

## COMMUNICATION AS PREVENTION TO TRAGEDY: FERPA IN A SOCIETY OF SCHOOL VIOLENCE

Currently, in the United States, there are “significant misunderstanding[s] about the scope and application” of the Family Educational Rights and Privacy Act (FERPA).<sup>1</sup> These misunderstandings impede communications that could save the life of a student who is a threat to self or others.<sup>2</sup> This Article clarifies what communications FERPA allows and suggests an amendment to help administrators better serve the needs of students with mental health issues.

### I. INTRODUCTION

A professor notices a disruptive student wearing reflector sunglasses and a hat to class each day and writing dark papers with violent emotions.<sup>3</sup> Upon request to remove the hat and sunglasses, the student begins to wear scarves wrapped around his head.<sup>4</sup> Campus residence hall advisors observe odd behavior from the same student, including allegations that he wrote heavy metal lyrics on the walls of his suite, carried knives around, and claimed to be his imaginary twin brother.<sup>5</sup> What communications are these individuals allowed to make to one another or the student’s parents? Can administrators disclose concerns to mental health officials within the school or to health boards in the local community?

On a different campus, a student attempts suicide by inhaling exhaust fumes.<sup>6</sup> Residence hall advisors talk to the student and suggest counseling.<sup>7</sup>

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1. DEP’T OF HEALTH & HUMAN SERVS., DEP’T OF EDUC., AND DEP’T OF JUSTICE, REPORT TO THE PRESIDENT: ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (2007), available at [www.hhs.gov/vtreport.pdf](http://www.hhs.gov/vtreport.pdf) (last visited Aug. 11, 2008) [hereinafter PRESIDENTIAL REPORT].

2. *Id.*

3. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL vii, viii, 42 (2007), available at [www.governor.virginia.gov/TempContent/echPanelReport-docs/FullReport.pdf](http://www.governor.virginia.gov/TempContent/echPanelReport-docs/FullReport.pdf) (last visited Aug. 11, 2008) (Foreword states that the Virginia Tech Review Panel Report was a review, independent of the Commonwealth’s own efforts, performed by experts in “law enforcement, security, governmental management, mental health, emergency care, victims’ services, the Virginia court system, and higher education.”) [hereinafter PANEL REPORT].

4. *Id.* at 42.

5. *Id.*

6. *Jain v. State*, 617 N.W.2d 293, 295 (Iowa 2000).

7. *Id.*

The student reveals to a roommate his future suicidal plans.<sup>8</sup> Can administrators disclose their concerns about a student with suicidal tendencies?<sup>9</sup> Are hall advisors allowed to communicate their worries with the student's family?<sup>10</sup>

For many years, administrators, hall advisors, and teachers would simply make a mental note of these activities and try to keep an eye on the student. One reason administrators were afraid to communicate and disclose information was that they feared disclosure would breach FERPA.<sup>11</sup> While there are other statutes that may contribute to campus faculty and staff's decisions not to disclose, including fear of violating the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA), this Article focuses on FERPA's communication elements and asserts that people hesitate to communicate about students' behaviors because they do not understand the limits and extensions of FERPA.

College administrators must no longer err on the side of non-disclosure. After the violent events on school campuses over the past decade, including the April 2007 Virginia Tech tragedy, federal and state governments must take action to indicate when administrators can disclose information involving students with potential mental health issues. Communication among administrators is likely not only to decrease the possibility of violent behavior, but also to help students better acclimate to their new collegiate environment and reduce stressors that could lead to suicidal actions.<sup>12</sup> Communication is valuable because it can create relationships of trust within the college environment. It can serve as an outlet for students dealing with mental illness and can help these students find a community in which they feel comfortable while pursuing their education. This Article analyzes ways in which communication can prevent students with mental health issues from harming themselves or others.

In order to protect the interests and privacy of students with mental health issues, as well as the interests of the rest of the collegiate community, Congress should amend FERPA to increase communication. This amendment must encourage administrators to communicate potential concerns about students to other administrators or mental health professionals. Universities must have a mandatory communication system in place to ensure that students receive the help they need. If an amendment requires disclosure in certain situations, administrators will no longer have

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8. *Id.* at 296.

9. *Id.*

10. *Id.*

11. See PANEL REPORT, *supra* note 3, at 63; 20 U.S.C. § 1232g(b)(2) (2000).

12. See *generally* Shin v. Mass. Inst. of Tech., 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005).

the option of hiding behind the shield of non-disclosure. By publicly explaining the steps that will continue to safeguard administrator communications from public exposure, students will be reassured that they will not be discriminated against when seeking help.

This Article begins with a brief introduction to FERPA and its sections dealing with disclosure. Next, it analyzes the case of Seung Hui Cho and the Virginia Tech tragedy, focusing on the many areas where FERPA would have allowed communication. The Article then investigates the growing number of students arriving at college with mental health needs and the various struggles administrators face. Pulling together current remedies and proposals, the Article recommends amending FERPA in order to increase communication. Examining past amendments to FERPA supports creating amendments as an effective response to an ever-changing society. Throughout the Article, I attempt to highlight the balancing of interests that must take place to ensure that students feel comfortable receiving mental health services. The majority of students struggling with mental health issues are not violent<sup>13</sup> and the goal of an amendment increasing communication is not to stigmatize them, but, rather, to help students needing mental health services better adjust to a collegiate environment and prevent tragedy.

## II. HISTORY OF FERPA

FERPA was enacted to help educational institutions across the nation protect the privacy interests of their students.<sup>14</sup> FERPA, one of the Education Amendments of 1974<sup>15</sup> that were signed by President Ford on August 21, 1974,<sup>16</sup> is a part of the General Education Provisions Act focusing on "Protection of the Rights and Privacy of Parents and Students."<sup>17</sup>

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13. See *infra* note 64 and accompanying text.

14. U.S. DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 1 (2002), available at [www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf](http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf) (last visited Aug. 11, 2008); see also 20 U.S.C. § 1232g.

15. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended in scattered sections of 20 U.S.C.).

16. U.S. DEP'T OF EDUC., *supra* note 14, at 1.

17. U.S. DEP'T OF EDUC., *supra* note 14, at 1-2 (FERPA is also often referred to as the "Buckley Amendment," in honor of its principal sponsor, Senator James Buckley of New York. FERPA's constitutional connection is under the spending clause, which grants to Congress the constitutional right "to spend funds to provide for the general welfare." FERPA originally "applied to 'any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution.'" Amendments made in 1974 inserted "the term 'educational agency or institution'" and then proceeded to define the term "as 'any public or private agency or institution which is the recipient of funds under any applicable program.'" In 1994, the scope of FERPA became broader as the Improving America's Schools Act extended coverage of FERPA "to education records maintained by State educational agencies, whose records are

FERPA was enacted "to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent."<sup>18</sup> The goal of FERPA was to eliminate the misuse of student records by imposing a standard for the management of educational records.<sup>19</sup> FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" unless it is otherwise permitted by the act itself.<sup>20</sup> In other words, the act conditions the receipt of federal funds on an educational institution or agency's compliance with FERPA.<sup>21</sup>

Under FERPA, parents have a "right to inspect and review the education records of their children."<sup>22</sup> However, once a student is eighteen years old or is attending a postsecondary educational institution, the consent and rights are given only to the student.<sup>23</sup> Thus, the student must consent to allow the parents access to educational records. "Educational records" include "records, files, documents, and other materials" that contain information which directly relates to the student and are maintained by a covered institution or its agent.<sup>24</sup>

There are exceptions to the general rule that educational records cannot be disclosed.<sup>25</sup> For example, a university is allowed to disclose educational records without a student's prior consent to school officials, including

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not otherwise subject to FERPA." (quoting § 513, 88 Stat. at 571-72; 20 U.S.C. § 1232g); see 34 C.F.R. § 99.3 (2007).

18. *United States v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002) (citing Joint Statement, 120 CONG. REC. 39858, 39862 (1974)); Bernard James, *FERPA and School Violence: The Silence That Kills*, in *SCHOOL VIOLENCE INTERVENTION: A PRACTICAL HANDBOOK* 460, 462 (Arnold P. Goldstein & Jane Close Conoley eds., 1997).

19. James, *supra* note 18 at 464.

20. 20 U.S.C. § 1232g(b)(2); *Miami Univ.*, 294 F.3d at 806.

21. 20 U.S.C. § 1232g(b)(2).

22. *Id.* § 1232g(a)(1)(A).

23. *Id.* § 1232g(d); 34 C.F.R. § 99.3 (2007) (defining "institution of postsecondary education" as "an institution that provides education to students beyond the secondary school level;" "secondary school level" is determined by state law and means the "level (not beyond grade 12) at which secondary education is provided").

24. 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii)(2000); *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 426 (2002).

25. See 20 U.S.C. § 1232g(b)(1)(A)-(J). FERPA allows the following communications without student consent: (1) between teachers, deans, and school officials with "legitimate educational interests," (2) to another school where the student seeks to enroll, (3) to authorized representatives of the United States, (4) in connection with financial aid, (5) of information that state statutes allow to be disclosed to state and local officials, (6) to educational organizations developing student programs, (7) to accrediting organizations so they may carry out their functions, (8) to the "parents of a dependent student of such parents," (9) in connection with a health or safety emergency, or (10) to comply with judicial order. *Id.*

teachers, who “have legitimate educational interests.”<sup>26</sup> A “legitimate educational interest” is satisfied if the school “official needs to review an education record in order to fulfill his or her professional responsibilities for the University.”<sup>27</sup> Ambiguities arise since education and healthcare administrators often find that determining what qualifies as an “educational record” or a “legitimate educational interest” is a difficult line to draw, and so they choose to err on the side of nondisclosure. Therefore, FERPA should be amended to illustrate specific situations in which administrators *must* communicate when a school’s staff notice a student displaying symptoms of mental illnesses.

