A PREVENTABLE TRAGEDY AT VIRGINIA TECH: WHY CONFUSION OVER FERPA'S PROVISIONS PREVENTS SCHOOLS FROM ADDRESSING STUDENT VIOLENCE*

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I. INTRODUCTION

On April 16, 2007, Seung Hui Cho, a student at Virginia Tech University, killed thirty-two students and faculty, injured seventeen more, and then took his own life in the deadliest campus shooting in U.S. history.[1] Though Cho's behavior on several instances in the months leading up to April 16th indicated that he was a danger to both himself and the university community, administrators failed to accurately assess the threat he posed.[2]

Three days after the shootings, Virginia Governor Tim Kaine convened a diverse panel of experts on topics including mental health assessment, university administration, public safety, law enforcement, victim services, emergency medical services, and the state's justice systems.[3] These experts conducted an independent review and prepared a report, *Mass Shootings at Virginia Tech* (the Virginia Tech Report), detailing the issues that contributed to the tragedy.[4] The Virginia Tech Report found the failure of the school's departments (including the student counseling center, campus law enforcement, and administrators)

* The author dedicates this Note to the 32 students and faculty killed on April 16, 2007, the individuals who were injured, and all those who continue to suffer because of the events of that day. This Note seeks to encourage inquiry into policies that will help protect campus communities from having to face such a tragedy again.

[1] Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASHINGTON POST, Apr. 17, 2007, at A01, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/04/16/AR2007041600533.html

[2] VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR KAINE, COMMONWEALTH OF VIRGINIA 21–24 (Aug. 2007), *available at* http://www.governor.virginia.gov/TempContent/techPanelReportdocs/FullReport.pdf (providing summary of Cho's disciplinary and mental health issues while a student at Virginia Tech, as well as his problems prior to enrollment at the university) [hereinafter VIRGINIA REPORT].

[3] *Id.* at 5.

[4] *Id.* ("On June 18, 2007 Governor Kaine issued Executive Order 53 to reaffirm the establishment of the Virginia Tech Review Panel and clarifying the panel's authority to obtain documents necessary for its review."). The text of Executive Order 53 is available at Appendix A of the VIRGINIA REPORT.

to share information with each other about Cho's disciplinary and mental health issues, to be the primary reason why the university failed to identify Cho as a risk to the community.[5] The Virginia Tech Report Panel's investigation also found that the lack of communication among departments stemmed from confusion over the federal laws that govern privacy of student records, including the Family Education and Privacy Act of 1974 (FERPA).[6]

Five days after the Virginia Tech shootings, President George W. Bush directed the Secretary of Health and Human Services, the Secretary of the Department of Education, and the Attorney General to travel to states across the U.S. and meet with educators, mental health experts, law enforcement and state and local officials.[7] The President convened the meetings to discuss issues raised by the shootings and to prepare a report with key findings about the challenges combating student violence that educators face.[8] The *Report to the President on Issues Raised by the Virginia Tech Tragedy* (HHS Report) confirmed the widespread confusion in schools across the United States about what constitutes a FERPA violation.[9]

Together, the Virginia Tech Report and the HHS Report evidence the need for Congress to clarify when FERPA's emergency exception allows school officials to share information in student records and thus help prevent tragedies such as the Virginia Tech shootings.[10] The HHS Report found that "information silos" among educators, health providers, and public safety officials due to misinterpretations of privacy laws prevent the necessary sharing of information about students that might be a danger to a campus community.[11] Indeed, despite a provision in FERPA that allows for a transfer of records between schools, Cho's extensive treatment records from his middle and high schools for severe social anxiety disorder and suicidal and homicidal ideation remained unknown to Virginia Tech administrators until after the shootings.[12] The information silos described by the HHS Report proved prevalent among Virginia

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[5] *Id.* at 2.

[6] *Id.* at 52; Family Educational Right to Privacy Act (FERPA), 20 U.S.C. § 1232g (2006).

[7] UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 1 (2007), *available at* http://www.hhs.gov/vtreport.pdf [hereinafter HHS REPORT].

