student," killed thirty-two of his fellow Virginia Tech students and faculty, wounded seventeen more, and then killed himself.¹¹ Soon after, the media reported that Cho exhibited several warning signs in his classes and dorm, but that privacy laws precluded Cho's professors and resident advisors from discussing their concerns with one another.¹²

The Virginia Tech Report provides a complete timeline of events, including the warning signs Cho exhibited. Aside from his poor communication skills and extreme shyness, Cho did not exhibit violent tendencies or signs of a serious mental illness during his elementary school years.¹³ His first major incident followed the 1999 Columbine High School shootings when Cho wrote a paper for his high school English class indicating that he wanted to repeat what happened at Columbine.¹⁴ This incident prompted Cho's teacher to contact his parents.¹⁵ In response, Cho's parents had a child psychiatrist evaluate Cho, and Cho's high school initiated accommodations for his then diagnosed emotional disability.¹⁶ This combination of psychiatry and educational accommodation helped Cho graduate high school without further incident.¹⁷

Seung Hui Cho enrolled at Virginia Tech,¹⁸ despite the concerns of his high school counselor who worried that Virginia Tech's large size would be an inappropriate fit for Cho.¹⁹ Upon enrolling, Cho did not exhibit any known warning signs during his first two years at Virginia Tech. Although not socially active, Cho's behavior at this time generated scant alarm or suspicion.²⁰

In the Fall of 2005, his junior year, Cho's behavior became troubling as he began to display major warning signs. These warnings signs were subsequently well documented.²¹ In poetry class, Cho wrote violent poems that he shared with

11. *Id.* at 1.

12. Shaila Dewan & Marc Santora, *Officials Knew Troubled State of Killer in '05*, N.Y. TIMES, Apr. 19, 2007; Kerry Dougherty, *Privacy Laws Can Isolate Mentally Ill College Students from Parents*, VA. PILOT, Apr. 21, 2007; Jeff Gammage & Stacey Burling, *Laws Limit Schools Even After Alarms*, PHILA. INQUIRER, Apr. 19, 2007, at A1; Editorial, *Something Wrong, Nothing Done*, BOSTON GLOBE, Apr. 20, 2007; Evan Thomas et al., *Making of a Massacre*, NEWSWEEK, Apr. 30, 2007.

13. VA. TECH REVIEW PANEL, *supra* note 2, at 32–40.

14. *Id.* at 35.

15. *Id.*

16. *Id.* at 35–36.

17. *See id.* at 36–37.

18. *Id.* at 40–41.

19. *Id.* at 37. Virginia Tech has approximately 26,370 students. *Id.* at 11.

20. *Id.* at 40–41.

21. *Id.* at 40–52.

the class. Many of his classmates then refused to attend class.²² The poetry professor discussed her concerns about Cho with her supervisor and the Virginia Tech Care Team.²³ The Care Team was established to identify and work with students having problems.²⁴ Cho's use of disturbing themes in his writings continued during a spring 2006 fiction writing class.²⁵

Outside of the academic setting, Cho's behavior raised concern in his dorm. During the Fall 2005 semester, Cho made persistent and unwelcomed advances towards a female student.²⁶ The female student contacted the campus police, who instructed Cho to avoid further contact with her.²⁷ Shortly after, Cho threatened to commit suicide.²⁸ Cho's suitemate contacted the campus police, who returned and subsequently transported Cho to a behavioral health center for a mental health screening.²⁹ The screening determined Cho was mentally ill and a danger to himself and others and, therefore, he was involuntarily hospitalized for the night.³⁰ The following day, a special justice ruled Cho "presents an imminent danger to himself as a result of mental illness" and ordered Cho into outpatient therapy.³¹ Later that day, Cho was triaged by the Cook Counseling Center, but never attended any later sessions. Cho's failure to attend future treatment sessions was never relayed to the special justice or Virginia Tech.³²

The residential staff discussed Cho's communications with the female student and her subsequent complaint to police,³³ and even communicated their concerns to

22. *Id.* at 42-43.

23. *Id.* at 43.

24. *Id.* at 52. Specifically, the Care Team is responsible for addressing "concerns regarding student behavior. . . including, but not limited to, concerns of disruptive, threatening, or violent behavior." VA. TECH, PRESIDENTIAL INTERNAL REVIEW: WORKING GROUP REPORT ON THE INTERFACE BETWEEN VIRGINIA TECH COUNSELING SERVICES, ACADEMIC AFFAIRS, JUDICIAL AFFAIRS AND LEGAL SYSTEMS 8 (2007) [hereinafter INTERFACE REPORT]. The Care Team tries to develop a complete profile of a student to determine and tailor the appropriate response for that student's situation. *Id.* Following the Virginia Tech tragedy, several universities established and use such teams to address potentially troubling behavior and offer assistance. *Troubled Students Now Put on Watch Lists*, MSNBC.COM, Mar. 28, 2008, <http://www.msnbc.msn.com/id/23847510/>. Drawing from lessons learned, these care teams include a full-range of representative (such as professors, residential advisors, and counselors) to ensure a complete picture of a student can be developed. *Id.* The care teams now emphasize early intervention and treatment. *Id.*

25. VA. TECH REVIEW PANEL, *supra* note 2, at 49.

26. *Id.* at 46.

27. *Id.*

28. *Id.* at 47. ("Following the visit from the police, Cho sent an instant message to one of his suitemates stating 'I might as well kill myself.'")

29. *Id.* Virginia's mental health law authorizes a magistrate to grant an emergency custody order upon probable cause that an individual "presents an imminent danger to himself or others . . ." VA. CODE ANN. § 37.2-808.A. (2005 & Supp. 2007).

30. VA. TECH REVIEW PANEL, *supra* note 2, at 47.

31. *Id.* at 48.

32. *Id.* at 49.

33. *Id.* at 46.

Cho's 2006 resident advisor.³⁴ However, this dorm incident was never relayed to the Care Team.³⁵ As a result, the academic-based Care Team and residential staff each had limited knowledge of Cho's unsettling pattern of behavior.³⁶

At no time were Cho's parents informed of their son's behavior, including Cho's involuntary hospitalization and court appearance.³⁷ Cho's parents stated if they were aware of Cho's behavior, they would have taken him home for a leave of absence.³⁸

B. Communication Gaps Prevented Developing a Complete Picture of Cho's Mental Health

Communication breakdowns at various stages prevented Virginia Tech educators from developing the full picture of Cho's unhealthy behavior pattern.³⁹ The gaps in communication prevented early and effective management of Cho's mental illness.⁴⁰ As this case study demonstrates, avoiding such communication lapses is critical to encouraging more complete communication of mental health and safety information among all educators.

The first of these communication gaps is the gap between high school and college. The general extent of the interaction between high schools and colleges is limited to the high school forwarding of a student's transcript as part of a student's application process. A high school has no obligation to inform a college of any student's disability.⁴¹ Nor is a high school required to report the history of a student's mental or emotional disturbances.⁴² As such, although "[s]tudents may start fresh in college . . . their [mental health] history may well remain relevant."⁴³ Yet Virginia Tech was unaware that, while at high school, Cho received special

34. *Id.* at 51.

35. *Id.* at 46–47.

36. *Id.* at 46–47, 52. Appendix M of the Virginia Tech Review Panel Report lists the warning signs and indicators for at risk individuals. *Id.* app. at M-1 to M-4. This list is not geared specifically to the warning signs Cho exhibited, but instead provides a cumulative list of factors. *Id.* at M–2.

37. *Id.* at 49.

38. *Id.*

39. *Id.* at 52.

40. *Id.* at 52–53. Information sharing is critical to reducing the violence potential of at-risk students. *Id.* at 53; INTERFACE REPORT, *supra* note 24, at 13.

41. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TRANSITION OF STUDENTS WITH DISABILITIES TO POSTSECONDARY EDUCATION: A GUIDE FOR HIGHSCHOOL EDUCATORS (2007), *available at* <http://www.ed.gov/about/offices/list/ocr/transitionguide.html>. Additionally, the high school student has no obligation to inform a college of his or her disability. *Id.* Only if the student seeks an academic accommodation must the student identify his or her disability. *Id.* Indeed, a high school would likely run afoul of disability laws if the high school indicated which students received accommodations based on a disability. *Id.*

42. See VA. TECH. REVIEW PANEL, *supra* note 2, at 38–39 (noting that FERPA permits disclosure of special education records, but does not mandate for disclosure); 20 U.S.C. § 1232g(a)(4)(A).