### III. RECENT TRAGEDIES ON COLLEGE CAMPUSES

#### A. *Background of the Virginia Tech Tragedy*

On April 16, 2007, a tragedy shook the nation when Seung Hui Cho (Cho) took the lives of thirty-two of his classmates and faculty members before killing himself.<sup>28</sup> In the wake of this shocking event, educational institutions across the nation took time not only to honor the victims but also to determine how to prevent acts of violence on their own campuses. The Virginia Tech incident was not the first time that tragedy struck a campus due to the violent actions of an individual with serious mental health problems.<sup>29</sup> Additionally, each year, many college students struggling with mental illness take their own lives.<sup>30</sup> The 2006 National College Health Assessment found that of the 94,806 students surveyed, 43.8% reported that they “felt so depressed that it was difficult to function,” and 9.3% had

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26. *Id.* § 1232(g)(b)(1)(A); U.S. DEP’T OF EDUC., MODEL NOTIFICATION OF RIGHTS UNDER FERPA FOR POSTSECONDARY INSTITUTIONS (2006), at [www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html](http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html) (last visited Aug. 11, 2008).

27. U.S. DEP’T OF EDUC., *supra* note 26.

28. See JAMES W. STEWART, III, OFFICE OF THE INSPECTOR GENERAL FOR MENTAL HEALTH, MENTAL RETARDATION & SUBSTANCE ABUSE SERVICES, INVESTIGATION OF APRIL 16, 2007 CRITICAL INCIDENT AT VIRGINIA TECH 3, available at [www.oig.virginia.gov/documents/VATechRpt-140.pdf](http://www.oig.virginia.gov/documents/VATechRpt-140.pdf) (last visited Aug. 11, 2008) [hereinafter INSPECTOR GENERAL REPORT].

29. Joan Arehart-Treichel, *Mental Illness on Rise on College Campuses*, PSYCHIATRIC NEWS, Mar. 15, 2002, at 6 (In 2001, a Gallaudet University student murdered a fellow student, and in January 2002, a failed student at the Appalachian School of Law killed the dean, a professor, and another student).

30. See *id.*; Carrie Sturrock, *Colleges Reach out to Prevent Suicides*, S.F. CHRON., Feb. 4, 2007, at A1, available at [www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/02/04/SUICIDE.TMP](http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/02/04/SUICIDE.TMP) (last visited Aug. 10, 2008) (an estimated 1,100 college students take their own lives each year) (citing the Jed Foundation); see also THE JED FOUND., SUICIDE AND AMERICA’S YOUTH, available at [www.jedfoundation.org/articles/SuicideStatistics.pdf](http://www.jedfoundation.org/articles/SuicideStatistics.pdf) (last visited Aug. 10, 2008) (showing that 90% of suicide victims have a psychiatric illness and only 15% were receiving treatment).

“seriously considered attempting suicide.”<sup>31</sup> In order to prevent these considerations of violence from materializing, schools must find a way to (1) provide the proper support to individuals with mental illness and (2) ensure that educational instructors and healthcare providers understand the obligations and prohibitions FERPA imposes. By analyzing Cho’s mental health history and Virginia Tech’s communication difficulties, we can gain a better understanding of the level to which misunderstandings of FERPA contributed to the tragedy.

### B. Cho’s Younger Years

Cho was born in Korea in 1984 and moved with his family to the United States in 1992.<sup>32</sup> After developing whooping cough and pneumonia at the age of nine months, Cho underwent a cardiac procedure that led to his aversion to being touched.<sup>33</sup> As a young boy, Cho was not violent, but he was very introverted.<sup>34</sup> In middle school, Cho’s family took him to the Center for Multi-Cultural Human Services (CMHS) where psychiatrists diagnosed him with “[severe] ‘social anxiety disorder,’”<sup>35</sup> which they attributed to Cho having difficulty fitting into a new culture.<sup>36</sup> In the spring of his eighth grade year, Cho began to show signs of depression.<sup>37</sup> The following month, in April of 1999, Columbine High School murders occurred, and soon after “Cho wrote a disturbing paper in [his] English class that drew” the teacher’s attention.<sup>38</sup> The paper included thoughts of suicide and murder and stated that “‘he wanted to repeat Columbine.’”<sup>39</sup> This paper appears to be the first time Cho made anyone aware that he might act out in violence towards others.<sup>40</sup>

After being examined by another psychiatrist, Cho was diagnosed as having “selective mutism” and “major depression: single episode.”<sup>41</sup> Selective mutism is defined as “a childhood anxiety disorder characterized by a child or adolescent’s inability to speak in one or more social

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31. AM. COLL. HEALTH ASS’N, AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT: REFERENCE GROUP DATA REPORT SPRING 2006, at 28 tbls.40.E & 40.F (2006).

32. See PANEL REPORT, *supra* note 3, at 31-32.

33. *Id.*

34. *Id.* at 32-33.

35. *Id.* at 34 (alterations in original).

36. *Id.*

37. See PANEL REPORT, *supra* note 3, at 34-35.

38. *Id.* at 35.

39. *Id.* (This information about Cho’s paper is attributed to “someone familiar with the situation.”)

40. See *id.* at 35-36 (noting that Cho’s family was “shocked” to learn that Cho’s paper discussed violence towards others, not just suicide).

41. *Id.*

settings."<sup>42</sup> While individuals with selective mutism are typically impaired in their ability to function in educational settings, they can usually "learn age appropriate skills."<sup>43</sup> Symptoms of major depression include "recurrent thoughts of death or suicide," "persistently sad or irritable mood," and "difficulty thinking, concentrating, and remembering."<sup>44</sup> More than half of individuals "who experience a single episode of depression will continue to have episodes that occur as frequently as once or even twice a year."<sup>45</sup> Cho's doctor prescribed antidepressant medication, which Cho took for a year.<sup>46</sup> The doctor stopped the medication because Cho's mood seemed to have improved.<sup>47</sup>

### C. Cho's High School Years

In high school, an educational assessment classified Cho as needing special education and related services.<sup>48</sup> While Cho was medically diagnosed as having selective mutism and major depression: single episode, his educational diagnoses were emotional disturbance and speech and language disorder.<sup>49</sup> Many parents are surprised when the disability category that qualifies "their child for special education and related services is different from their [child's] medical 'diagnosis.'"<sup>50</sup> Part B of the Individuals with Disabilities Education Act (IDEA) lists thirteen disability categories that states use to determine whether a student is eligible to receive special education and related services.<sup>51</sup> Thus, a student must fit into one of these thirteen categories to receive the services.

While these support systems were in place, Cho seemed to respond well: he received good grades and was able to stay in mainstream classes.<sup>52</sup> In eleventh grade, Cho's weekly sessions at the mental health center ended because he no longer wanted to go. Even though his parents were unhappy with their son's decision, he was about to turn eighteen and become legally

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42. Selective Mutism Group, What is Selective Mutism (SM)?, at [www.selectivemutism.org/about-smg/what-is-sm](http://www.selectivemutism.org/about-smg/what-is-sm) (last visited Aug. 11, 2008).

43. *Id.*

44. KEN DUCKWORTH, NAT'L ALLIANCE ON MENTAL ILLNESS, UNDERSTANDING MAJOR DEPRESSION AND RECOVERY: WHAT YOU NEED TO KNOW ABOUT THIS MEDICAL ILLNESS 3, available at [www.nami.org/Template.cfm?Section=By\\_Illness&template=/ContentManagement/ContentDisplay.cfm&ContentID=61084](http://www.nami.org/Template.cfm?Section=By_Illness&template=/ContentManagement/ContentDisplay.cfm&ContentID=61084) (last visited Aug. 11, 2008).

45. *Id.* at 1.

46. PANEL REPORT, *supra* note 3, at 35.

47. *Id.*

48. *Id.* at 36.

49. *Id.* at 34, 39.

50. Texas Project FIRST, Diagnosis vs. Disability Category: Defining "Eligibility", at [www.texasprojectfirst.org/DiagnosisVSDisability.html](http://www.texasprojectfirst.org/DiagnosisVSDisability.html) (last visited Aug. 11, 2008).

51. *Id.*; 20 U.S.C. § 1401 (Supp. IV 2004).

52. See PANEL REPORT, *supra* note 3, at 36-37.

capable of making the decision.<sup>53</sup> In the fall of 2003, Cho applied to Virginia Tech. Though his guidance counselor recommended he go to a smaller college closer to home, Cho did not follow that advice.<sup>54</sup> His application to Virginia Tech did not indicate that his high school had made special accommodations for him.<sup>55</sup> While Cho's guidance counselor gave him the name of a school district employee he could contact if he encountered problems at college, Cho never did.<sup>56</sup>

In 2004, after Cho had started college, Congress changed the legal definition of "transition services" in the IDEA.<sup>57</sup> In amending the IDEA, Congress recognized the need to provide "effective transition services to promote successful post-school employment or education" for students with recognized disabilities.<sup>58</sup> These transition services could be very useful to students as they begin to adjust to a new academic community. Currently, once a student is accepted to a university he or she can seek accommodations for their mental health diagnosis or seek counseling.<sup>59</sup> However, the student is responsible for seeking this accommodation.<sup>60</sup>

As Cho prepared to enter Virginia Tech, no one at the University ever became aware of Cho's educational diagnosis at the high school.<sup>61</sup> While individuals may fault FERPA for this lack of disclosure, there are numerous reasons why disclosure by the high school is not required and would have been improper. Under FERPA, secondary schools generally can disclose educational records to a university for "legitimate educational interests," but the ADA prevents universities from seeking this information as a preadmission inquiry.<sup>62</sup> This restriction reflects the fine line between the

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53. *Id.* at 37.

54. *Id.*

55. *Id.*

56. *Id.* at 38.

57. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2658 (codified at 20 U.S.C. § 1401(34) (Supp. IV 2004)); see also 34 C.F.R. § 300.43 (2007).

58. 20 U.S.C. § 1400(c)(14); see 20 U.S.C. § 1401(34) (defining transition services as "a coordinated set of activities for a child with a disability that . . . focus[es] on improving the academic and functional achievement of the child . . . to facilitate the child's movement from school to post-school activities, including post-secondary education").

59. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., STUDENTS WITH DISABILITIES PREPARING FOR POSTSECONDARY EDUCATION: KNOW YOUR RIGHTS AND RESPONSIBILITIES, at [www.ed.gov/about/offices/list/ocr/transition.html](http://www.ed.gov/about/offices/list/ocr/transition.html) (last visited Aug. 11, 2008).

60. See *id.*

61. See PANEL REPORT, *supra* note 3, at 38.

62. *Id.* See generally Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000) (The ADA's purpose is to "eliminate discrimination against individuals with disabilities." Since Universities are considered public accommodations, the ADA will not allow any opportunities for discrimination that might arise in a situation such as a preadmission inquiry.); see also 34 C.F.R. § 99.36.



applicant's right to privacy and a university's desire to understand the background of its prospective students. This line cannot be crossed, as each applicant deserves a fair assessment in determining his or her qualifications.

Requiring disclosure in the college admissions context might lead to discrimination against individuals with mental health issues. These individuals are often stereotyped as being more violent.<sup>63</sup> However, just because an individual has a mental health diagnosis, does not mean that he or she is more likely to act out in violence.<sup>64</sup> In actuality, about "80 percent to 90 percent of people with mental illness never commit violent acts."<sup>65</sup> Factors such as youthfulness, male gender, history of violence, and poverty all rank above mental illness as predictors of violence.<sup>66</sup> Nevertheless, according to the editor of *Psychiatric Services*, a monthly publication of the American Psychiatric Association, "society has been more concerned about its own protection than about the protection of psychiatric patients."<sup>67</sup> Mental health professionals must also make sure that individuals with mental health disorders are protected from harm<sup>68</sup> in the educational environment and otherwise.

Some supporters of mandatory disclosure feel that if immunization records are required then mental health records should be required as well.<sup>69</sup> FERPA allows admission committees access to disciplinary records; thus, committees are able to analyze a student's potential for violence.<sup>70</sup> State laws also allow pre-admission access to law enforcement records. In Virginia, law enforcement agencies must disclose basic information about felony crimes to anyone who requests it.<sup>71</sup>

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63. John M. Grohol, *Dispelling the Myth of Violence and Mental Illness*, PSYCHCENTRAL, June 1998, at <http://psychcentral.com/archives/violence.htm> (last visited Aug. 11, 2008).

64. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., UNDERSTANDING MENTAL ILLNESS: FACT SHEET, at [www.samhsa.gov/MentalHealth/understanding\\_MentalIllness\\_Factsheet.aspx](http://www.samhsa.gov/MentalHealth/understanding_MentalIllness_Factsheet.aspx) (last visited Aug. 11, 2008) ("Most people who suffer from a mental disorder are not violent . . . ." (quoting Grohol, *supra* note 63)).

65. Aaron Levin, *Violence and Mental Illness: Media Keep Myths Alive*, PSYCHIATRIC NEWS, May 4, 2001, at 10, available at <http://pn.psychiatryonline.org/cgi/content/full/36/9/10> (last visited Aug. 11, 2008).

66. *Id.*

67. News Release, Am. Psychiatric Ass'n, People with Severe Mental Illness More Likely to Be Victims Than Perpetrators of Violence (Feb. 1, 2008), available at [ww2.psych.org/MainMenu/Newsroom/NewsReleases/2008NewsReleases/PeopleWithSevereMentalIllnessMoreLikelyToBeVictimsStudySays2108.aspx](http://ww2.psych.org/MainMenu/Newsroom/NewsReleases/2008NewsReleases/PeopleWithSevereMentalIllnessMoreLikelyToBeVictimsStudySays2108.aspx) (last visited Aug. 11, 2008) (quoting Howard Goldman, editor of *Psychiatric Services*).

68. *Id.*

69. See PANEL REPORT, *supra* note 3, at 38.

70. Larry Gordon, *Colleges Probe Personal Troubles*, HOUSTON CHRON., Dec. 8, 2007, at A16.

71. VA. CODE ANN. § 2.2-3706 (2007).

In practice, admission committees do seek and obtain applicants' discipline-related information. For example, students applying to colleges often fill out the Common Application.<sup>72</sup> Starting in 2006, the Common Application began asking students and counselors to include any suspensions, dismissals, or probation sentences which were due to academic or behavioral misconduct.<sup>73</sup> Students must also include whether they have been "convicted of a misdemeanor, felony, or other crime."<sup>74</sup>

Supporters of Common Application disclosure requirements feel that since schools are being held to a higher level of accountability, they need to have a better understanding of their applicants.<sup>75</sup> Critics of Common Application disclosures feel that the requirements "are more likely to harm 'the perfectly ordinary mischievous kid without much utility in preventing the next tragedy.'"<sup>76</sup> Cho's situation illustrates the critics' argument because he had no arrests or discipline record in high school and, thus, would not have been required to disclose any discipline information on a common application.<sup>77</sup>

#### D. Cho's College Years

During his freshman year at Virginia Tech, Cho seemed to adjust relatively well. His parents routinely visited, and his grades were good.<sup>78</sup> However, this trend changed his sophomore year.<sup>79</sup> His grades in his science and math classes slipped, and he switched his major to English.<sup>80</sup> In the fall of 2005, the beginning of his junior year, Cho withdrew more from the college community and began writing about violence.<sup>81</sup> He moved into a suite, and his suitemates began to notice many odd behaviors.<sup>82</sup> Cho's behavior towards his suitemates included posting bizarre messages, calling them pretending to be his imaginary twin brother, and burning things in their room.<sup>83</sup> When Cho attended a party with his suitemates he brought out a knife and started stabbing the carpet.<sup>84</sup> Also during this semester,

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72. Gordon, *supra* note 70.

73. *Id.*

74. *Id.* (quoting the Common Application).

75. *Id.*

76. *Id.* (quoting Barmak Nassirian, Associate Executive Director of the American Association of Collegiate Registrars and Admissions Officers).

77. Gordon, *supra* note 70.

78. PANEL REPORT, *supra* note 3, at 40.

79. *See id.* at 40-41.

80. *Id.* at 40.

81. *Id.* at 41.

82. *Id.* at 41-42.

83. PANEL REPORT, *supra* note 3, at 42.

84. *Id.*

heavy metal lyrics, similar to lyrics found on Cho's Facebook page, appeared on the walls of their suite.<sup>85</sup>

Cho also acted out in Dr. Giovanni's poetry class.<sup>86</sup> He continuously wore reflector glasses and hats to class, wrote disturbing material that he would not revise, and took pictures of classmates with his cell phone.<sup>87</sup> Other students stopped attending class because of Cho's actions.<sup>88</sup> Initially, some communication about Cho's behavior occurred as Dr. Giovanni disclosed her problems with Cho to the head of the English department, Dr. Roy.<sup>89</sup> Dr. Roy then contacted the Dean of Student Affairs, the Cook Counseling Center, and the College of Liberal Arts to see if any of Cho's actions were against the Code of Student Conduct.<sup>90</sup>

While Cho likely could have been disciplined under the disorderly conduct section of the *University Policy for Student Life*, the English Department never made the requisite formal request to take action.<sup>91</sup> A "Care Team" consisting of the Dean of Student Affairs, the Residence Life director, the head of Judicial Affairs, Student Health officials, and legal counsel discussed Cho at their regular meeting.<sup>92</sup> As Dr. Ross and Dr. Giovanni had already discussed that Cho should transfer out of Dr. Giovanni's class, the Care Team perceived that the situation was taken care of and never made any referrals to the Cook Counseling Center.<sup>93</sup> In addition, the Care Team was never contacted again, even when Residence Life and Campus Police dealt with Cho's unwanted communications to female students and subsequent threatening behavior<sup>94</sup> as examined below.

Later that semester, "Cho's suitemates wrote a letter to a resident adviser documenting [Cho's] bizarre and threatening behavior, and the campus police met with Cho twice after receiving reports from female students that he had sent them unwanted e-mail or instant messages."<sup>95</sup> After these meetings, "Cho sent an instant message to his suitemate saying 'he might as well kill himself,'" which the suitemate reported to his own father who then reported it to campus police.<sup>96</sup> This incident led to Cho's

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85. *Id.*

86. *See id.*

87. *Id.* at 42-43.

88. *See* PANEL REPORT, *supra* note 3, at 42-43 (One student told Dr. Giovanni that students in the class were afraid of Cho.).

89. *See id.* at 43.

90. *Id.*

91. *Id.*

92. *Id.*

93. PANEL REPORT, *supra* note 3, at 43.

94. *Id.* at 43-44.

95. Miriam Shuchman, *Falling Through the Cracks—Virginia Tech and the Restructuring of College Mental Health Services*, 357 NEW ENG. J. MED. 105, 105 (2007).

96. *Id.* at 105-06.

involuntary hospitalization at St. Albans Behavior Health Center based on a non-specific mood disorder.<sup>97</sup> Both the independent evaluator and the psychiatrist felt that Cho was not “an imminent danger to himself/others” and recommended outpatient treatment.<sup>98</sup> The recommendations for outpatient treatment were not based on the University’s information or diagnoses but mainly “on Cho’s denying any drug or alcohol problems or any previous mental health treatment.”<sup>99</sup> The special justice, appointed by the Circuit Court to preside over Cho’s commitment hearing, altered the independent evaluator’s review and ruled that Cho *did* present an “imminent danger to himself as a result of mental illness” but still ordered outpatient treatment.<sup>100</sup>

Determining whether someone is a danger to himself or others is extremely important, and school and mental health administrators may hesitate to make such a significant prediction without clear guidelines.<sup>101</sup> Cho kept his first appointment at the Cook Counseling Center according to his outpatient order, but the Center’s policy was “to allow patients to decide whether to make a followup appointment.”<sup>102</sup> Since Cho was considered a “voluntary patient,” the Counseling Center did not tell “the court, St. Albans, or Virginia Tech officials that Cho never returned to Cook Counseling Center.”<sup>103</sup>

In spring 2007, Cho began to attend class less and started buying guns and ammunition.<sup>104</sup> Then on April 16, 2007, Cho shot and killed thirty-two Virginia Tech students and faculty members, injured another twenty-four, and then killed himself.<sup>105</sup>

#### IV. ALLOWED COMMUNICATION UNDER FERPA

Deciding when a student is a threat to himself or others is difficult, and “[p]redicting who among us will commit a violent act has been called ‘the paramount consideration in the law-mental health system.’”<sup>106</sup> The goal of

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97. See PANEL REPORT, *supra* note 3, at 47.