[8] *Id.*

[9] *Id.* at 7.

[10] VIRGINIA REPORT, *supra* note 2, at 2 (noting that Virginia Tech administrators failed to recognize that federal law provides ample leeway for reporting information when a student poses an emergency risk to the safety of himself or others); HHS REPORT, *supra* note 7, at 7 (noting that "although participants in each state meeting were aware of . . . FERPA, there was significant misunderstanding about [its] scope and application . . .").

[11] HHS REPORT, *supra* note 7, at 7.

[12] VIRGINIA REPORT, *supra* note 2, at 34–39 (summarizing Cho's record of special education and mental health issues prior to enrollment at Virginia Tech and noting that those records were never transferred to the university).

Tech's counseling center, campus police, and academic departments knowledgeable about Cho's violent tendencies.[13] Each department failed to share critical information about Cho's issues because it believed that doing so violated FERPA.[14] In reality, FERPA contains an emergency exception that allowed for sharing among Virginia Tech departments, and between schools Cho attended, about conduct that demonstrated he posed a risk to himself and the campus community.[15]

FERPA lists several instances when records may be disclosed without a student's consent, including an emergency exception that permits disclosure of 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."[16] FERPA also provides that the educational record may include "appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community," and FERPA further notes that it permits "disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student."[17] Yet, as shown by the Virginia Tech tragedy, the prevailing confusion about when the exception applies limited the transfer of information more significantly than required by law.[18] School administrators interviewed for the HHS Report described situations in which they incorrectly believed they faced legal liability if they disclosed information in a student's educational record.[19] This finding is particularly troubling because FERPA's emergency exception should instead empower university administrators to make appropriate, proactive responses that address the dangerous behavior of students like Cho.[20] As currently drafted, the stat-

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[13] *Id.* at 52.

[14] *Id.* at 2.

[15] 20 U.S.C. § 1232g(b)(1)(I)(2006) (providing that records may be released "subject to regulations of the Secretary, in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons").

[16] *Id.*

[17] 20 U.S.C. § 1232g(a)(7)(B)(h)(1)–(2) (2006):

> Nothing in this section shall prohibit an educational agency or institution from— (1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school or community, or (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

[18] HHS REPORT, *supra* note 7, at 7.

[19] *Id*.

[20] *Id.* at 8.

ute's exception does not serve its intended purpose of allowing disclosure of conduct that threatens "the health or safety of the student or other[s]."[21] The Department of Education finally acknowledged that widespread confusion about FERPA has prevented effective use of the emergency exception when it adopted revised regulations in December 2008.[22] Unfortunately, these revised regulations do not resolve the ambiguity over when a university may safely employ the emergency exception and share information in a student record that might help to avert a tragedy like the one at Virginia Tech.[23]

This Note argues that because FERPA still does not adequately define when an emergency exists, Congress should amend the provision to more effectively encourage schools to take action when a student poses a safety threat to the university community. The Note addresses the reasons why university administrators do not understand or appropriately apply FERPA and why the statute, legislative history, and case law fail to resolve the ambiguity surrounding FERPA's emergency exception.[24] Part II of this Note outlines the history, development, and key provisions of FERPA. Part III discusses FERPA's scope and applicability under recent case law, including when disclosure or transfer of student records is appropriate. Part IV considers university responsibility for student safety and addresses research that homicidal acts, like Cho's, are linked to suicide and threats of violence. Part V concludes that Congress must amend FERPA to explicitly provide that a student threat of violence to self or others triggers the emergency exception to allow more effective university intervention.

II. FERPA EXPLAINED

A. *Asserted Purpose, Rights Conferred, and History of FERPA*[25]

FERPA regulations govern any educational agency, public or private K–12 schools, or postsecondary schools that receive federal education funds, includ-

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[21] 20 U.S.C. § 1232g(b)(1)(I) (2006); HHS REPORT, *supra* note 7, at 7.

[22] Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,806 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99).

[23] *Id.* at 74,854 (giving the full text of the revised regulation on disclosure in event of emergency at §99.36).