43. *Id.* at 39.

accommodations pursuant to disability laws, nor was Virginia Tech aware of Cho's statement about wanting to repeat the Columbine shooting.⁴⁴

Another detrimental communication gap occurred between the Care Team and resident staff. Members of the Care Team and the residential staff never discussed Cho's behavior, depriving each other of critical information. Cho's professors maintained their own chain-of-command system for discussing his behavior: moving from professor to department chair to the Care Team.⁴⁵ At the same time, the resident staff had their own internal system for discussing Cho's behavior, and the two channels never intersected.⁴⁶ This lack of information-sharing "contributed to the failure to see the big picture . . . [and] [a]lthough to any one professor these signs might not necessarily raise red flags, the totality of the reports would have and should have raised alarms."⁴⁷ In addition, the Care Team's strict interpretations of FERPA hampered their ability to investigate,⁴⁸ causing "widespread lack of understanding" through "conflicting practice" as to what could and could not be shared.⁴⁹

C. Initial Reports Blamed Privacy Laws for Thwarting Educators' Efforts to Address Cho's Warning Signs

The Virginia Tech Review Panel notes the "widespread perception is that information privacy laws [such as FERPA] make it difficult to respond effectively to troubled students."⁵⁰ The Report's assertion is based on professors' conceptions of privacy laws and several news media reports in the immediate aftermath of the Virginia Tech tragedy. Some of the reports included statements by professors, who claimed privacy laws restricted what they could say and do.⁵¹ Other media reports echoed the same sentiment.⁵² For example, one news media outlet published a story

44. *Id.* at 37; Amy Gardner et al., *Panel: Va. Tech Failed to Respond to Cho Warning Signs*, WASH. POST, Aug. 30, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000759.html>.

45. VA. TECH REVIEW PANEL, *supra* note 2, at 43.

46. *See Id.* at 52–53. Such isolated communication channels are sometimes referred to as "information silos." U.S. DEP'T OF JUSTICE ET AL., *supra* note 4, at 7.

47. VA. TECH REVIEW PANEL, *supra* note 2, at 52–53.

48. *Id.* at 52. Even during preparation of the Report, some requested "information was delayed until various privacy issues were resolved . . ." *Id.* at 7. Additionally, during some meetings while preparing the Report, Virginia Tech's attorney stated he could not share some information due to privacy laws. *Id.* at 63.

49. *Id.* at 63.

50. *Id.*

51. *E.g., id.* at 63; INTERFACE REPORT, *supra* note 24, at 10–11; U.S. DEP'T OF EDUC. ET AL., *supra* note 4, at 7.

52. *See, e.g.,* Shaila Dewan & Marc Santora, *Officials Knew Troubled State of Killer in '05*, N.Y. TIMES, Apr. 19, 2007, at A1; Marc Fisher, *Heed Columbine's Lessons: Make Information Available, and Speak Out*, WASH. POST., Apr. 19, 2007, at A10; Kimberly Hefling, *Rep. Murphy Urges Changes in College Privacy Measure*, PITTSBURGH POST-GAZETTE, Apr. 26, 2007, at A7; Nancy Shute & Avery

indicating that there were many warning signs and Virginia Tech failed to connect the dots.⁵³ However, some media accounts did note an exception to the strict privacy laws: college counselors are required to report serious threats of harm by students.⁵⁴

II. EXPLORING FERPA

Both media reports and educators perceived that federal privacy laws prevented Seung Hui Cho's educators from discussing their concerns about his mental health with one another.⁵⁵ In the educational setting, the primary federal law governing student privacy is the Federal Education Rights and Privacy Rights Act (FERPA),⁵⁶ also known as the Buckley Amendment in honor of its sponsor.⁵⁷ This comment investigates those media claims by examining what communication FERPA forbids and permits after weighing the balance between safety and privacy.

A. FERPA Overview

Congress passed FERPA in 1974, under its spending clause authority,⁵⁸ to protect the privacy interests of students in response to public concern "about government record keeping and the dissemination of information commonly considered private in nature."⁵⁹ FERPA applies to all educational agencies or institutions that receive federal funding,⁶⁰ including colleges whose students receive grants or loans under various federal college tuition assistance programs.⁶¹ Thus, practically all higher education institutions must follow FERPA's

Comarow, *What Went Wrong?*, U.S. NEWS & WORLD REP., Apr. 30, 2007, at 42; Evan Thomas, *Making of a Massacre*, NEWSWEEK, Apr. 30, 2007, at 22.

53. Jane Stancill & Lesley Clark, *Cho Was a Known Psychological Problem, but He'd Broken No Laws*, MCCLATCHY-TRIB. (Wash., D.C.), Apr. 18, 2007, available at http://www.mcclatchydc.com/staff/lesley_clark/story/16002.html.

54. Marsha King, *Colleges Review Mental Health-Issues*, SEATTLE TIMES, Apr. 22, 2007, at B1.

55. Marc Fisher, *A System in Need of a Dose of Common Sense*, WASH. POST, June 17, 2007, at C1; Stancill & Clark, *supra* note 53.

56. Pub. L. No. 93-380, § 513(a), 88 Stat. 571, 571-74 (codified as amended at 20 U.S.C. § 1232g (2000 & Supp. V 2005)).

57. Britton White, *Student Rights: From In Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education*, 2007 BYU EDUC. & L.J. 321, 332. James Buckley was a Senator from New York. *Id.* at 332 n.67.

58. § 513(a), 88 Stat. at 571; Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 5 (2001).

59. Ethan M. Rosenzweig, Comment, *Please Don't Tell: The Question of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L. J. 447, 451 (2002) (quoting Nancy S. Footer, *Student Affairs Overview*, in THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: A LEGAL COMPENDIUM 463 (Steven J. McDonald ed., 1999)).

60. 20 U.S.C. § 1232g(a)(1)(A)-(B) (2000).

61. 34 C.F.R. § 99.1(c)(2) (2007).

requirements.⁶² As a federal statute, FERPA supersedes conflicting state laws governing student privacy.⁶³

FERPA has a two-fold purpose: (1) protect the privacy of student records⁶⁴ and (2) allow students to access their educational records.⁶⁵ Generally, to disclose information contained in the students' educational records, colleges must obtain permission from the students, as most students entering universities are 18 years of age or older.⁶⁶

FERPA defines education records as files containing "information directly related to a student"⁶⁷ that "are maintained by an educational agency or institution or by a person acting for such agency or institution."⁶⁸ In contrast, educational records do not include the records of a "law enforcement unit of the educational agency"⁶⁹ or treatment records for college students made by physicians, psychiatrists, psychologists, or other similar professionals.⁷⁰ In addition, directory information is not considered to be part of students' educational records and can be

62. Rosenzweig, *supra* note 59, at 453. Ironically, one explanation for FERPA's extension to colleges is because of a drafting error. White, *supra* note 57, at 334. Indeed, Senator Buckley didn't intend for FERPA to apply to colleges. *Id.* Nevertheless, after almost thirty-five years in which several amendments referring to colleges were passed and multiple lawsuits concerning college settings occurred, it is well established that FERPA encompasses colleges. *Id.*

63. *United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002) ("[T]he Ohio Public Records Act does not require disclosure of records the release of which is prohibited by federal law. Based on that exception, the Ohio Public Records Act does not conflict with the FERPA and the state and federal statutes can coexist." (citation omitted)); *Rim of the World Unified Sch. Dist. v. Superior Court*, 129 Cal. Rptr. 2d 11, 14–15 (Cal. Ct. App. 2002) (holding that FERPA's prohibition against releasing records preempts a California law requiring that student expulsion records be publicly disclosed upon demand). In addition, a college is required to contact the Department of Education, if the College is unable to comply with a FERPA provision because of a conflicting state law. 34 C.F.R. §§ 99.60–99.61 (2007).

64. 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents . . .").

65. 20 U.S.C. § 1232g(a)(1)(A) ("[P]arents of students. . . [shall have] the right to inspect and review the education records of their children."). This right vests to the student once the student obtains the age of majority or attends a postsecondary institution. *Id.* § 1232g(d). As this comment specifically examines FERPA in the college setting, postsecondary terms are used. Thus, "college" replaces the broader statutory language of "educational agency or institutions," *Id.* § 1232g(a)(3), and "student" substitutes for parent of a minor child and student who obtains the age of majority, as most college students are eighteen or older. *See Id.* § 1232g(d). However, the use of "college" should not be taken to mean FERPA applies to only the initial post-secondary level of education. FERPA encompasses all graduate levels of education, as FERPA applies to all "educational agenc[ies] . . . authorized to direct and control public elementary or secondary, or postsecondary educational institutions." 34 C.F.R. § 99.1.