98. *Id.* at 47-48. “The role of the independent evaluator is to provide information to the court and the job of the attending psychiatrist is to provide clinical care for the patient.” *Id.*

99. *Id.* at 48.

100. *Id.*

101. See JOHN MONAHAN, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NO. (ADM) 81-921, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 5 (1981) (thinking of “dangerous behavior” as a prediction of conditional probability).

102. PANEL REPORT, *supra* note 3, at 49.

103. *Id.*

104. *Id.* at 52.

105. INSPECTOR GENERAL REPORT, *supra* note 28, at 3.

106. MONAHAN, *supra* note 98, at 1 (quoting the President of the American Psychiatric Association).

privacy laws such as FERPA is “to strike a balance between protecting privacy and allowing information sharing that is necessary or desirable.”<sup>107</sup> The Virginia Tech tragedy illustrates that FERPA’s intricacies and lack of clarity in terms of how to deal with students who may have mental health issues must be resolved. FERPA does not limit as much as officials think it does in terms of mental health disclosure.<sup>108</sup> Avenues must be found to communicate potential warning signs to school officials and parents while still protecting the privacy rights of students.

This Article suggests strategies to clarify FERPA that will reduce the risk that a student with mental health issues will harm themselves or others. Having a general understanding of FERPA is helpful prior to analyzing the intricacies of its application to the Virginia Tech situation. For purposes of this Article, several allowed communications will be analyzed in detail. The relevant exceptions to the general FERPA privacy protections include: (1) communications between teachers and school officials with “legitimate educational interests,” (2) records maintained by a law enforcement agency, (3) disclosure of discipline records to individuals with “legitimate educational interests,” and (4) disclosure for health or safety emergencies.<sup>109</sup> This Article categorizes these exceptions as communication of records and communication arising from administrator’s observations.

#### A. Records

Many of the records that Virginia Tech had on Cho could have been shared under FERPA.<sup>110</sup> First, medical records can often be disclosed because,<sup>111</sup> as laid out in FERPA, educational records do not include records “which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional.”<sup>112</sup> Thus, “health or medical ‘treatment records’ of postsecondary students are excluded from the FERPA definition of education records provided they are disclosed only to individuals providing treatment.”<sup>113</sup> FERPA applies only to information found in student records.<sup>114</sup> FERPA alone would likely allow disclosure to

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107. PANEL REPORT, *supra* note 3, at 63.

108. *See id.* (“Much of the frustration about privacy laws stems from lack of understanding. When seen clearly, the privacy laws contain many provisions that allow for information sharing where necessary.”).

109. 20 U.S.C. § 1232g(b)(1)(A), (C), & (I) (2000).

110. PANEL REPORT, *supra* note 3, at 63.

111. *Id.* at 65.

112. 20 U.S.C. §1232g(a)(4)(B)(iv).

113. PANEL REPORT, *supra* note 3, at app. G-6.

114. *Id.* at 66; *see also* Joey Johnsen, Note, *Premature Emancipation? Disempowering College Parents Under FERPA*, 55 *DRAKE L. REV.* 1057, 1062 (2007) (“While FERPA is deferential on school-parent communication regarding student substance abuse, the statute is

parents or teachers since medical records are not considered educational records.<sup>115</sup> Such disclosure would enable colleges to better serve the needs of their students. However, even if FERPA allows disclosure, a campus health center must also comply with state privacy laws.<sup>116</sup> Virginia Tech's Cook Counseling Center had records regarding Cho's mental health treatment. Assuming that the records were not part of his educational record and were not restricted by state law, this information could have been shared with Cho's family members or mental health professionals outside the university.

The Virginia Tech Review Panel (Review Panel), formed by Virginia Tech to perform an internal review after the Cho tragedy, has made several suggestions regarding future amendments to FERPA.<sup>117</sup> One suggestion is to clarify how FERPA applies to medical records.<sup>118</sup> Additional elaboration needs to be made to highlight the differences between medical and educational records as well as the relationship between FERPA and state law.<sup>119</sup>

Second, FERPA does not restrict communication of campus police records.<sup>120</sup> Once again, FERPA's definition of "education records" does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."<sup>121</sup> However, because of the specific purpose for which these exempt records must be created, there is a fine line in determining how they are categorized. In the Virginia Tech situation, the records that the Virginia Tech Police Department kept detailing female students' complaints about Cho's behavior were created for a "law enforcement purpose of investigating a potential crime."<sup>122</sup> Therefore, they were not educational records. These original complaints could have been disclosed to Cho's parents even after the University requested a copy for

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silent on school knowledge of suicidal acts and parental notification of a student's academic standing.").

115. See 20 U.S.C. § 1232g(a)(4)(B)(iv).

116. *Id.*

117. See PANEL REPORT, *supra* note 3, at 68–70.

118. *Id.* at 69.

119. *Id.*

120. See *id.* at 66.

121. 20 U.S.C. § 1232g(a)(4)(B)(ii); James, *supra* note 18, at 464–65 (FERPA's focus on educational records does not include "law enforcement unit records." It does include "other, non-law enforcement functions" such as disciplinary conduct or investigations regarding the school code of conduct. If there is not a formal investigation, it most likely is not an educational record.).

122. See PANEL REPORT, *supra* note 3, at 66.

Cho's educational records.<sup>123</sup> Similarly, as campus police were responsible for transporting Cho to the Carilion St. Albans Behavioral Health Center after he was involuntarily committed, information about the transport was also created for a law enforcement purpose and could have been disclosed.<sup>124</sup>

Third, in regard to disciplinary records, in *United States v. Miami University*, the Sixth Circuit Court of Appeals held that "student disciplinary records are education records" within FERPA's definition.<sup>125</sup> Thus, school disciplinary records cannot be communicated to the general public. In the *Miami* case, the student newspaper was attempting to follow campus crime trends.<sup>126</sup> Miami University, in following FERPA, would not release the information regarding the accused's identity or date of alleged discipline.<sup>127</sup>

While discipline records cannot be revealed to the general public, FERPA does allow disclosure of disciplinary action taken against a student to teachers and school officials "who have legitimate educational interests in the behavior of the student."<sup>128</sup> According to FERPA's corresponding federal regulations, a "'disciplinary action or proceeding' means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution."<sup>129</sup> Furthermore, the federal regulations provide that "[a]n educational agency . . . may disclose personally identifiable information from an education record of a student without . . . consent" if "[t]he disclosure . . . is in connection with a disciplinary proceeding" at a college or university.<sup>130</sup> There are numerous particularized rules within the regulation and statute to control the information that is released.<sup>131</sup> For example, a post-secondary institution is not allowed to "disclose the final results of the disciplinary proceeding unless it determines that A) [t]he student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and B) [w]ith respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies."<sup>132</sup> The Review Panel suggests including

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123. See *id.* (stating that when the University's Judicial Affairs office requested the records, FERPA applied to the copies held in that office but not to the record the police department retained).

124. *Id.* at 67.

125. 294 F.3d 797, 812 (6th Cir. 2002).

126. *Id.* at 803.

127. See *id.*

128. 20 U.S.C. § 1232g(h)(2) (2000); *Miami Univ.*, 294 F.3d at 813.

129. 34 C.F.R. § 99.3 (2007).

130. 34 C.F.R. § 99.31(a)(14)(i).

131. See *id.*; see also 20 U.S.C. § 1232g(a)(5)(A), (b)(1), (b)(2)(B), (b)(6), (h) & (i).

132. 34 C.F.R. § 99.31(a)(14)(i).

law enforcement and medical staff as officials with a “legitimate interest” in educational records.<sup>133</sup> By enabling these individuals to qualify as school officials with a “legitimate interest” in a student’s educational record, these professionals will hopefully intervene more often when they see a student struggling with signs of mental illness.<sup>134</sup>

In the Virginia Tech situation, the disciplinary actions taken against Cho for his actions in the dorms probably would not have been protected by FERPA and could have been openly communicated to other administrators or even Cho’s parents. Under FERPA regulations, “crime of violence” includes “destruction/damage/vandalism of property.”<sup>135</sup> When Cho wrote on the walls of the dorm he damaged property.<sup>136</sup> However, in order for a report to be disclosed, it must first be written.<sup>137</sup> In Cho’s case, it is unclear whether residence hall advisors ever made formal discipline reports or referred matters to the Care Team.<sup>138</sup> While disciplinary records disclosure has always been allowed under FERPA, university staff often doubt that they can release this sort of information to other administrators.<sup>139</sup>

#### B. Observations

In terms of administrators’ observations, FERPA’s focus is on information in education records, leaving communication of personal observations and conversations with a high-risk student unrestricted.<sup>140</sup> In the Virginia Tech situation, FERPA would not have prohibited professors and Residence Life staff who were concerned about Cho to share those concerns with Cho’s parents and other administrators.<sup>141</sup> While Cho’s mental health was deteriorating, he interacted with professors, other students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center.<sup>142</sup> All of these groups had concerns about his mental health.<sup>143</sup>

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133. PANEL REPORT, *supra* note 3, at 69.

134. *Id.*

135. 34 C.F.R. § 99.39.

136. PANEL REPORT, *supra* note 3, at 42.

137. *Id.* at 43 (In order to initiate charges, residence life would need to submit something in writing.)

138. See *id.* at 46–47 (stating that Resident Advisors emailed with supervisors regarding a female student’s complaint about text messages, but did not refer the matter to the Care Team or Judicial Affairs).