[24] VIRGINIA REPORT, *supra* note 2, at 67 ("the boundaries of the emergency exceptions have not been defined by privacy laws or cases, and these provisions may discourage disclosure in all but the most obvious cases.").

[25] The text of FERPA has been amended nine times since its enactment in 1974. The most recent amendments are the Campus Sex Crime Prevention Act of 2000 and the USA Patriot Act of 2001. *See* U.S. DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 1–10 (2002), *available at* http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpalegh history.pdf (providing a full list of the amendments to FERPA and specifying the objectives of each amendment) [hereinafter LEGISLATIVE HISTORY OF FERPA].

ing federally guaranteed student loans.[26] President Ford signed FERPA on August 21, 1974, and it became effective on November 19, 1974.[27] It is now codified at 20 U.S.C. § 1232g with regulations at 34 C.F.R. pt. 99.[28] The Family Policy Compliance Office (FPCO) of the United States Department of Education monitors and enforces adherence to FERPA's provisions.[29] Congress passed FERPA "as an attachment to a bill, [so] there is no significant legislative history for [its] original provisions."[30] It was not subject to the usual process of legislative committee review and interested institutions and individuals did not testify at public hearings.[31] FERPA's main sponsors, Senators James Buckley of New York and Clairbourne Pell of Rhode Island, gave a Joint Statement, on December 13, 1974, which serves as the only legislative history ("Joint Statement").[32] In response to the educational community's concerns over certain ambiguities in FERPA, the Joint Statement sought to "provide a narrative and explanation of the meaning and intent of the various provisions of the amendment."[33] The Joint Statement described FERPA's purpose as "to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent."[34]

FERPA requires that student records be kept confidential.[35] It provides access to third parties only with the consent of parents or adult students.[36] The privacy rights conferred to parents transfer to students when the student turns

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[26] Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 5–6 (2001).

[27] LEGISLATIVE HISTORY OF FERPA, *supra* note 25 at 1

[28] 20 U.S.C. § 1232g; Family Educational Rights and Privacy, 34 C.F.R. § 99 (2008) (not yet updated to include the changes and final rules promulgated in December 2008).

[29] 34 C.F.R. § 99.60 (designating the Family Policy Compliance Office as the federal office in charge of enforcing FERPA); About the Family Policy Compliance Office (FPCO), http://www.ed.gov/policy/gen/guid/fpco/index.html (last visited Apr. 11, 2009) (providing that the mission of the Family Policy Compliance Office is to meet the needs of students by effectively implementing FERPA) [hereinafter About the FPCO].

[30] Daggett & Huefner, *supra* note 26, at 5.

[31] Daniel Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher:* Falvo v. Owasso Independent School District*, Peer Grading, and a Student's Right to Privacy Under the Family Education Rights and Privacy Act*, 30 J.L. & EDUC. 575, 578 (2001).

[32] *Id.* (citing 120 CONG. REC. S39,863 (daily ed. Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell)).

[33] *Id.* at 578–79.

[34] United States v. Miami Univ., 294 F.3d 797, 806 (6th Cir. 2002) (quoting 120 CONG. REC. S39,858, 39,862 (daily ed. Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell)) (discussing FERPA's enactment and the joint statement issued by Senators Buckley and Pell).

[35] Daggett & Huefner, *supra* note 26, at 4.

[36] *Id.*

eighteen or enrolls in a postsecondary school.[37] FERPA also confers on parents and adult students the right to review the protected records in the student's educational record and challenge records on the grounds that they are misleading or inaccurate.[38] FERPA allows adult students to access their own records within a "reasonable" time, not later than forty-five days after they make a request.[39] This access includes a personal inspection of the original records, but usually not the right to obtain copies.[40]

B. *Definition of Educational Records*

FERPA only protects disclosure of documents within a student's educational record.[41] Therefore, the provisions of the law defining the types of documents that are considered part of a student's educational record are particularly important.[42] FERPA's definition of records governs the access, disclosure, and challenges to information in the student record.[43] When it was first passed, FERPA included an extensive list of what should be included in student "education records":

> Any and all official records, files and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of seri-

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[37] *Id.* at 6, n.21 (citing 20 U.S.C. § 1232g(d) (2006); 34 C.F.R. § 99.5) (explaining that 34 C.F.R. § 99.5 provides "that when a student becomes a legal adult, that student gains the right to access his or her own education rights and that adult student's parents lose their former FERPA rights").