66. 20 U.S.C. § 1232g(d). The exceptions to this general requirement are subsequently discussed in Part II.B.

67. *Id.* § 1232g(a)(4)(A)(i).

68. *Id.* § 1232g(a)(4)(A)(ii).

69. *Id.* § 1232g(a)(4)(B)(ii).

70. *Id.* § 1232g(a)(4)(B)(iv).

made public.⁷¹ Directory information includes students' names, contact information, fields of study, degrees received, and for athletes, their height and weight.⁷² However, colleges must notify students that such directory information will be disclosed to the public unless the student opts out of that disclosure.⁷³

Due to FERPA's coverage of only "educational records," commentators question how far the definition of "educational records" under FERPA extends.⁷⁴ For example, the Supreme Court recently determined that peer grading⁷⁵ does not create educational records for FERPA purposes.⁷⁶ Recent debate questions whether Congress intended educational records "to include records related to a student's behavior."⁷⁷

The Department of Education (Department) oversees FERPA compliance⁷⁸ through its Family Policy Compliance Office (Office).⁷⁹ If a student believes that

71. See *Id.* § 1232g(a)(5)(A)-(B). The Penn State Directory is an example of a typical college directory. Penn State, Penn State Directory, <http://www.psu.edu/ph/> (last visited May 12, 2008). Penn State's directory provides information for students to request removal of their contact information from the directory. *Id.*

72. § 1232g(a)(5)(A). Thus, for example, searching the Penn State Director for Meghan Kelleher, the author's younger sister, provides Meghan's contact information and shows she is an undergraduate student earning a degree in public relations. The directory disclosure also allows Penn State to list players' heights and weights in its sports rosters. For example, Penn State provides the heights of the players on the 2007 national championship women's volleyball squad. Penn. State Univ., Penn State Women's Volleyball, <http://gopsusports.cstv.com/sports/w-volley/mtt/psu-w-volley-mtt.html> (last visited May 12, 2008). Penn State also displays the heights and weights for the 2007 Penn State football team. Penn. State Univ., 2007 Penn State Football Roster, http://gopsusports.cstv.com/auto_pdf/p_hotos/s_chools/psu/sports/m-footbl/auto_pdf/07-mfootbl-alpha-roster (last visited May 12, 2008).

73. § 1232g(a)(5)(B).

74. See generally Daggett & Huefner, *supra* note 58, at 3 (discussing what does, and what should, constitute an educational record under FERPA). Indeed, taken to the extreme, a broad definition of educational records could potentially prevent a student's artwork from being displayed in the classroom without the parent's consent. Dixie Snow Huefner & Lynn M. Daggett, *Commentary, FERPA Update: Balancing Access to and Privacy of Student Records*, in WEST'S EDUCATION LAW REPORTER at 469, 473-74 (2001). One author has questioned whether FERPA will soon cover genetic information, predicting schools will eventually use genetic information to determine whether a student is eligible for special education criteria and other possible educational purposes. Mark A. Rothstein, *Genetic Secrets: A Policy Framework*, in GENETIC SECRETS PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA, at 451, 487-88 (Mark A. Rothstein ed., 1997).

75. Peer grading is a grading process where students exchange papers with one another, score the papers, and then verbally report the score to the teacher. *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 429 (2002). Thus, in peer grading at least one other student, if not the whole class, is aware of how a student performed on a quiz or test. *Id.*

76. *Id.* at 435-36.

77. Rosenzweig, *supra* note 59, at 458.

78. 20 U.S.C. § 1232g(f)-(g) (2000); U.S. Dep't of Educ., Family Policy Compliance Office (FPCO), <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited May 12, 2008).

79. 34 C.F.R. § 99.60(a)-(b) (2007). The Family Policy Compliance Office is tasked to "[i]nvestigate, process, and review complaints and violations . . . and [p]rovide technical assistance to ensure compliance . . ." *Id.* § 99.60(b)(1)-(2).

his or her college violated FERPA, the student files a complaint with the Office, which then conducts an investigation.⁸⁰ If punishment is warranted, the Department may withdraw federal funding from the college.⁸¹ This is the only available remedy for a student; FERPA does not provide a private cause of action for a student to enforce FERPA.⁸² Nor can a student use a section 1983 action, a mechanism for redressing a deprivation of federal statutory rights,⁸³ to sue for damages for a college's violation of FERPA.⁸⁴

While FERPA's basic premise is clear—to protect student privacy—several questions remain regarding how Congress balanced students' privacy rights and the public health and safety in the college environment. Unfortunately, little legislative history surrounds the enactment of FERPA.⁸⁵ This is because FERPA was introduced as a floor amendment and not subjected to the usual committee scrutiny or hearings.⁸⁶

B. FERPA Exceptions Permitting Disclosure

Even with its focus on maintaining student privacy, FERPA provides for several circumstances in which a college may disclose information in a student's educational records without the student's consent.⁸⁷ These exceptions include routine administrative disclosures related to transferring schools,⁸⁸ financial aid,⁸⁹

80. 34 C.F.R. §§ 99.63; 99.64(b).

81. 34 C.F.R. § 99.67(a). Despite the severity of non-compliance, the Department has never withdrawn funding from a college for violating FERPA. Rosenzweig, *supra* note 59, at 454. Indeed, FERPA's remedy to withdraw funding would lead to a "significant financial blow to universities and other institutions, and potentially could cause a decrease in the level of education. In the long-run, the students attending these institutions and their parents—the parties whom FERPA was intended to protect—would be the ones most penalized by such action." *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1140 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797, 798 (6th Cir. 2002).

82. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 69 (1st Cir. 2002) (finding that Congress did not intend for FERPA to embody a private right of action).

83. 42 U.S.C. § 1983 (2000); accord KAREN M. BLUM & KATHRYN R. URBONYA, *FED. JUDICIAL CTR., SECTION 1983 LITIGATION I* (1998).

84. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002) (holding FERPA does not confer rights enforceable by § 1983 claims). Prior to the Supreme Court's ruling, there was a large split in the circuits as to whether FERPA individual rights were enforceable by section 1983. *Id.* at 278, 278 n.2. The former Chief Justice Rehnquist wrote the majority opinion. *Id.* at 276. However, his departure from the court isn't likely to alter the court's position or familiarity with this subject, as the attorney for Gonzaga University is now the Chief Justice. *See Id.* at 275; White, *supra* note 57, at 340–41.

85. Joy Blanchard, *University Tort Liability and Student Suicide: Case Review and Implications for Practice*, 36 J.L. & EDUC. 461, 472 (2007).

86. Rosenzweig, *supra* note 59, at 464.

87. For a complete description of all FERPA's exceptions, see Huefner & Daggett, *supra* note 74, at 469.

88. 20 U.S.C. § 1232g(b)(1)(B) (2000).

89. *Id.* § 1232g(b)(1)(D).

and institutional audits.⁹⁰ Other exceptions include disclosure of campus criminal offenses, such as the final results of any disciplinary proceedings held by the institution to the alleged victim⁹¹ or the alleged perpetrator.⁹²

FERPA also allows educational institutions to disclose students' records for judicial, legal, and safety purposes. Judicial exceptions include disclosure of information designated in a federal grand jury subpoena⁹³ and disclosure to state and local officials of information concerning the juvenile justice system.⁹⁴ Disclosures are also permitted for law enforcement purposes.⁹⁵ Most recently, in 2001 Congress amended FERPA to allow the Attorney General to obtain educational records "relevant to an authorized investigation or prosecution" of terrorism.⁹⁶ Another permitted safety disclosure allows a school to inform a student's parent or legal guardian about the student's violation of any law prohibiting the use of alcohol or controlled substances, if the student is under twenty-one years of age.⁹⁷

C. *The Safety and Health Emergency Exception*

The safety and health emergency exception is the most relevant disclosure exception with respect to the Virginia Tech tragedy. Under this exception, the release of information in a student's educational record is permitted "subject to [the] regulations of the [Department of Education] Secretary, in connection *with an emergency*, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons. . . ."⁹⁸ Pursuant to FERPA authorization, the Secretary issued regulations detailing what constitutes a health and safety emergency and what information may be disclosed under that exception.⁹⁹

90. *Id.* § 1232g(b)(3) (allowing federal and state tax and educational representatives access to student or other records necessary for an audit and evaluation). However, personally identifiable data must be destroyed upon completion of the audit. *Id.*

91. *Id.* § 1232g(b)(6)(A).

92. *Id.* § 1232g(b)(6)(B).