139. James, *supra* note 18, at 465; see, e.g., PANEL REPORT, *supra* note 3, at 43-44, 64-65 (Residence life did not make additional references to the Care Team after they became aware of Cho’s “unwanted communications to female students and threatening behavior.” Additionally, the Virginia Tech Police Department did not share information to school administration that Cho was “detained pending a commitment hearing.”).

140. PANEL REPORT, *supra* note 3, at 66; see 20 U.S.C. § 1232g(a)(4)(B)(i-iv).

141. PANEL REPORT, *supra* note 3, at 66.

142. See *id.* at 40-53.



Throughout this process, Cho's parents were unaware of the problems and that he was meeting with these various groups.<sup>144</sup> Additionally, no one told Cho's parents that their son had threatened suicide, been committed to St. Albans Health Center, been in court, or that he was struggling with mental illness.<sup>145</sup> One reason for this lack of communication between administrators or with Cho's parents was that the various groups believed that such communications were prohibited by FERPA.<sup>146</sup> In actuality, however, FERPA provides multiple avenues to share information and communicate.<sup>147</sup>

As discussed above, all of the observations that the English professors noted about Cho's withdrawn conduct or picture-taking in class could have been revealed to other administrators or health officials, such as the counseling center.<sup>148</sup> Similarly, the female students or the suitemates Cho harassed with his phone calls and stalking messages, would have been allowed to communicate their concerns with the University's Office of Judicial Affairs.<sup>149</sup> In order for Virginia Tech's Care Team and disclosures made by professors such as Dr. Giovanni to be effective, communications must be continuous and properly addressed.<sup>150</sup>

Other recent events illustrate the importance of communicating day-to-day observations to appropriate authorities. On February 14, 2008, Steven Kazmierczak, a former student at Northern Illinois University (NIU), opened fire in an NIU lecture hall, killing five people, wounding sixteen others, and then taking his own life.<sup>151</sup> Kazmierczak's professors at the University of Illinois, where he was pursuing his master's degree in social work, stated "[h]e was personable, easy to talk to, [and] an excellent student."<sup>152</sup> The NIU President stated that Kazmierczak "compiled 'a very good academic

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143. See *id.*; *supra* Part II.D.

144. PANEL REPORT, *supra* note 3, at 49, 63.

145. *Id.*

146. *Id.* at 63.

147. See 20 U.S.C. § 1232g(b) (2000); see also LAWRENCE K. PETTIT, AM. ASS'N OF STATE COLLS. & UNIVS., EXPECTING THE UNEXPECTED: LESSONS FROM THE VIRGINIA TECH TRAGEDY 4-5 (2007), available at [http://aascu.org/pdf/07\\_expectingunexpected.pdf](http://aascu.org/pdf/07_expectingunexpected.pdf) (last visited Aug. 11, 2008) (recommendations to colleges and universities on how to legally increase communication).

148. PANEL REPORT, *supra* note 3, at 66; see 20 U.S.C. § 1232g(b).

149. PANEL REPORT, *supra* note 3, at 66; see 20 U.S.C. § 1232g(b).

150. See PANEL REPORT, *supra* note 3, at 68 (explaining that effective intervention requires a group effort).

151. Ted Gregory, *6 Dead in NIU Shooting; 4 Identified*, CHICAGO TRIBUNE, Feb. 15, 2008, at 1; Mike Stuckey et al., *College Shooter's Deadly Rampage Baffles Friends*, MSNBC.COM, Feb. 16, 2008, at [www.msnbc.msn.com/id/23171567/](http://www.msnbc.msn.com/id/23171567/) (last visited Aug. 11, 2008).

152. Monica Davey, *Active and Successful, Gunman Showed Few Hints of Trouble*, N.Y. TIMES, Feb. 16, 2008, at A1.

record, no record of trouble.”<sup>153</sup> The only indications of problems were observations made by those interacting with Kazmierczak just before the shooting who said he was acting “erratic in the past two weeks, . . . after he had stopped taking his medication.”<sup>154</sup> The NIU tragedy highlights the important role that day-to-day observations play in detecting a change in a student’s persona.

### C. Health or Safety Emergencies

Additionally, FERPA allows disclosure of information within educational records, “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.”<sup>155</sup> This disclosure includes an administrator’s observations. The ambiguous element of this part of the statute is the word “emergency” since there is no explicit definition.<sup>156</sup> Without a definition, individuals often choose not to disclose important information because they do not know if an emergency exists.<sup>157</sup> However, FERPA regulations do specify that students who take actions that pose a safety risk to themselves or others may have this information included in their education records.<sup>158</sup> As discussed above, that information may then be communicated to individuals or schools who have “legitimate educational interests in the behavior of the student.”<sup>159</sup> However, the regulation states that this section shall be “strictly construed.”<sup>160</sup> In a letter to the University of New Mexico providing guidance on interpreting FERPA and HIPAA, the U.S. Department of Education (DOE) stated “that a student’s suicidal statements, coupled with unsafe conduct and threats against another student, constitute a ‘health or safety emergency’ under FERPA.”<sup>161</sup> The DOE went on to say that the above example does not provide a “blanket exception” for administrators to make disclosures every time a student makes a threat.<sup>162</sup>

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153. See Stuckey et al., *supra* note 151.

154. *Id.*

155. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36 (2007).

156. See 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, 1025 (2006).

157. See *id.* (analyzing the rise in student suicide on college campuses, “[w]ithout a specific disclosure requirement, and a clearer definition of an emergency, schools often err on the side of non-disclosure even if the circumstances may actually qualify for the FERPA exception”).

158. 34 C.F.R. § 99.36(b)(1).

159. *Id.* § 99.36(b)(2); see *supra* Part III.A.

160. 34 C.F.R. § 99.36(c).

161. PANEL REPORT, *supra* note 3, at app. G-9.

162. *Id.*

According to the Virginia Tech Report, “emergency” has been “limited to circumstances involving imminent, specific threats to health or safety.”<sup>163</sup> However, most educators do not realize that “[w]eapons, guns, drugs, and gangs . . . as well as those events involving the health of a student who may place others at risk” all qualify as emergencies.<sup>164</sup> Unfortunately, “FERPA . . . is often interpreted as prohibiting faculty or staff members from sharing information about a student with one another or with family members unless there is an emergency.”<sup>165</sup> According to Peter Lake, director of the Center for Excellence in Higher Education Law and Policy at Stetson University, “FERPA was not intended to block communication” between deans and professors or universities and students’ families.<sup>166</sup> The text of FERPA restricts discussion of a student’s academic record, not discussions about the student’s unusual behavior in class, strange actions, or illness.<sup>167</sup> The Review Panel suggests allowing more flexibility with the “emergency” provision by clarifying what qualifies as an “emergency” and increasing the breadth of the definition so that nondisclosure does not continue to be a default decision.<sup>168</sup>

As colleges and universities will not get federal funds if they do not comply with FERPA, these institutions are hesitant to disclose information about student’s mental health status.<sup>169</sup> Administrators fear that the schools will lose their federal funding.<sup>170</sup> In response to these fears, the Virginia Tech committee suggested a “‘safe harbor’ provision” for individuals who make “a disclosure with a good faith belief that the disclosure was necessary to protect the health, safety, or welfare of the person involved or members of the general public.”<sup>171</sup>

#### D. Mental Health Laws and Treatment

A FERPA amendment becomes increasingly important as the amount of students struggling with mental illness rises. Young adults across the country claim that there is a lot of depression among college students, leading to various problems including suicide and individuals not discussing their

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163. *Id.* at 67.

164. James, *supra* note 18, at 468 (discussing how most serious and violent crimes on campus qualify under the emergency exception to FERPA).

165. Shuchman, *supra* note 95, at 109.

166. *Id.*

167. *Id.*

168. PANEL REPORT, *supra* note 3, at 69.

169. See Gearan, *supra* note 156, at 1032-33 (discussing how many colleges rely on federal funding and, in recent years, have adhered more strictly to privacy).

170. *Id.*

171. PANEL REPORT, *supra* note 3, at 68.

problems.<sup>172</sup> A recent American College Health Association survey found 15% of college students were diagnosed with depression, a 10% increase from 2000 rates.<sup>173</sup> In terms of severe psychological problems such as Cho's, a 2005 national survey of Counseling Center Directors reported a 14% increase in these problems among students from 2000 to 2005.<sup>174</sup> "[A] global study by the World Health Organization, the World Bank and Harvard University indicate[s] that mental illness accounts for more than 15% of the burden of disease in the U.S. and other established market economies," which is more than the costs of all cancers.<sup>175</sup> These statistics indicate that mental illness is a growing societal issue. However, there are ways for colleges to communicate warning signs and help students. As a rising number of students arrive on college campuses with mental health issues, college personnel must find a way to balance their needs without penalizing these students or breaching their privacy.<sup>176</sup>

FERPA shortcomings in the treatment of mental health are also manifested in the increasing number of litigated suicide cases. In *Jain v. State*, a case in which the plaintiff filed suit against a state university after his son committed suicide, the Iowa Supreme Court held that there was no special relationship between the University and Jain's son Sanjay.<sup>177</sup> The court reached this conclusion even though the University did not alert Sanjay's parents of a previous suicide attempt.<sup>178</sup> FERPA was one of several reasons why the suicide attempt was not disclosed to his parents.<sup>179</sup> One

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172. See Joseph Damore, *One Lesson from Virginia Tech*, MOD. HEALTHCARE, May 28, 2007, at 23.

173. *Id.*; Am. Coll. Health Ass'n, *American College Health Association—National College Health Assessment Spring 2007 Reference Group Data Report (Abridged)*, 56 J. OF AM. COLLEGE HEALTH 469, 477 (2008) available at [www.acha-ncha.org/docs/JACH%20March%202008%20SP%2007%20Ref%20Grp.pdf](http://www.acha-ncha.org/docs/JACH%20March%202008%20SP%2007%20Ref%20Grp.pdf) (last visited Aug. 10, 2008) (highlighting the rise of students on college campuses struggling with depression).