[38] *Id.* at 4.

[39] *Id.* at 6.

[40] *Id.*

[41] *Id.* at 12–13.

[42] *See* Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 431, 434 (2002) (noting that the existence of a FERPA violation turns on whether peer graded documents constitute part of a student's educational record). In *Owasso v. Falvo*, the Supreme Court held that peer graded documents do not constitute part of a student's educational record because they are not "maintained" as contemplated by the definitions of educational records in FERPA. *Id.* The case illustrates the importance of the definition of "documents within an education record" because the petitioners' FERPA claim was dismissed for their failure to demonstrate that the document at issue was part of the protected educational record of the student. *Id.*

[43] Daggett & Huefner, *supra* note 26, at 13.

ous or recurrent behavior patterns.[44]

Within six weeks of enacting FERPA, Congress amended the statute to draft a more concise, but broader definition: "those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."[45] The Joint Statement of Senators Buckley and Pell stated that the amendment was intended to limit FERPA's scope to apply generally to "education records," rather than the previous "long list of illustrative examples" of the types of records and documents protected.[46] An unintentional effect of this amendment, however, was to foster confusion about the types of documents that should be protected from disclosure.[47] The confusion was noted in *Owasso Independent School District v. Falvo*, a recent U.S. Supreme Court case that attempted to clarify the types of documents that fit in the broad definition of educational records.[48] *Owasso* is discussed in detail in Part III below.

The FERPA regulations give some guidance about how to construe the broad definition of educational records.[49] The documents must be "maintained" by the educational institution to constitute part of the educational record.[50] Records received by schools from outside sources are protected, as long as the school "maintains" those records.[51] FERPA records include not only documents in an official "student file," but also documents found "in a teacher's desk, nurse's office, or a principal's file."[52] The protected information may be recorded in many ways, "including, but not limited to handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."[53] FERPA's regulations provide that the protected "personally identifiable information" must be anything that makes the student's identity "easily traceable," including

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[44] *Id.* (quoting Education Amendments of 1974, Pub. L. No. 93-380, § 513.88 Stat. 484 (1974) (codified as amended at 20 U.S.C. § 1232g (1974))).

[45] *Id.* at 13 n.70 (citing 20 U.S.C. § 1232g(a)(4)(A)) (noting "[t]he regulations' general definition of education records closely tracks the language in the statute").

[46] Dinger, *supra* note 31, at 579 n.23 (citing 120 CONG. REC. S39,862 (daily ed. Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell)).

[47] *Id.* at 611–12 (arguing that the Tenth Circuit wrongly decided *Falvo v. Owasso* because its interpretation of FERPA's broad educational records definition was flawed). The Tenth Circuit's opinion is available at Falvo v. Owasso Indep. Sch. Dist., 233 F.3d 1203 (10th Cir. 2000)).

[48] Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 431, 434, 437 (2002).

[49] *See* Family Educational Rights and Privacy, 34 C.F.R. § 99.3 (2008) (listing the definitions that apply to the FERPA regulations).

[50] *Id.*

[51] Daggett & Huefner, *supra* note 26, at 13.

[52] *Id.* at 14.