93. *Id.* § 1232g(b)(1)(J); e.g., *Victory Outreach Ctr. v. City of Philadelphia*, 233 F.R.D. 419, 419 (E.D. Pa. 2005) (requiring St. Joseph's University to respond to a court subpoena requiring information about alumni-witnesses, over St. Joe's argument that such a request violates FERPA).

94. *Id.* § 1232g(b)(1)(E)(ii)(I).

95. *See* § 1232g(b)(1)(c).

96. USA PATRIOT Act of 2001, Pub. L. 107-56, § 507, 115 Stat. 272, 367 (codified at 20 U.S.C. § 1232g(j) (Supp. II 2002)). This prompted one critic of the USA PATRIOT Act to respond "disclosures of educational records [became] the rule, rather than the exception." John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1132 (2002).

97. 20 U.S.C. § 1232g(i) (2000).

98. *Id.* § 1232g(b)(1)(I) (emphasis added).

99. 34 C.F.R. § 99.36 (2007).

The regulations permit disclosure when the information is “necessary to protect the health or safety of the student or other individuals.”¹⁰⁰ The regulations require that the student exhibit “conduct that pos[es] a significant risk to the safety or well-being of that student, other students, or other members of the school community.”¹⁰¹ The disclosure of appropriate information can be made only to “teachers and school officials within the agency or institution [who] . . . have legitimate educational interests in the behavior of the student.”¹⁰²

Although the basic premise of this provision is clear—disclosure of information contained in educational records is permitted during a health or safety emergency—determining what situations qualify as an emergency under FERPA remains unclear.¹⁰³ At one point, the Secretary set forth four criteria to determine whether the emergency exception applied:

- (1) The seriousness of the threat to the health or safety of the student or other individuals;
- (2) The need for the information to meet the emergency;
- (3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and
- (4) The extent to which time is of the essence in dealing with the emergency.¹⁰⁴

However, the Secretary has since reverted from these defined criteria back to the ambiguous term “emergency.”¹⁰⁵ The Secretary believed colleges are “capable of making those determinations without the need for Federal regulations.”¹⁰⁶ Thus, colleges may exercise discretion in determining whether a situation is truly a safety or health emergency to permit disclosure of necessary student information.¹⁰⁷ Nevertheless, the Department maintains that the emergency provision is to be

100. *Id.* § 99.36(a).

101. *Id.* § 99.36(b)(1).

102. *Id.* § 99.36(b)(2).

103. Part III of this comment discusses other relevant statutes and case law addressing medical providers’ obligations to disclose information to third parties endangered by their patients with recommendations on ways to amend FERPA to effectively prevent tragedies like Virginia Tech in the future.

104. 34 C.F.R. § 99.37(b) (1986), *amended by* 53 Fed. Reg. 11942, 11948 (Apr. 11, 1988).

105. Family Educational Rights and Privacy, 53 Fed. Reg. 11942, 11948 (Apr. 11, 1988) (codified at 34 C.F.R. 99.36 (2007)).

106. Family Educational Rights and Privacy, 53 Fed. Reg. at 11957.

107. *Brown v. City of Oneonta*, 106 F.3d 1125, 1132 (2d Cir. 1997); Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students’ Lives and Limits Liability*, 75 *FORDHAM L. REV.* 3081, 3102 (2007).

strictly construed.¹⁰⁸ Furthermore, this disclosure is permissive. Colleges may, but are not required to, disclose emergency information.¹⁰⁹

The Department has emphasized an educational institution's obligation to strictly construe the health and safety emergency provision. Two such guidance letters from the Department are reprinted in the Virginia Tech Report.¹¹⁰ In the first, the University of New Mexico asked the Department to clarify a conflict between two New Mexico regulations that mandated the reporting of diseases against FERPA's privacy protection for the University's students. The Department answered that "Congress' intent [is] to limit application of the 'health or safety' exception to exceptional circumstances."¹¹¹ Thus, the Department restricted the exception to "a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for further information in order to avert or diffuse serious threats to the safety or health of a student or other individuals."¹¹² The Department emphasized that the exception is "temporally limited to the period of the emergency and generally does not allow a blank release of personally identifiable information"¹¹³ As a result, the Department held that New Mexico's statutory reporting requirement for communicable diseases satisfies the emergency provision.¹¹⁴ In contrast, New Mexico's statutory requirement for routine notification of diseases does not meet the emergency provision, even when such routine notification includes infectious diseases.¹¹⁵

In the second guidance letter reprinted in the Virginia Tech Report, the Department responded to alleged FERPA violations. There, a school system disclosed personally identifiable information to a juvenile court system during a series of hearings into the student's misconduct.¹¹⁶ The Department determined that the school's initial disclosure to the court fell within the health and safety exception.¹¹⁷ However, the Department determined that the school's later disclosures to the court to respond to the court's informal request during a subsequent adjudicatory hearing violated FERPA because the health or safety

108. 34 C.F.R. § 99.36(c) (2007).

109. *Id.* § 99.36(a) (providing that "[a]n educational agency or institution *may* disclose personally identifiable information") (emphasis added); *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000) (noting that the § 99.36(a) is a discretionary exception to FERPA protections).

110. VA. TECH REVIEW PANEL, *supra* note 2, app. G-1.

111. *Id.* at app. G-2 to -3, G-7.

112. *Id.* at app. G-8.

113. *Id.* at app. G-9.

114. *Id.* at app. G-10.

115. *Id.*

116. *Id.* at app. G-14, G-16. The student made suicidal statements and threatened another student. *Id.* at app. G-16.

117. *Id.* at app. G-17.

emergency had subsided by the time those two events occurred.¹¹⁸ Yet the informal request and adjudicatory hearing both evaluated the same underlying incident of the student's misconduct which gave rise to the health and safety emergency in the first place.¹¹⁹

There is very little case law interpreting FERPA's health and safety emergency disclosure provision. However, in such cases the courts interpreting FERPA's emergency disclosure provision have generally found that a school's disclosure did not violate the emergency disclosure provision.¹²⁰ In *Doe v. Woodford County Board of Education*, the Sixth Circuit upheld a school board's decision to disclose a student's information under the health and safety emergency provision.¹²¹ The student in *Doe*, who was diagnosed with hemophilia and suffered from Hepatitis B, joined the ninth grade basketball team.¹²² During an early-season practice, the student's middle school principal, who knew of the student's medical condition, saw the student practicing.¹²³ The middle school principal informed the basketball coach of the student's medical condition and inquired if it was safe for

118. *Id.* at app. G-17 to -19.

119. *Id.* at app. G-16 to -18.

120. In addition to the two cases fully discussed in the text, only three other cases discuss the health and safety emergency provision and, even then, the provision is discussed in passing. At issue in *Ellis v. Cleveland Municipal School District*, 309 F. Supp. 2d 1019, 1021 (N.D. Ohio 2004), *aff'd*, 455 F.3d 690 (6th Cir. 2006), was whether FERPA precluded discovery of students' statements about an altercation between substitute teachers and students. In holding that FERPA does not protect information about physical abuse by substitute teachers, the court noted FERPA recognizes the importance of protecting student safety through the health and safety emergency exception, even if the exception was not implicated in this case. *Id.* at 1024.

In *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000) the primary issue was whether a parent had a valid negligence claim against the University of Iowa after their child, a freshman, committed suicide. While the claim depended on whether the University had a special relationship to the student to establish a duty of care, the court noted the health and safety emergency exception is discretionary and the university's failure to take advantage of its existence does not equate to establishing a duty of care for the university. *Id.* at 298.

In *University of Maryland Eastern Shore v. Rhaney*, 858 A.2d 497, 498 (Md. Ct. Spec. App. 2004), *aff'd* 880 A.2d 357 (Md. 2005), a student brought a negligence action against the University after he was assaulted in his dorm room by a fellow student. While holding that the University did not breach its duty of care, the court observed in a footnote that the health and safety emergency provision allows disclosure during an emergency, but the plaintiff failed to contend that the University owed him a duty of care under this provision. *Id.* at 500-01 n.4, 506.

Additionally, the Florida Attorney General was asked to determine whether the state child protection service is able to access student records while investigating alleged child abuse. Op. Att'y Gen No. 98-52, at *1 (Fla.1998), *available at* 1998 WL 637997. The Attorney General notes that a state statute generally protects a student's privacy but contains a similar emergency exception. *Id.* at *4. The Attorney General recommends using the FERPA definition of emergency, yet is unable to define emergency, writing that the "determination of what constitutes an emergency necessitating the release of student records . . . involves mixed questions of law and fact . . . [that] must be determined on a case-by-case basis" *Id.* at *5.

121. 213 F.3d 921, 923 (6th Cir. 2000).