174. H.R. Res. 2220, 110th Cong. (2007) (enacted), at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.2220>: (last visited Aug. 11, 2008); ROBERT P. GALLAGHER, U. OF PITTSBURGH, NATIONAL SURVEY OF COUNSELING CENTER DIRECTORS 2005, available at [www.education.pitt.edu/survey/nscdd/archive/2005/monograph.pdf](http://www.education.pitt.edu/survey/nscdd/archive/2005/monograph.pdf) (last visited Aug. 10, 2008) (indicating that, along with depression, other forms of severe mental illness among college students are also on the rise).

175. See Damore, *supra* note 172; U.S. SURGEON GEN., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL, 4 tbl.1-1 (1999), available at [www.surgeongeneral.gov/library/mentalhealth/pdfs/c1.pdf](http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c1.pdf) (last visited Aug. 10, 2008).

176. See Aaron Levin, *Va. Tech Tragedy Spurs Examination of Commitment*, *Campus MH, PSYCHIATRIC NEWS*, June 1, 2007, at 1.

177. See 617 N.W.2d 293, 295-96, 300 (Iowa 2000).

178. See *id.* at 295-96.

179. *Id.* at 295-96, 298.

month after that attempt, Sanjay did commit suicide.<sup>180</sup> Jain argued that an emergency situation arose after Sanjay's attempted suicide and that, in accordance with FERPA, he should have been alerted to the suicide attempt.<sup>181</sup> The court reasoned that because the emergency exception is a discretionary part of FERPA, the school was not required to disclose the suicide attempt to Sanjay's parents.<sup>182</sup> *Jain v. State* is representative of a multitude of other cases that illustrate an increasingly common national problem.<sup>183</sup> FERPA is consistently used as a reason not to disclose student disciplinary and health concerns due to concerns over the protection of student privacy.<sup>184</sup>

University administrators are in a difficult position when dealing with mental health issues. For example, a university could be found liable if they fail to prevent a suicide or murder.<sup>185</sup> In *Shin v. Massachusetts Institute of Technology*, Elizabeth Shin went to the university counseling center prior to setting herself on fire.<sup>186</sup> The Massachusetts Superior Court allowed Shin's parents to sue administrators for not notifying them of Elizabeth's deteriorating condition.<sup>187</sup> The parties eventually settled the case "for an undisclosed amount."<sup>188</sup>

Likewise, administrators may also be found liable if they take action to remove from campus a student who has shown potential suicide

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180. *Id.* at 296. "Jain killed himself in December 1994 after a long night of drinking." Johnsen, *supra* note 114, at 1087.

181. *Jain*, 617 N.W.2d at 297-98.

182. *Id.* at 298. The issue of whether the University was required to disclose the suicide attempt under FERPA was not preserved for appeal. *Id.*

183. See Johnsen, *supra* note 114, at 1062-63 (discussing FERPA); Heather E. Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 INDIANA L. REV. 423, 430-35 (2007) (Since the *Jain* decision, court cases such as *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002), and *Shin v. Massachusetts Institute of Technology*, No. 02-0403, 19 Mass. L. Rptr. 570 (Mass. Super. Ct. 2005), have broadened the idea of special relationships with a University and a duty to disclose, making the need for college personnel to understand FERPA even more critical.).

184. See Johnsen, *supra* note 114, at 1088 (stating that under FERPA's "troublesome scheme[,] . . . colleges cloak student disciplinary and health concerns in the name of privacy").

185. Tamar Lewin, *Laws Limit Colleges' Options When a Student is Mentally Ill*, N.Y. TIMES, Apr. 19, 2007, at A1.

186. No. 02-0403, 2005 Mass. Super. LEXIS 333, \*13 (Mass. Super. Ct. 2005) (illustrating the ways students reach out to university personnel in a cry for help and how administrators must then decide whether to communicate with family members).

187. *Id.* at 14-15; see Lewin, *supra* note 185.

188. Lewin, *supra* note 185.

symptoms.<sup>189</sup> In 2006, “the City University of New York . . . agreed to pay \$65,000 to settle a lawsuit brought by a student who had been barred from her [Hunter College] dormitory room because she was hospitalized after a suicide attempt.”<sup>190</sup> The student’s attorney brought attention to the stigma associated with mental illness by stating that if the student “had been hospitalized for mononucleosis or pneumonia,” she likely “would have been welcomed back to her dorm.”<sup>191</sup>

At Virginia Tech, Cho’s professors and other university staff faced similar decisions of whether to disclose the difficulties with Cho’s behavior that they encountered. These difficulties included “non-participation in class, limited response to efforts to personally interact, dark writings, [and wearing] reflector glasses.”<sup>192</sup> As stated by Dr. Richard Kadison, Chief of Mental Health Services at Harvard University, often schools are only able to bring students to the hospital if they display an “imminent risk to themselves or someone else.”<sup>193</sup> Thus, even if students are writing papers about disturbing topics or seem withdrawn and hostile, a school may not have a sufficient reason to force a student to seek hospitalization.<sup>194</sup> Considered alone, one teacher may not determine a student’s behavior poses a danger; but if each teacher had communicated his or her concerns about Cho’s mental health to each other or a designated university representative, the University might have been able to seek help for Cho early on.<sup>195</sup> By having a central authority in charge of addressing professors concerns about students, additional students could receive help from the university. The central authority could receive notices anonymously if professors or resident life staff were afraid of the backlash they might receive or that the student would no longer confide in them.

In addressing this problem, a great deal of balancing must take place. Mental health experts worry that students with mental illnesses will now be targeted as a result of tragedies such as the one at Virginia Tech.<sup>196</sup> Paul Appelbaum, a forensic psychiatrist, “points out that people with serious

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189. See *id.*; Shari Roan, *Crisis on Campus*, L.A. TIMES, Sept. 3, 2007, at F1 (“Universities are concerned they will get sued if they tell and sued if they don’t tell.” (quoting Representative Tim Murphy (R-Pa.))).

190. Press Release, Judge David L. Bazelon Ctr. for Mental Health Law, Hunter College Settles Lawsuit by Student Barred from Dorm After Treatment for Depression (Aug. 23, 2006), at [www.bazelon.org/newsroom/2006/8-23-06-hunter-settlement.html](http://www.bazelon.org/newsroom/2006/8-23-06-hunter-settlement.html) (last visited Aug. 11, 2008).

191. *Id.* (quoting attorney David Goldfarb).

192. PANEL REPORT, *supra* note 3, at 53.

193. Lewin, *supra* note 185.

194. See *id.*

195. PANEL REPORT, *supra* note 3, at 53.

196. See Levin, *supra* note 176.

mental illness contribute to only 3 percent of the violence in the U.S.”<sup>197</sup> These facts illustrate the importance of making sure amendments to FERPA take into account the best interests of students with mental health issues as well as the rest of the academic community. Because students struggling with mental health problems must be able to receive care, amendments to privacy law must avoid any breaches of privacy that might create disincentives for these students to pursue the help they need. Students with mental illness already face many disincentives: they fear being stigmatized;<sup>198</sup> they fear their peers will retaliate against them; they fear that by receiving help they will no longer be able to obtain licensure in certain professions.<sup>199</sup> Often colleges and universities are at a loss on how to best help the student and resort to punitive actions, such as requiring them to leave university housing or charging them with disciplinary violations for suicidal gestures or thoughts.<sup>200</sup> These actions create more disincentives for students to seek help, isolating them from counselors and teachers and, in turn, increasing the risk of harm.<sup>201</sup>

An amendment to FERPA needs to protect student privacy while at the same time making communications guidelines clear for administrators. Congress must work with mental health policy makers to make sure students with mental health issues are not afraid to get the assistance they require.<sup>202</sup> According to a recent U.S. Surgeon General’s analysis, “[w]ith proper diagnosis, treatment and monitoring, 80% of people suffering from depression will make a full recovery.”<sup>203</sup> While students struggling with more severe mental illness, such as Cho, may not have their illness disappear after diagnosis, they rely on treatment to function in daily situations.<sup>204</sup> Thus, identifying students with mental illness and finding them adequate care is critical to their functioning as part of the college community.

At Virginia Tech, while “student health services is in the same building as the counseling center, the two [services are not] integrated and [do not]

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197. *Id.*; see also *supra* notes 64-65 and accompanying text.

198. JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, SUPPORTING STUDENTS: A MODEL POLICY FOR COLLEGES AND UNIVERSITIES, available at [www.bazelon.org/pdf/Supporting\\_Students.pdf](http://www.bazelon.org/pdf/Supporting_Students.pdf) (last visited Aug. 11, 2008) [hereinafter MODEL POLICY] (providing a communication model for universities).

199. See *id.*; Roan, *supra* note 189.

200. See generally MODEL POLICY, *supra* note 198, at 1 (highlighting the importance of not forcing students to permanently leave campus in order to receive mental health treatment).

201. *Id.* at 2.

202. See Damore, *supra* note 172 (Hospital industry leaders recommend “integrating mental health services in primary care” and making sure that mental health benefits are adequate.).

203. *Id.*

204. See DUCKWORTH, *supra* note 44.

share responsibility for patients or patient records.”<sup>205</sup> Without proper integration, lapses occur that result in students not receiving the help they need. These “lapses in coordinating follow-up care are fairly common in college mental health.”<sup>206</sup> Ideally, a college program would have “a protocol for evaluating students who are returning to school after being hospitalized or taking a medical leave for psychiatric care.”<sup>207</sup> This process is called “screening” or “reentry” and is becoming increasingly important for college campuses as the number of students with serious mental disorders grows.<sup>208</sup>

At Virginia Tech, after Cho’s involuntary hospitalization and order for outpatient treatment, there was very little follow-up communication and no disclosure of the order for outpatient treatment to Cho’s family members or the administration.<sup>209</sup> The Virginia Tech Review Panel suggests that universities need to create a system that connects “troubled students” with appropriate counseling services while balancing the student’s privacy rights.<sup>210</sup> Other suggestions include requiring documentation and reporting of “threatening behavior” immediately to a college’s “threat assessment group.”<sup>211</sup> While Virginia Tech did have a Care Team that, as one of their functions, would assess threats, the Team never received information about Cho’s involuntary hospitalization or stalking of students.<sup>212</sup>

## V. LOOKING TOWARD THE FUTURE

### A. *Recommendations of Reports Responding to the Virginia Tech Tragedy*

As seen above, there were several situations at Virginia Tech when communication to Cho’s parents or other education administrators would have been allowed. The fact that disclosure did not occur may be indicative of a larger problem. The Department of Education, Department of Justice, and Department of Health and Human Services (HHS) created a report for the President (Presidential Report) based on information gathered from “educators, mental health experts, law enforcement, and state and local officials” from across the country.<sup>213</sup> The Presidential Report revealed that each of the schools visited had different interpretations and levels of confusion about legal restrictions on administrators’ ability to share

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205. Shuchman, *supra* note 95, at 107.