[53] *Id.* (citing 34 C.F.R. § 99.3).

parents' names, family address, or a social security number.[54] Notably, student disciplinary records are also considered "education records" and protected from disclosure.[55]

C. *Requirement of Nondisclosure of Educational Records*

FERPA is a "Spending Clause" statute enacted by Congress pursuant to Art. I, § 8 of the U.S. Constitution.[56] This means that an educational institution can lose its federal funding if it releases educational records to an unauthorized third party as restricted by FERPA.[57] Accordingly, school administrators often err on the side of nondisclosure of student records because they fear that a violation may result in a loss of federal funding.[58] Federal regulations underscore the seriousness of disclosure by requiring that release of information in a student's educational record be accompanied by a signed and dated consent specifying the records disclosed, the purpose of the disclosure, and the parties to whom disclosure may be made.[59] A student over the age of eighteen enrolled at a university can refuse to consent to share information in the educational record with his or her parents, as long as the parents no longer claim the child as a dependent for tax purposes.[60]

A student who believes his or her FERPA rights were violated may file a complaint with the FPCO.[61] The FPCO investigates the complaint and notifies both the complainant and the school whether it finds a FERPA violation, and if so, the reasons for the violation.[62] A "single instance" of a release of a protect-

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[54] *Id.*

[55] John E. Theuman, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)*, 112 A.L.R. FED. 1, § 5[e] (1993) (citing 20 U.S.C.A §§ 1232g(a)(4)(A), 4(B)(ii), (b)(6)(A–C), (h)(2), (i)(l) (2002); United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002)).

[56] LEGISLATIVE HISTORY OF FERPA, *supra* note 25, at 2 (noting that Section 8 provides that Congress may spend funds to provide for the general welfare but "'[n]o funds shall be made available under any applicable program . . . .' unless statutory requirements are met").

[57] *See, e.g.,* Gonzaga Univ. v. Doe, 536 U.S. 273, 278–79 (2002).

[58] HHS REPORT, *supra* note 7, at 7.

[59] Family Educational Rights and Privacy, 34 C.F.R. § 99.30 (2008).

[60] Daggett & Huefner, *supra* note 26, at 6 (noting that "'[p]arent's rights transfer to students when students reach the age of eighteen or enroll in a postsecondary institution"); 20 U.S.C. 1232g(b)(1)(H) (providing that parent has access to records of a student enrolled in a university if that student is still claimed as a dependent on parent's taxes).

[61] About the FPCO, *supra* note 29 (providing the information for what "parents and eligible students" should do if they wish to file a complaint with the FPCO regarding a FERPA violation); 34 C.F.R. §99.66 (listing the steps the FPCO must take to investigate complaints regarding a possible FERPA violation).

[62] 34 C.F.R. §99.66(b).

ed record without consent does not violate FERPA.[63] An educational institution must have a practice of unlawfully permitting the release of protected education records before the FPCO will find a FERPA violation.[64] If the FPCO determines that a school violated FERPA, the school must meet a list of conditions within a set time to resolve the complaint.[65] When the violations are egregious, or if a pattern of violations exists, the FPCO "may initiate proceedings to withdraw federal funding from the school."[66]

A party to litigation can gain access to otherwise confidential information because FERPA creates an exception for the production of information in response to a subpoena from a federal grand jury.[67] Courts weigh the interest of the litigants against the privacy interests of the student to decide whether to issue a subpoena of the protected records.[68] FERPA regulations require the issuing court or agency to "order the educational institution not to disclose the existence or contents of the subpoena or information furnished in response to it."[69] Universities must notify adult students in advance when protected records are produced in compliance with a subpoena.[70]

In 2002, the United States Supreme Court held that FERPA creates no private right of action so a student may not personally sue a university for damages if protected information is wrongly released.[71] The Secretary of Education can still sue schools to enforce FERPA rather than pursuing administrative remedies.[72] The ability to bring a lawsuit in federal court provides the Secreta-

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[63] Theuman, *supra* note 55, at § 12[c] (citing 20 U.S.C. § 1232 (a), (b), (e); Commonwealth v. Buccella, 751 N.E.2d 373 (Mass. 2001)).

[64] Gonzaga Univ. v. Doe, 536 U.S. 273, 288 (2002) (citing 20 U.S.C. §§ 1232g(b)(1)–(2)) (noting the FERPA prohibits funding an educational institution with a policy or practice of permitting the release of education records).

[65] 34 C.F.R. §99.66(c).

[66] Daggett & Huefner, *supra* note 26, at 11 (citing 20 U.S.C. § 1232(g)(b)(2), (f); 34 C.F.R. § 99.67) (noting "FERPA enforcement can be accomplished via termination or withholding federal funds").