122. *Id.* at 923.

123. *Id.*

the student to play.¹²⁴ The student was placed on a hold status until the coach could obtain medical clearance showing it was safe for both the student and his teammates to continue practicing and playing.¹²⁵ The student subsequently quit playing and sued the school district.¹²⁶ In upholding the school district's motion for summary judgment, the Court held that the disclosure was protected under the health and safety exception.¹²⁷

In another case, the Court of Appeals for the Second Circuit held it was "unclear" whether FERPA's emergency exception allowed school administrators to release a list of the names and addresses of all black, male college students in response to a police request.¹²⁸ In this case, a knife-wielding man broke into a bedroom of a non-student's residence and attacked an elderly guest.¹²⁹ The victim reported to the police that she believed the attacker was both young and black.¹³⁰ Police dogs tracked the attacker's scent from the resident's home in the direction of the State University of New York College at Oneonta campus.¹³¹ Then, the police requested the college provide a list of its black male students to assist the police investigation, and the college complied with the request.¹³² Subsequently, those named students brought a section 1983 action that alleged the police and college conspired to violate the students' expectation of privacy under FERPA.¹³³ The police and college responded, and the court agreed, that they were both entitled to qualified immunity because the law was unclear as to whether the release of the list was permitted under FERPA's emergency exception.¹³⁴

III. ANALYSIS: POTENTIAL IMPROVEMENTS TO FERPA

A review of the warning signs Cho presented, the school's confusion over privacy law, and FERPA's stringent requirements that must be met before permitting disclosure in a health and safety emergency, all indicate that FERPA

124. *Id.*

125. *Id.* at 923-24.

126. *Id.* at 924.

127. *Id.* at 927. The court also ruled against the student's ADA claim, stating Congress created a narrow exception to the broad prohibition against disability-discrimination, because the "need to protect public health may at times outweigh the rights of disabled individuals" *Id.* at 925 (quoting *Montalvo v. Radcliffe*, 167 F.3d 873, 876 (4th Cir. 1999)).

128. *Brown v. Oneonta*, 106 F.3d 1125, 1128 (2d Cir. 1997).

129. *Id.* at 1128.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1129. This case was decided before the U.S. Supreme Court's 2002 ruling that FERPA does not confer enforceable rights for purpose of a section 1983 action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290-91 (2002).

134. *Brown*, 106 F.3d at 1129, 1133.

needs to be amended.¹³⁵ Although case law regarding the health and safety emergency disclosure has supported disclosure by educational institutions, there have been few rulings and confusion remains. To amend FERPA, either Congress or the Department of Education must clarify FERPA to encourage educators to communicate with one another to address their legitimate concerns about their students. In doing so, amendments or guidance should carefully err on the side of promoting communication between educators to proactively monitor and ensure a student's mental health in order to protect both the student and the public. This, simply, will assist educators to connect-the-dots and "see the big picture."¹³⁶

Within a college setting, other instances of appropriately balancing safety and privacy generally provide guidance for amending FERPA, and examining proposed amendments to FERPA in light of student suicides provides further insight. Other factors that future changes to FERPA should consider include developing hold harmless provisions and a means of bridging the communication gap between high schools and colleges.

A. *Balance Between Privacy and Safety Overview*

The issue of appropriately balancing privacy and safety is longstanding and fluctuating. On one side, the United States Supreme Court recognizes a constitutional basis for privacy.¹³⁷ At the same time, state and federal laws recognize instances where the safety of third parties depends upon the disclosure of personal information. State and federal laws regulating a patient's health information (including mental health) have struck a balance between these conflicting interests, and thus can shed light on how best to improve FERPA. For example, the federal Health Insurance Portability and Accountability Act (HIPAA)¹³⁸ and similar state statutes¹³⁹ both protect patient privacy, while

135. Even the Department of Education notes that lawmakers should consider amending FERPA. See U.S. DEP'T OF EDUC. ET AL., *supra* note 4, at 8.

136. VA. TECH REVIEW PANEL, *supra* note 2, at 52.

137. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing a constitutional right to protect informational privacy); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing a constitutional right of marital privacy).

138. Pub. L. 104-191, § 1177, 110 Stat. 1936, 2029 (1996) (codified at 42 U.S.C. § 1320d-6). However, HIPAA is very similar to FERPA in that both statutes are very limited in their enforcement mechanisms. Neither statute provides a private right of action. *Doe*, 536 U.S. at 278–79 (finding no private right of action for FERPA); *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006) (*per curiam*) (finding no private right of action for HIPAA). The Department of Health and Human Services, which is responsible for administering HIPAA, has brought only one criminal case and no civil cases despite some 13,000 civil complaints. DANIEL J. SOLOVE ET AL., *INFORMATION PRIVACY LAW* 388 (2d ed. 2006). Even then, the criminal case was primarily based on identify theft: a lab assistant opened credit cards using a patient's information and ran up a \$9000 debt. *Id.*

139. *E.g.*, MD. CODE ANN., HEALTH-GEN. § 4-302 (LexisNexis 2005 & Supp. 2007); VA. CODE ANN. § 32.1-127.1:03 (2004 & Supp. 2007).

maintaining provisions for disclosing a patient's information without the patient's permission in certain health or safety emergencies.¹⁴⁰

HIPAA applies to three entities: health plans, health care clearinghouses, and health care providers who transmit any health information in electronic form.¹⁴¹ Generally, HIPAA requires that these entities ensure the confidentiality of protected health information.¹⁴² This requires the covered entities to adopt internal procedures to protect patient-privacy, train their employees regarding privacy procedures, and secure patient records.¹⁴³ Moreover, when disclosing protected health information, a covered entity must limit that information to the minimum amount of information necessary to "accomplish the intended purpose of the . . . disclosure"¹⁴⁴

Nevertheless, HIPAA also includes several provisions which permit disclosure of protected health information without the consent of the individual. These include situations involving communicable diseases or conditions,¹⁴⁵ suspicions of child abuse,¹⁴⁶ and other forms of domestic violence or abuse.¹⁴⁷ Similar to FERPA's health and safety emergency exception, HIPAA allows for disclosure of protected health information for the prevention of a serious or immediate threat to the public health or safety.¹⁴⁸ HIPAA also contains a catch-all provision allowing for disclosure when the covered entity, in exercising its professional judgment, believes such disclosure is necessary to prevent serious harm to potential victims of abuse, neglect, or domestic violence.¹⁴⁹

140. Such statutes also permit disclosure of a patient's health information without the patient's consent for routine administrative purposes. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 4-305(b)(1)(iii) (allowing disclosure in legal proceedings); *Id.* § 4-305(b)(2)(i) (allowing disclosure for educational or research purposes); *Id.* § 4-305(b)(5) (allowing disclosure for insurance claim purposes).

141. 45 C.F.R. § 164.104(a) (2007). HIPAA does not apply to information that FERPA governs. The definition of "protected health information" specifically excludes individually identifiable information contained in educational records FERPA covers. *Id.* § 160.103.

142. *Id.* § 164.306(a).

143. *Id.* §§ 164.310, 164.312.

144. *Id.* § 164.502(b).

145. *Id.* § 164.512(b)(1)(iv).

146. *Id.* § 164.512(b)(1)(ii).

147. *Id.* § 164.512(c).

148. *Id.* § 164.512(j)(1)(i)(A). Like FERPA's health and safety emergency, the statutory language also fails to provide guidance as to what situations constitute immediate. As discussed later, the Virginia Tech situation does not neatly categorize itself into the typical immediate emergency situation. *See infra* Part III.F. While the actual shootings clearly constitute an emergency, it is problematic to try and define exactly when the emergency situation begins. Thus, it is unclear whether Cho's violent writings and other warning signs invoke the emergency and immediate exceptions for disclosure of protected health information.

149. *Id.* § 164.512(c)(iii)(A).