206. *Id.*

207. *Id.* at 106.

208. *Id.*

209. See PANEL REPORT, *supra* note 3, at 49.

210. *Id.* at 53.

211. *Id.*

212. *Id.* at 52.

213. PRESIDENTIAL REPORT, *supra* note 1, at 1.



information about a student who could be a threat to self or to others.<sup>214</sup> Many schools had concerns about liability arising from sharing information that teachers, administrators, or institutions could face.<sup>215</sup>

Similarly, the Virginia Tech Report documented a clear lack of understanding of privacy laws, including FERPA.<sup>216</sup> The Virginia Tech Report committee suggested that the state attorney general's office help clarify the misunderstandings for schools.<sup>217</sup>

The Presidential Report found that some "state laws and regulations are more restrictive than federal laws."<sup>218</sup> State-level recommendations included increased information sharing through educational sessions.<sup>219</sup> These sessions would enable administrators, mental health providers, and family members to know when "they are legally entitled to share and receive information."<sup>220</sup> Sessions would also review state and federal privacy laws.<sup>221</sup>

While state laws can be more restrictive than FERPA, they cannot circumvent FERPA and allow disclosure if the federal act will not allow it.<sup>222</sup> However, once an educational institution realizes that disclosure would be allowed under FERPA, they must also ensure that disclosure is allowed under state law.<sup>223</sup>

FERPA Regulations address how a university should handle conflicts with state law. The regulation states that if an educational institution cannot comply with FERPA because it conflicts with state or local law, the institution should "notify the [Family Policy Compliance] Office within 45 days" of the conflicting law.<sup>224</sup> While this provision is helpful in developing policy, when an administrator must choose whether to communicate concerns about a student immediately, he or she may not have time to notify the Family Policy Compliance Office and wait for a response before it is too late to provide that student with the services he or she requires. Thus, by clarifying FERPA through an amendment, an administrator's potential for conflict will be reduced.

The Presidential Report also recommended certain action on the federal level, including specific tasks for HHS and DOE, to clarify and ensure

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214. *Id.* at 7.

215. *Id.*

216. See PANEL REPORT, *supra* note 3, at 68.

217. *Id.*

218. PRESIDENTIAL REPORT, *supra* note 1, at 7.

219. *Id.*

220. *Id.* at 8.

221. *Id.*

222. See PANEL REPORT, *supra* note 3, at 66.

223. *Id.*

224. 34 C.F.R. § 99.61 (2007).

understanding of FERPA.<sup>225</sup> The report advised DOE to help parents and school officials understand how institutions can communicate, and HHS and DOE to “develop additional guidance” and research whether further action needs to be taken “to balance more appropriately the interests of safety, privacy, and treatment implicated by FERPA and HIPAA.”<sup>226</sup>

Education administrators and mental health providers struggle with understanding the permissible range of disclosure. By enacting an amendment to FERPA, which clarifies the types of disclosure allowed in particular situations, more at-risk students may be able to get help before it is too late. By consolidating the above recommendations into a “College Campus Communication Safety Act” that would amend FERPA, Congress could give school officials, students, and parents a clear national standard for when they can communicate.

## VI. A CALL FOR ACTION

Critics of FERPA repeatedly ask for the law to be clarified for educators.<sup>227</sup> The Virginia Tech Review Panel suggested that national higher education associations should develop best practice protocols for information sharing.<sup>228</sup> The Review Panel thought that if this and its other recommendations were implemented, the privacy laws might not need to be amended because clear guidance on FERPA interpretation would be sufficient.<sup>229</sup> Lawrence Pettit, author of a study by the American Association of State Colleges and Universities, stressed the importance of understanding “both internal and external communication channels” to avoid “confusion in an emergency” about who administrators and health providers can call.<sup>230</sup>

### A. Current Remedies

The Family Policy Compliance Office attempts to provide guidance for post-secondary institutions by sending out brochures and posting a “Model Notification of Rights under FERPA for Postsecondary Institutions.”<sup>231</sup> While the model notification clears up some misconceptions, it does not expand on the “health and safety emergency exception” or when administrators

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225. See PRESIDENTIAL REPORT, *supra* note 1, at 8-9.

226. *Id.*

227. See *id.* at 7; PANEL REPORT, *supra* note 3, at 63.

228. See PANEL REPORT, *supra* note 3, at 53.

229. See *id.* at 68, 70.

230. PETTIT, *supra* note 147, at 4.

231. U.S. DEP'T OF EDUC., *supra* note 26; see, e.g., DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (n.d.), available at [www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf](http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf) (last visited Aug. 11, 2008) [hereinafter U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY].

have "legitimate educational interests." In general, educational institutions "are not prohibited . . . from receiving information pertaining to [a student]." <sup>232</sup> Universities are allowed "to receive any information another agency cares to share with them, unless state law prohibit[s] the disclosure." <sup>233</sup> However, having information does not immediately solve mental health problems. Independent observations of a student are the only way to assess the student's current mental health status.

The Judge David L. Bazelon Center for Mental Health Law has also issued a model policy on how colleges and universities can best support students. <sup>234</sup> The policy focuses on acknowledging but not stigmatizing mental health problems, encouraging students to seek treatment, and ensuring information is kept confidential. <sup>235</sup> One suggestion involves asking every student enrolled in a university to fill out a form documenting who he or she would like the university to contact in case of a psychiatric emergency. <sup>236</sup> This person could be anyone, including a family member, friend, or clergy. <sup>237</sup> Then, if a mental health issue arises, the university has a designated person with whom they can communicate. This person may be able to intervene and help the student receive health services.

After the Virginia Tech tragedy, schools across the nation are working to analyze how to prevent future acts of violence. Many of the new plans focus on communicating a safety threat to students immediately. <sup>238</sup> A lot of schools, including The University of Maryland at College Park, have signed contracts with vendors to send out text and voice alerts to student cell phones in an emergency. <sup>239</sup> On September 21, 2007, at Delaware State, there was a shooting incident and administrators called resident assistants, taped warnings to building doors, recorded a message on the emergency line, and placed an alert on the university Web site. <sup>240</sup> While these procedures were helpful, university administrators thought text messaging

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232. James, *supra* note 18, at 465 (analyzing the effect of FERPA specifically on juvenile offenders and discussing the "common misconception that FERPA cuts educators out of the juvenile justice and juvenile child care networks to preserve the privacy of students").

233. *Id.*

234. See generally MODEL POLICY, *supra* note 198, at 2 (In response to rising numbers of students with mental health issues, Bazelon provides a "model policy to help colleges and universities navigate these complex issues and develop a nondiscriminatory approach to a student who is in crisis because of a mental health problem.").

235. *Id.* at 3.

236. *Id.* at 5.

237. *Id.*

238. Andrea Foster, *After Va. Tech, Campuses Rush to Add Alert Systems*, CHRON. HIGHER EDUC., Oct. 5, 2007, at A1.

239. *Id.*

240. *Id.*

would be more beneficial.<sup>241</sup> Problems with this voluntary system are that not all of the administrators and students at the university are providing their contact information.<sup>242</sup>

The examples above illustrate communication plans after an emergency situation has arisen. Steps must also be taken to increase communication among administrators prior to the occurrence of an emergency situation. This is where a FERPA amendment would apply and hopefully prevent future tragedies. Progress is being made to clarify FERPA for education administrators. In October 2007, U.S. Secretary of Education Margaret Spellings announced that new brochures are available to provide guidance on FERPA as part of an effort to better balance school safety concerns with student privacy rights.<sup>243</sup> The brochures, which were "accompanied by a letter and handout on emergency management resources, were sent . . . to schools, school boards, associations, and others nationwide."<sup>244</sup> At Saint Louis University, guides are available to education administrators to help them respond to "warning signs of stress or other mental distress" in students.<sup>245</sup> Included are "tips on how to spot students in distress and . . . respond to a student emergency."<sup>246</sup> Additionally, schools such as Washington University in St. Louis and University of North Carolina at Chapel Hill are "training faculty and staff to identify and help troubled students."<sup>247</sup> Alan Glass, the director of Washington University's student-health services, stated that the goal of such training is to encourage administrators to no longer "worry alone."<sup>248</sup> The hope is that faculty and staff will express concerns to University administrators and the University can then determine if it should intervene.<sup>249</sup>

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241. *Id.*

242. *Id.*

243. Press Release, U.S. Dep't of Educ., Secretary Spellings Announces New Guidance to Improve Emergency Preparedness in Schools, Joins Secretaries Chertoff and Gutierrez to Praise Fairfax County for Its Emergency Preparedness Efforts (Oct. 30, 2007), at [www.ed.gov/news/pressreleases/2007/10/10302007.html](http://www.ed.gov/news/pressreleases/2007/10/10302007.html) (last visited Aug. 11, 2008).

244. *Id.*

245. E-mail from Lawrence Biondi, President, Saint Louis Univ., to the Saint Louis University Community (Nov. 14, 2007) (on file with author); STUDENT HEALTH & COUNSELING SERVS. OF ST. LOUIS UNIV., MENTAL HEALTH/ALCOHOL/DRUG SERVICES FOR STUDENTS: A GUIDE FOR FACULTY AND STAFF 2-5 (2007) (listing campus medical and mental health resources and discussing "behaviors indicating emotional stress").