[67] Phyllis E. Brown, *Educating Students With Disabilities*, *in* 2 EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 6:16 (2007) (citing 20 U.S.C. § 1232g(b)(1)(J)(i)).

[68] Daggett & Huefner, *supra* note 26, at 16.

[69] Brown, *supra* note 67 (citing 20 U.S.C. § 1232g(b)(1)(J)(ii)).

[70] *Id.* (citing 20 U.S.C. § 1232g(b)(2)); 34 C.F.R. § 99.31(a)(9)) (noting that "[t]he regulations allow for disclosure without the consent of the student if the disclosure sought complies with a judicial order or subpoena and the [university] has made a reasonable effort at notification").

[71] *Id.* (citing Gonzaga Univ. v. Doe, 536 U.S. 273 (2002)).

[72] United States v. Miami Univ., 294 F.3d 797, 808 (6th Cir. 2002)). The Sixth Circuit noted, "under 20 U.S.C. § 1234c(a) the Secretary may take the following actions when a recipient of funds fails to comply with the FERPA: (1) withhold further payments under that program . . . (2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title; (3) enter into a compliance agreement

ry of Education with a powerful enforcement remedy.[73] In fact, the Virginia Tech Report found that a fear of the Department of Education's (DOE) enforcement remedies led to "overly strict interpretations" of FERPA, and stopped school administrators, mental health professionals, and police from sharing relevant information about the safety risk Cho posed.[74] The Virginia Tech Report's findings conclude that though existing exceptions allowed administrators to share information about Cho's troubling behavior in the weeks before the shootings, the fear of triggering enforcement remedies "may discourage disclosure in all but the most obvious cases."[75]

D. *Relevant Exceptions to the Requirement of Non-Disclosure of Student Records*

FERPA contains a few exceptions that, when triggered, allow safety concerns to outweigh the privacy interests of an individual student.[76] The 1974 Amendments created several exemptions to FERPA's privacy protection requirements, and provide insight into situations where Congress deems privacy interests insufficient to prevent the release of records.[77] The 1974 Amendments exclude four categories of documents from the definition of education record:

> (1) records in the sole possession of instructional, supervisory, and administrative personnel; (2) records of a law enforcement unit which are kept apart from 'education records,' [and] are maintained solely for law enforcement purposes . . .; (3) records of employees [who do not also attend the school]; and (4) physician, psychiatrist, or psychologist treatment

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with a recipient to bring it into compliance, as authorized by section 1234f of this title; or (4) *take any other action authorized by law with respect to the recipient*." *Id.* The court goes on to hold that the fourth alternative "expressly permits the Secretary to bring suit to enforce the FERPA conditions in lieu of its administrative remedies." *Id.*

[73] *See* Daggett & Huefner, *supra* note 26, at 11 n.61 (citing United States v. Miami Univ., 91 F. Supp. 2d 1132, 1138–44 (S.D. Ohio 2000)) (explaining that "[t]he federal government, in some cases, may also enforce FERPA by bringing a civil action").

[74] VIRGINIA REPORT, *supra* note *supra* note 2, at 52–53. The report describes how the Virginia Tech counseling center, police department, and academic offices could have collectively benefited and more effectively addressed Cho's threat as a safety risk if they had shared information with each other, but failed to do so because of flawed interpretations of federal privacy law. *Id.*

[75] *Id.* at 67.

[76] *Miami Univ.*, 294 F.3d at 812–13 (noting for instance, that regarding the sanctioned release of certain disciplinary records to an alleged victim:

> Congress balanced the privacy interests of an alleged perpetrator of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding.