Likewise, state statutes provide for the confidentiality of medical records,¹⁵⁰ yet also maintain exceptions to this general principle to protect the health and safety of others. Exceptions exist for reporting suspected incidents of child abuse¹⁵¹ and disclosures to the police in response to a possible commission of a crime.¹⁵² Especially relevant are provisions analogous to FERPA, such as those requiring disclosure in emergency situations.¹⁵³

Outside of statutes regulating medical records, the law continues to recognize several instances where a disclosure of one's private information is necessary to protect the safety of others. For example, in Maryland there is a statutory obligation for educators to report suspected child abuse.¹⁵⁴ In addition, courts have held that physicians have a duty to disclose knowledge of persons having communicable diseases to individuals likely to come in contact with these persons.¹⁵⁵

Yet, nowhere is the duty to disclose more pronounced than in the well-known case of *Tarasoff v. Regents of the University of California*.¹⁵⁶ There, the patient Poddar told his therapist, Dr. Moore, that he was going to kill an unnamed girl, who Moore readily identified as Tarasoff.¹⁵⁷ In response to Poddar's threat, Moore contacted the campus police, who briefly detained Poddar but soon released him after Poddar promised to stay away from Tarasoff.¹⁵⁸ Moore never contacted Tarasoff or her family.¹⁵⁹ True to his word, Poddar killed Tarasoff upon her return to campus.¹⁶⁰

Tarasoff's parents sued Dr. Moore and his employer, the University of California at Berkley's Memorial Hospital, alleging, *inter alia*, that they failed to warn Tarasoff and her family of the imminent danger Poddar posed to Tarasoff.¹⁶¹ The Supreme Court of California held that when a therapist determines (or should determine) that his or her patient presents a serious danger of harming another, the

150. *E.g.*, MD. CODE ANN., HEALTH-GEN. § 4-302 (LexisNexis 2005 & Supp. 2006); VA. CODE ANN. § 32.1-127.1:03 (Supp. 2007).

151. MD. CODE ANN., HEALTH-GEN. § 4-306(b)(1).

152. VA. CODE ANN. § 32.1-127.1:30(D).

153. MD. CODE ANN., HEALTH-GEN. § 4-305(b)(6) (LexisNexis 2006 & Supp. 2007).

154. MD. CODE ANN., FAM. LAW § 5-702 (LexisNexis Supp. 2007).

155. *Bradshaw v. Daniel*, 854 S.W.2d 865, 872 (Tenn. 1993) ("[T]he existence of the physician-patient relationship is sufficient to impose upon a physician an affirmative duty to warn identifiable third persons in the patient's immediate family against foreseeable risks emanating from the patient's illness."); *Simonsen v. Swenson*, 177 N.W. 831, 831-32 (Neb. 1920) (concluding that a physician was not liable for disclosing a patient's medical condition, which at the time, was regarded as highly contagious by the medical profession).

156. 551 P.2d 334 (Cal. 1976).

157. *Id.* at 341.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 340-41.

therapist incurs an obligation to protect the intended victim against such danger, even when the intended victim is not a patient of the therapist.¹⁶²

Taken together, HIPAA, state statutes regulating medical records, and the common law recognize that privacy must yield to protecting the health and safety of others. As one court succinctly stated: “[a]n individual’s privacy interest in medical information and records is not absolute. The court must determine whether the societal interest in disclosure outweighs the privacy interest involved.”¹⁶³ These examples serve as a strong basis for amending FERPA to allow for increased disclosure when health and safety is in jeopardy to prevent potential future tragedies from occurring.

B. *Use of FERPA in the Context of College Student Suicides*

Additional guidance as to balancing privacy and safety in the college setting comes from suicides of college students. The rate of college students’ suicides has increased.¹⁶⁴ This increase has led to calls to reform FERPA, in order to make it easier for a suicidal student to seek treatment.¹⁶⁵ Such proposals in this context provide guidance as to how FERPA can be amended.

In addition to the increasing rate of student suicides, there is an increasing rate of subsequent litigation. Typically, the parents of the college student who committed suicide sue their child’s university, alleging the college owed a duty to the student and should have contacted the parents to help prevent the suicide.¹⁶⁶ For example, the parents of an M.I.T. student who committed suicide filed a \$27 million wrongful death suit against M.I.T.¹⁶⁷

Colleges generally defend such lawsuits in a three-fold approach: first, by arguing no duty or special relation exists to prevent the suicide; second, even if a duty exists, the college contends that it certainly does not have a duty to the parent; and third, by arguing that even if the college wanted to contact the parents, the college would not have been able to do so because of FERPA.¹⁶⁸ The college’s first defense no longer carries the weight it once did, as the legal environment has shifted to holding colleges liable for a student’s suicide, finding colleges do have a

162. *Id.* at 340.

163. *Doe v. Barrington*, 729 F. Supp. 376, 385 (D.N.J. 1990).

164. Blanchard, *supra* note 85, at 461; John S. Gearan, Note, *When is it OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1030–31 (2006).

165. Gearan, *supra* note 164, at 1041–42; Cohen, *supra* note 107, at 3104–07.

166. Cohen, *supra* note 107, at 3088–3101 (discussing cases in which parents sued their child’s college, after their child committed suicide).

167. *Shin v. M.I.T.*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005); Gearan, *supra* note 164, at 1023. In April 2006, M.I.T. settled the claim brought by the student’s parents for an undisclosed sum. Cohen, *supra* note 107, at 3097–99.

168. Cohen, *supra* note 107, at 3090–91, 3101, 3104.

duty of care to their students.¹⁶⁹ However, despite having a duty to its students, universities do not have a duty to a student's parents; "[n]o court has yet . . . impose[d] a requirement on universities to notify parents of a student's suicidal tendencies."¹⁷⁰

The third defense, that FERPA prohibits colleges from contacting the parents, is still a common defense.¹⁷¹ For example, a mother began searching for her son, a missing junior, when the student's friends contacted the mother after not seeing the student for several days.¹⁷² The mother claimed that M.I.T. refused to allow her to access her son's dorm room or computer files.¹⁷³ Even after her son had been gone a week, M.I.T. prohibited the mother from accessing her son's files on the school's server, prompting the mother to rhetorically respond: "[t]hey're protecting the privacy of someone who's been gone a week?"¹⁷⁴ Days later, the son's body was found; his death certificate listed suicide as the cause of death.¹⁷⁵

In response to student suicides, commentators have called for several solutions.¹⁷⁶ These include expanding FERPA's discretionary notification provision, even to the point of requiring colleges to report incidents that the college may perceive as harming the student or others.¹⁷⁷ As one commentator notes,

169. Blanchard, *supra* note 85, at 467. Initially, colleges were not liable under the doctrine of *in loco parentis*; now, courts no longer recognize the defense of *in loco parentis* and hold that the college has a "special relationship" with its students, thus giving rise to a duty of care. *Id.*; Gearan, *supra* note 164, at 1026–27. On the other hand, colleges are subject to lawsuits for overreacting if they automatically suspend the student. For example, a George Washington University (GWU) student sued the university for violating his rights after the university suspended the student in response to reports that the student was suicidal. Susan Kinzie, *Lawsuit Against GWU Prompts Liability Questions About Suicidal Students*, WASH. POST, Mar. 10, 2006, at A1.

170. Blanchard, *supra* note 85, at 472.

171. Additionally, colleges will defend against liability by arguing that FERPA does not mandate disclosure, but rather disclosure is discretionary; in short, no affirmative duty to disclose exists under FERPA. Cohen, *supra* note 107, at 3103–04 (discussing the difficulties of triggering a duty to notify under FERPA); see also *Jain v. Iowa*, 617 N.W.2d 293, 298 (noting that FERPA permits the disclosure of student information in the event of an emergency, but the decision to disclose is within the discretion of the educational institution).

172. Elizabeth Bernstein, *A Mother Takes on MIT: How University's Privacy Policy Complicated Sue Kayton's Search for Her Missing Son*, WALL ST. J., Sept. 10, 2007, at A1.

173. *Id.*

174. *Id.*

175. *Id.*

176. In addition to amending FERPA, other solutions include mandating counseling for at risk students as a condition of their continued college education. Cohen, *supra* note 107, at 3120–35. However, such policies may run afoul of anti-disability discrimination acts. See generally Elizabeth Wolnick, Note, *Depression Discrimination: Are Suicidal College Students Protected by the Americans with Disabilities Act?*, 49 ARIZ. L. REV. 989, 991, 1005–16 (2007) (discussing the tension between university programs to prevent student suicide and the protections of the Americans with Disabilities Act). See Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C. & U.L. 169, 170–71 (2007), for an article discussing disability legislation in the broader context of the millennial generation.

177. Cohen, *supra* note 107, at 3104–05.

without a specific disclosure requirement, colleges will err on the side of non-disclosure.¹⁷⁸ However, the risk of notifying the student's parents greatly pales compared to the actual harm of death to the student or others.¹⁷⁹ If, as these commentators contend, FERPA must be amended to reduce the number of student suicides, it is all the more imperative to amend FERPA to prevent another wide-scale tragedy. While suicides have only one direct victim, the Virginia Tech shooting had thirty-two.