246. E-mail from Lawrence Biondi, President, Saint Louis Univ., to the Saint Louis University Community, *supra* note 245; STUDENT HEALTH & COUNSELING SERVS. OF SAINT LOUIS UNIV., *supra* note 245 (guide includes warning signs of stress, suicide, and threats to others as well as how to respond to a student emergency).

247. Pat Wingert, *How to Prevent a Tragedy*, NEWSWEEK, Jan. 7, 2008, at 22.

248. *Id.*

249. *Id.*

Other remedies include attempts to reform mental health laws. Currently, a Commission on Mental Health Reform is in place in Virginia. The Commission's purpose is to "conduct a comprehensive examination of Virginia's mental health laws and services and [to] study ways to use the law more effectively to serve the needs of people with mental illness, while respecting the interests of their families and communities."<sup>250</sup> Virginia's reforms focus on temporary detentions and involuntary commitment.<sup>251</sup> These mental health reforms likely will play a large role in the treatment of students with mental illness in the future.<sup>252</sup> By adding an amendment to FERPA, which specifically indicates when administrators and mental health officials may communicate mental health concerns regarding students, future campus emergencies may be minimized or prevented entirely.

#### B. Past Actions and Future Amendments Proposed

In order to gain a better understanding of whether amending FERPA is feasible, it is helpful to examine FERPA's amendment history. Since its enactment FERPA has been amended nine times.<sup>253</sup> The first amendment, sponsored by Senators Buckley and Pell, was made just four months after FERPA was enacted.<sup>254</sup> Many of FERPA's amendments have served as a way for the Act to respond to changes in society and the people the Act seeks to protect.<sup>255</sup>

Included in the Higher Education Amendments of 1998, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistic Act requires annual distribution of certain information about safety on college campuses so that students and administrators stay informed.<sup>256</sup> The Act

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250. COMM'N ON MENTAL HEALTH LAW REFORM, COMMONWEALTH OF VA., FACT SHEET (2006) available at [www.dmhmrsva.org/documents/OMH-CMHLRFactSheet.pdf](http://www.dmhmrsva.org/documents/OMH-CMHLRFactSheet.pdf) (last visited Aug. 11, 2008).

251. PANEL REPORT, *supra* note 3, at 56, 60.

252. While these issues could be analyzed in great detail, this Article focuses on communication and future amendments to FERPA.

253. U.S. DEP'T OF EDUC., *supra* note 14, at 1 (1974 - Buckley/Pell Amendment; 1979 - Amendments to Education Amendments of 1978; 1979 - Establishment of Department of Education; 1990 - Campus Security Act; 1992 - Higher Education Amendments of 1992; 1994 - Improving America's Schools Act; 1998 - Higher Education Amendments of 1998; 2000 - Campus Sex Crime Prevention Act; 2001 - USA PATRIOT Act of 2001).

254. *Id.*

255. See generally *id.* (discussing how each amendment changed FERPA).

256. See U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY, *supra* note 231; AM. COLL. HEALTH ASS'N, CAMPUS VIOLENCE WHITE PAPER 5 (2005), available at [www.acha.org/info\\_resources/06\\_Campus\\_Violence.pdf](http://www.acha.org/info_resources/06_Campus_Violence.pdf) (last visited Aug. 11, 2008); ASS'N OF AM. UNIVS., SUMMARY OF HR 6, THE HIGHER EDUCATION AMENDMENTS OF 1998, at Section 485(f): Campus Crime Disclosure (1998), at [www.aau.edu/education/HR6Summary.html](http://www.aau.edu/education/HR6Summary.html) (last visited Aug. 11, 2008).

allows collegiate institutions to warn campus members “of crimes that represent a threat to the safety of students or employees” and to disclose campus security policies.<sup>257</sup>

Megan’s Law, which was enacted in 2000, amended FERPA to explain when colleges should release student records under the Campus Sex Crimes Prevention Act.<sup>258</sup> Under this Act, institutions can “disclose information they receive from state officials on registered sex offenders without the offenders’ permission.”<sup>259</sup>

Additionally, the USA PATRIOT Act of 2002 amended FERPA “to allow universities to release records of suspected terrorists to law-enforcement agencies” without the student’s consent.<sup>260</sup> Prior to the amendment, law enforcement officials had to obtain a subpoena or court order to access the educational records.<sup>261</sup> The court order would only be granted upon proof of cause, and the student would be advised that his or her educational records had been disclosed.<sup>262</sup> Now, law enforcement officials are given the power to receive a special court order that allows access to a student’s records as long as the officials can provide facts that “the information is needed for an authorized investigation.”<sup>263</sup> Additionally, universities no longer have to inform students of the release of their educational records to law enforcement officials.<sup>264</sup> Thus, the USA PATRIOT Act lowers the bar for disclosing educational records.<sup>265</sup> Critics of this amendment worry that students will no longer engage in educational pursuits that have to do with politically volatile topics.<sup>266</sup>

All of the amendments discussed above were passed in response to societal need. Megan’s Law was enacted in response to a rising number of sex offenders and the September 11th attacks provided the impetus to use any and all means to prevent future terrorist attacks.<sup>267</sup> Similarly, the Virginia Tech tragedy demonstrates that an amendment to FERPA is now needed to ensure the safety of students in academic environments around

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257. U.S. DEP’T OF EDUC., *BALANCING STUDENT PRIVACY AND SCHOOL SAFETY*, *supra* note 231.

258. Kelly Field, *Education Department Considers Revisions in Privacy-Law Regulations, Official Says*, *CHRON. OF HIGHER EDUC.*, Apr. 8, 2005, at A21.

259. *Id.*

260. *Id.*; see also AM. CIVIL LIBERTIES UNION OF OHIO, *IMPACT OF THE USA PATRIOT ACT ON FERPA (2002)* (stating that the Act has “a primary purpose of making it more expedient for law enforcement to investigate suspected terrorists.”).

261. See AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 260.

262. *Id.*

263. *Id.*

264. *Id.*

265. See *id.*

266. See AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 260.

267. *Id.*; see Field, *supra* note 258.

the country. If an amendment is to successfully ensure safety, however, schools must make sure that actions taken do not serve as a disincentive for students to receive the mental healthcare that they need. Educational institutions must find a balance whereby they are able to alert parents and proper school officials to students' mental health issues while still maintaining the students' confidence in seeking treatment. If students are afraid to seek help, no one will be able to intervene and assist those who are a danger to themselves or others.

On May 8, 2007, Congressman Tim Murphy proposed the Mental Health Security for America's Families in Education Act of 2007.<sup>268</sup> This proposal would have amended FERPA "[t]o permit educational agencies and institutions to disclose certain information to parents of students who may pose a significant risk to their own safety or well-being, or to the safety or well-being of others."<sup>269</sup> Under the proposal, disclosure could only occur if the student (1) consulted with an approved mental health professional and (2) received a written certification from the professional that the student poses a significant risk of harm to himself or others.<sup>270</sup> While the proposed amendment would have broadened allowed communication to parents, it did not clarify when communications are allowed among administrators or whether disclosure among administrators would be protected. Also, under the proposed amendment, in order to have disclosure, the student must have seen a mental health professional. Many students might refuse to see a mental health professional. Already, "80% of college students who commit suicide never sought services at their campus mental-health counseling center."<sup>271</sup> Thus, a broader amendment which clarifies other communications that can be made under FERPA is still necessary.

## VII. CONCLUSION

The Presidential Report, the Virginia Tech Review Panel Report, and comments from mental health professionals all seem to share a common thread: there is confusion about communications allowed under FERPA. An amendment detailing allowed and suggested communications would create a national standard that colleges and universities could apply.

While much of this analysis has focused on the Virginia Tech tragedy and the laws and policy shortcomings that impacted that situation, the majority of other states are facing similar struggles with their mental health

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268. H.R. 2220, 110th Cong. (2008) at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.2220>: (last visited Aug. 11, 2008).

269. *Id.*

270. *Id.*

271. See Roan, *supra* note 189.

laws and understanding of FERPA.<sup>272</sup> By amending FERPA to clarify the roles of and permitted communications among school personnel, administrators, and health officials when dealing with an at-risk student, tragedies may be prevented.

Suggestions for preventing future harm to university students are two-fold. First, on a national level, Congress needs to enact a "College Campus Communication Safety Act" that details when communication is not only allowed, but is in essence required, under FERPA. Such an amendment will make administrators more aware of their role in preventing tragedies. While the model notification and brochures are helpful, administrators may not utilize these tools. An amendment that spells out when communication needs to occur and required compliance dates, even if the communication is just to a Care Team or an elected administrative body, will compel communication from administrators at the penalty of litigation.

Currently, administrators err on the side of non-disclosure because they fear repercussions of incorrectly categorizing an individual as having mental health issues. As there is such a perceived stigma with mental health issues, administrators may hope that the perceived symptoms will go away. If a student had a physical ailment such as a broken leg, administrators would immediately communicate with each other and address the situation. One lesson learned from Virginia Tech is that mental health symptoms may not go away. Better communication might have allowed an opportunity for intervention and thus prevented tragedy. An amendment such as a "College Campus Communication Safety Act" will ensure that administrators are protected by FERPA when they communicate their observations about a student. Ideally, an amendment will allow administrators and mental health professionals to respond to students' needs and provide them with the help and services they require.

In addition, mental health laws must be re-examined so that they work with FERPA and not against it. These laws need to be clarified on the state level as well. If school officials have clear outlines of accepted behaviors on both the national and state level, they will be better able to react in a timely fashion to a student in need.

The above recommended changes to federal and state law will remove many perceived barriers to communication that has the potential to prevent tragedy. By increasing communication and decreasing confusion with regard to FERPA and mental health laws, college campuses may be able to

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272. See generally PRESIDENTIAL REPORT, *supra* note 1, at 3 (examples include CO, FL, MN, TN, TX, UT, WV, CA, NM, IN, OK, and MS).



better protect their academic community while adjusting to the needs of incoming classes struggling with higher mental illness rates.

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