C. *Hold Harmless Provisions*

Another way to improve FERPA is to include a good-faith, hold-harmless provision that will protect a college's funding if the college discloses information contained in an educational record. This provision will require that disclosures be made in good-faith, with genuine efforts to protect the health and safety of the student or the student's peers, such as in the Virginia Tech or M.I.T. situations. Such a provision will likely have the effect of encouraging communication among educators, who previously hid behind FERPA.

Likewise, a hold harmless provision will encourage educators to err on the side of disclosure. Looking at the consequences of disclosing information in opposite extremes reinforces the need to err on the side of disclosure to protect students' health and safety. If a good-faith disclosure of information occurs and the subsequent investigation determines there is no real threat, the college is able to remedy this situation. Even if the student suffers some humiliation from a disclosure of his or her information, the college is able to offer amends, provide resources to fix the situation, and even add an official explanation of the situation to the student's record to address any possible concerns with future employment or schooling. While such a disclosure does harm a student, the student is able to recover and continue. In contrast, the consequences of failing to act are much more serious: the death of the student or deaths of the student's classmates.

Such provisions can be modeled on the typical hold harmless provisions of child abuse statutes. These provisions typically provide: "[a]ny person who in good faith makes or participates in making a report of abuse or neglect . . . or participates in an investigation or resulting judicial proceeding is immune from any civil liability or criminal penalty"¹⁸⁰ Similarly, HIPAA includes a presumption of

178. Gearan, *supra* note 164, at 1025. Of course, such a transformation would likely require an enforcement mechanism, which the Department of Education would have to administer. One compromise is to strongly encourage, but without reaching the point of mandating, that colleges report such incidents.

179. Eisel v. Bd. of Educ., 597 A.2d 447, 455 (Md. 1991) ("[W]hen the risk of death to a child is balanced against the burden sought to be imposed on the counselors, the scales tip overwhelmingly in favor of a duty [to notify the parents].")

180. MD. CODE ANN., CTS. & JUD. PROC. § 5-620 (LexisNexis 2006); MD. CODE ANN., FAM. LAW § 5-708 (LexisNexis 2006).

good faith provision to its health and safety disclosure exception.¹⁸¹ Typically, such a disclosure must be made to the relevant parties and must be limited to relevant information.¹⁸² In the Virginia Tech context, this would mean disclosing the content of Cho's violent writings in his English classes, but not his grades from those classes or projects from his freshman biology class.¹⁸³

As later discussed, the Mental Health Security for America's Families in Education Act of 2007 improves FERPA by including a "good-faith" hold-harmless provision.¹⁸⁴

D. *Filling the Communications Gap*

The contact between Seung Hui Cho's high school and Virginia Tech was limited to only forwarding Cho's transcript to Virginia Tech as part of the application process.¹⁸⁵ Thus, Virginia Tech was unaware of Cho's earlier behavior problems and history.¹⁸⁶ Yet, as the Report notes, while college gives an opportunity for a student to start anew, the student's mental health history remains constant.¹⁸⁷ If Virginia Tech had been aware of Cho's complete history, Virginia Tech could have stipulated that Cho maintain therapy as a condition of his acceptance. While this means Cho would have already been singled out before even attending his first day of class, the flip side is that Virginia Tech would have been able to ensure early and continuous intervention for a student with documented mental health issues from day one.

If, on the other hand, a high school were to adopt a policy of regularly reporting all information about its students to college, such a policy would likely run afoul of anti-disability discrimination laws.¹⁸⁸ The Report recommends developing a two step process to overcome this problem. First, the student applies to college and the high school forwards the student's transcripts, just like the current application process.¹⁸⁹ Second, upon acceptance, the student then forwards all relevant health related information, including records of emotional and mental

181. 45 C.F.R. § 164.512 (j)(4) (2007).

182. *E.g., id.* § 164.512(j)(3).

183. VA. TECH REVIEW PANEL, *supra* note 2, at 40, 42.

184. Mental Health Security for America's Families in Education Act of 2007, H.R. 2220, 110th Cong. § 3 (2007).

185. VA. TECH REVIEW PANEL, *supra* note 2, at 37–38.

186. *Id.* at 38. In addition, Virginia Tech was not aware of the potential mismatch between Cho and such a large university. *See id.* at 37–38. This should not be interpreted as prohibiting introverted students from attending large, state schools. Rather, this reaffirms the importance of providing support for all students in all educational settings and ensuring all students are aware of such resources. *See id.* at 53.

187. *Id.* at 39.

188. *Id.* at 38–39.

189. *See id.* at 37, 39 (This is part of the current system of accepting students based just on grades and SAT scores.).

disturbances in addition to the typical vaccination requirements.¹⁹⁰ After all, if colleges can require a student to provide documentation concerning his or her physical health, such as the necessary vaccines for tetanus, measles, mumps, rubella, varicella (chickenpox), tuberculosis, and hepatitis B,¹⁹¹ then arguably a strong basis exists for reporting of mental health status.¹⁹²

E. *Proposed Bill to Amend FERPA*

Congress has taken the first step to fix some of the previously identified problems with FERPA in the Mental Health Security for America's Families in Education Act of 2007.¹⁹³ Introduced on May 8, 2007, the bill leads with twelve key findings that detail the severity of mental illnesses and the importance of treating such illnesses, including involvement of the student's parents when appropriate.¹⁹⁴ The remaining section amends FERPA by adding language to permit colleges to contact parents of dependent students and disclose any information that indicates that "the student poses a significant risk of harm to himself or herself, or to others, including a significant risk of suicide, homicide, or assault."¹⁹⁵ This bill is a solid first step to amending FERPA because it encourages disclosure, with the hope that the student will be able to receive the proper mental health treatment.

Additionally, this bill includes a "good-faith" hold-harmless provision.¹⁹⁶ This provision is sorely needed as the Virginia Tech Report indicates that professors hid behind FERPA to avoid addressing their concerns about Cho.¹⁹⁷ Finally, the bill changes the interpretation guidelines. Previously, these guidelines required strict construction of an emergency situation.¹⁹⁸ Under this bill, the guidelines are to be

190. *See id.* at 39.

191. This list is based on the University of Maryland School of Law immunizations requirement. UNIV. OF MD. SCH. OF LAW, STUDENT ANSWER BOOK 46-47 (n.d.), available at <http://www.umaryland.edu/student/sab/pdf2007/rulesand%20egulations.pdf>.

192. The Report goes on to suggest that there "should be some form of [a] 'permanent record'" for students. VA. TECH REVIEW PANEL, *supra* note 2, at 39. This suggestion, however, leads to several questions as to how a "permanent record" would actually function. Would such a "permanent record" extend only through the college level, or also extend to any graduate schooling? Would this apply if there were gaps between high school and college or college and graduate school when the student was in the workforce? What would prohibit such a permanent record from moving with the student into the workplace, as the student graduates to become an employee? Who would maintain such a record? Instead, the Report's suggestion should be taken to ensure colleges receive a fair, accurate, and complete portrait of the high school applicant.

193. Mental Health Security for America's Families in Education Act of 2007, H.R. 2220, 110th Congress (2007).

194. *Id.* § 2.

195. *Id.* § 3.

196. *Id.*

197. *See supra* Part I.A-B.

198. 34 C.F.R. § 99.36(c) (2007).

construed in favor of the college, allowing the college to take appropriate precautions to protect the student and others.¹⁹⁹

However, problems still remain that must be addressed in subsequent legislation. Primarily, the language is still discretionary: a college *may* disclose information, but is not *required* to disclose information.²⁰⁰ This discretionary language does not eliminate the problems discussed above, such as when colleges fail to disclose mental health information in a timely and appropriate fashion.

Second, this bill is only directed to communication between the college and parent of a dependent student.²⁰¹ This creates an additional step for the college to determine whether the at-risk student is defined as a dependent of the parent according to the IRS Code.²⁰² Moreover, this bill unrealistically implies that simply because a student is no longer a dependent for tax purposes, the student's parents no longer play a role in caring for the student.

Third, amendment efforts should include language encouraging communication among various college officials as well as between high schools and colleges. As illustrated by the Virginia Tech case, more effective communication between the faculty-based Care Team and Cho's residential staff may have prevented the tragedy.²⁰³ Likewise, communication between Cho's high school and college regarding his mental and emotional disturbances during high school could have allowed Virginia Tech administrators to provide timely and appropriate mental health services to Cho. Adopting these amendments to FERPA will likely strike a better balance between privacy and public health concerns so that future events like the Virginia Tech shooting can be avoided.

Unfortunately, the last major action on the bill was in July 2007, when the bill was referred to the House Subcommittee on Higher Education, Lifelong Learning, and Competitiveness.²⁰⁴ No activity on this bill has occurred since then. Given the recent shooting at Northern Illinois University,²⁰⁵ which occurred while this comment was being edited, it is clear that Congress must move quickly to repair FERPA by enacting this legislation.

199. H.R. 2220 § 3.

200. *Id.*

201. *Id.*

202. *Id.* In general, a "dependent" is defined as a child of a taxpayer who has not attained the age of nineteen or is a student who has not attained the age of twenty-four or a qualifying relative. 26 U.S.C. § 152(a) (Supp. 2007).

203. See *supra* Part I.B.

204. GovTrack.us, H.R. 2220: Mental Health Security for America's Families in Education Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2220> (last visited May 13, 2008).

205. The shooting at Northern Illinois University occurred on February 14, 2008. Peter Slevin & Kari Lydersen, *Gunman at Illinois College Kills 5 Students, Wounds 16*, WASH. POST, Feb. 15, 2008, at A1.

F. *New Department of Education Guidelines and Proposed Regulations*

Since the Virginia Tech Tragedy, the Department has issued a set of new guidelines to clarify FERPA and subsequently published proposed amendments to the FERPA regulations. In October 2007, the Department issued new guidelines to help clarify FERPA.²⁰⁶ These guidelines were released in three brochures: one each for elementary and secondary schools, parents, and colleges.²⁰⁷ Although these brochures were intended to clarify confusion surrounding FERPA, they simply recite the basic provisions of FERPA and fail to clarify the confusion surrounding the health and safety emergency provision.²⁰⁸ As previously discussed, the Department typically requires the health and safety emergency to be imminent.²⁰⁹

The brochure demonstrates that the Department still requires the health and safety emergency to be imminent, and permits disclosure only during the duration of the emergency.²¹⁰ This interpretation makes sense in theory, as schools should not have a blanket release to disclose a student's information. Such a release would be a backdoor approach to avoiding FERPA's privacy requirements. However, in practice, an emergency lacks clear boundaries. In the Virginia Tech situation, the actual shooting qualifies as an emergency, yet any information sharing between Virginia Tech faculty would not have helped at that point. Instead, disclosure was needed earlier to identify the multiple warning signs, such as Cho's violent writing in his classes.²¹¹ Such writings, by themselves, are unlikely to be considered a full emergency under the current legislation. Indeed, it is difficult to determine whether a violent writing is the initial sign of a true threat or even an expression of frustration at all.²¹² The practical difficulties of determining imminence of a threat illustrate that the Department's guidelines remain woefully unclear and equally unhelpful as to what constitutes an emergency, or, generally, when an emergency begins. On March 24, 2008, the Department published a series of proposed

206. Letter from Margaret Spellings, Secretary of the U.S. Dept. of Educ., to a school official (Oct. 30, 2007), <http://www.ed.gov/print/policy/gen/guid/secletter/071030.html>.

207. *Id.*

208. For the information provided in the brochure for Colleges and Universities, see FAMILY POLICY COMPLIANCE OFFICE, U.S. DEPT. OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (2007), available at <http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf>.

209. See *supra* notes 110–115 and accompanying text.

210. FAMILY POLICY COMPLIANCE OFFICE, *supra* note 208.

211. VA. TECH REVIEW PANEL, *supra* note 2, at 42.

212. Blystone, *supra* note 4, at 209 (quoting *In re Douglas D.*, 626 N.W. 2d 725, 758 (Wis. 2001) (Prosser, J., dissenting)). This article notes that one of Cho's professors "hit a wall" in terms of what she could do, because Cho did not make any threats to harm himself or others. *Id.* at 202. Yet, generally professors are in the best position to know whether a particular statement constitutes a true threat, as the professors have knowledge of the student's day to day behavior. *Id.* at 209.

amendments to the FERPA regulations.²¹³ These proposed regulations incorporate a wide variety of amendments, including implementing the Supreme Court's two recent decisions interpreting FERPA.²¹⁴ Of the proposals relevant to the facts above, the Department first clarifies the situations in which colleges may disclose a student's education record to the student's parents without the student's consent: if the student is a dependent for federal income tax purposes; if the student is under 21 and violated a rule against using alcohol or other controlled substance; and in connection with a health or safety emergency.²¹⁵ The Department clarifies that colleges can disclose information to a student's parent in connection with a health or safety emergency if the information is needed to protect the student or another student, regardless of the student's age or whether the student is a dependent for federal income tax purposes.²¹⁶

The Department makes significant proposed changes to the health and safety emergency exceptions regulation.²¹⁷ First, the Department proposes eliminating the requirement that the health and safety provision be strictly construed.²¹⁸ Second, the college may now account for the totality of the circumstances creating the emergency.²¹⁹ Third, the new regulation would require the Department to defer to the college's judgment that there is an "articulable and significant" threat to student safety, provided there was a rational basis for the college's decision.²²⁰ In short, the Department recognized that colleges must have greater flexibility to respond to potentially serious threats.²²¹ If enacted, these proposed revisions will go a long way to updating the FERPA regulations which hampered the Virginia Tech administration.

Elsewhere in the proposed regulations the Department, in addressing what can be shared between high schools and colleges, notes: "FERPA permits school officials to disclose any and all education records, including health and disciplinary records, to another institution where the student seeks or intends to enroll."²²² However, this statement creates more questions than the statement answers: would a high school's disclosure of Cho's modified schedule violate any anti-disability discrimination legislation? Was the Virginia high school required or merely

213. Family Educational Rights and Privacy, 73 Fed.Reg. 15574 (Mar. 24, 2008). These regulations mention by name the Virginia Tech shooting in explaining certain proposed regulations. *Id.* at 15574, 15581.

214. *Id.*; see *supra* notes 75, 84 (discussing the only two Supreme Court cases to interpret FERPA).

215. Family Educational Rights and Privacy, 73 Fed.Reg. 15574, 15578 (Mar. 24, 2008).

216. *Id.*

217. *Id.* at 15601.

218. *Id.* at 15589.

219. *Id.*

220. *Id.*

221. See *id.*

222. *Id.* at 15581.

allowed, to inform Virginia Tech that Cho made a statement that he wished to repeat Columbine?

CONCLUSION

The Virginia Tech tragedy renewed the debate over the appropriate balance between individual privacy and the public's health and safety, as dictated by federal education privacy laws. The Virginia Tech Report detailed the missed warning signs²²³ and communication gaps²²⁴ that prevented Cho's educators and residential advisors from developing the full picture. The educators and Care Team were aware of Cho's violent writings while the residential staff was aware of his behavioral problems in his dorm, including his suicidal statement.²²⁵ These pieces of information alone failed to incite Virginia Tech officials to take sufficient action to prevent the tragedy, but taken together could have provided an adequate basis to intervene. Part of the Virginia Tech educators' failure to develop the full picture stemmed from a misunderstanding of FERPA.²²⁶ Yet FERPA maintains several disclosure provisions,²²⁷ including a health and safety emergency provision, to permit such disclosure when needed.²²⁸

In response to the American Bar Association President's questions of what legal changes are warranted,²²⁹ the path to improve federal law is clear. Although the Department has issued new guidelines and proposed regulation changes, more work remains. First, Congress and the Department of Education must amend and clarify FERPA to require disclosures and improve communication among educators and between educators and parents.²³⁰ Lessons from rulings in on-campus-student-suicide cases and analogous privacy laws that contain disclosure exceptions provide guidance on how to improve FERPA.²³¹ First, FERPA must be changed to encourage appropriate disclosures to ensure a student's safety and well-being. Such disclosures must include communication between the college and parent, communication between the different units within a college, and even communication between a college and high school, upon the student's matriculation. Second, clearer and more flexible guidelines must be developed to define an emergency situation. Finally, hold-harmless provisions must be developed to encourage educators to communicate their concerns with one another without fear of liability for violating privacy rights.

223. *See supra* Part I.A.

224. *See supra* Part I.B.

225. *See supra* notes 21–36 and accompanying text.

226. *See supra* Parts I.C–II.A.

227. 20 U.S.C. § 1232g(b) (2000 & Supp. V 2005).

228. *Id.* § 1232g(b)(1)(I).

229. Mathis, *supra* note 3, at 28.

230. U.S. DEP'T OF EDUC. ET AL., *supra* note 4, at 8.

231. *See supra* Part III.B.

Together, these changes to FERPA will help improve health and safety in educational settings by allowing the mental health care system to provide more timely and effective treatment. These steps can also help colleges strike the proper balance by ensuring safety while still maintaining the privacy of its students. However, these steps will remain unrealized until Congress and the Department of Education act to improve FERPA.