[77] *See* LEGISLATIVE HISTORY OF FERPA, *supra* note 25, at 2–3 (providing that the 1974 Amendments defined education records and specifically excluded four types of documents).

records for eligible students.[78]

The 1974 Amendments also provide that otherwise protected documents can be disclosed in an emergency, if knowledge of the information in the record is necessary to protect the health or safety of others.[79] Protected information may also be disclosed to teachers and school officials, including those in other schools, who have a "legitimate educational interest" in the student record.[80]

FERPA does not protect notes about students written by teachers when those notes are never seen by anyone other than someone who temporarily fills the job of the author, for example a substitute teacher.[81] However, if the notes are later shown to another party, including a school administrator or the student, the notes are protected under FERPA.[82] Finally, FERPA does not protect records prepared by campus police.[83] Documents created exclusively by a campus police unit may be shown to outside authorities, like police departments, without obtaining the consent of an adult student.[84] FERPA does protect records maintained by a university specifically for disciplinary purposes because these documents are not considered law enforcement records.[85]

The FERPA exception permitting disclosure of otherwise protected information to appropriate parties when necessary to protect the health and safety of a

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[78] *Id.*; 20 U.S.C. § 1232g(a)(4)(B) (i)–(iv)(2006).

[79] LEGISLATIVE HISTORY OF FERPA, *supra* note 25, at 7; 20 U.S.C. § 1232g(b)(1)(I) (subsection (b)(1) provides in part that no funds shall be made available to any educational institution which has the policy or practice of:

> permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization, other than the following— . . . (I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

[80] 20 U.S.C. § 1232g(b)(1)(A)–(B) (2006):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . other than to the following— (A) other school officials, including teachers within the [school], who have been determined by [the school] to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required; (B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.

[81] *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (providing that "educational records" do not include "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute").

[82] Daggett & Huefner, *supra* note 26, at 15.

[83] *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8 (2008).

[84] Daggett & Huefner, *supra* note 26, at 15–16.

[85] *Id.* at 15 (citing 34 C.F.R. § 99.8 (requiring that school disciplinary records later provided to campus police remain education records subject to FERPA protection)).

student or others has proven to be the most ambiguous of the 1974 Amendments.[86] The Joint Statement immediately sought to limit the exception's scope: "[i]n order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception."[87] This shows that from its inception, use of the FERPA emergency exception was intended to be "strictly limited."[88] In 2004, the FPCO noted that "[t]he legislative history [of FERPA] demonstrates Congress's intent to limit the application of the 'health or safety' exception to exceptional circumstances."[89] Accordingly, the FPCO, as the agency that enforces FERPA, adopts a position that the emergency exception must be "interpreted . . . narrowly by limiting its application" to situations "that requir[e] an [immediate need] for information in order to avert or diffuse serious threats . . . ."[90] The Virginia Tech Report concludes that the FPCO's "provisions may discourage disclosure in all but the most obvious cases."[91]

In the aftermath of the Virginia Tech shootings, the DOE acknowledged that school administrators did not understand when the emergency exception applied under the existing regulations.[92] On March 24, 2008, the FPCO released proposed FERPA regulations that eliminated the language requiring strict construction of the emergency exception.[93] The proposed regulations were designed in part to address "the need to clarify how postsecondary institutions may share information with parents and other parties in light of the tragic events at Virginia Tech in April 2007."[94] The revised regulations became ef-

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[86] Theuman, *supra* note 55, at § 9 (citing 20 U.S.C.A § 1232g(b)(1)(I); Jain v. State, 617 N.W.2d 293 (Iowa 2000)) (noting that use of the health and safety exception is "discretionary" for schools and must be used in the face of the fact that FERPA generally "explicitly conditions receipt of federal educational funds upon an institution's compliance with the Act's privacy requirements").

[87] LEGISLATIVE HISTORY OF FERPA, *supra* note 25, at 7 (citing 120 CONG. REC. S39,863 (daily ed. Dec. 13, 1974). (statement of Sen. Buckley and Sen. Pell)).

[88] *See id.*

[89] Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Educ. to Melanie P. Baise, Associate University Counsel, University of New Mexico, G–6 (Nov. 29, 2004), *reproduced in* VIRGINIA REPORT, *supra* note 2, at app. G [hereinafter FPCO Letter of Nov. 29, 2004].

[90] *Id.*

[91] VIRGINIA REPORT, *supra* note 2, at 67.

[92] Dear Colleague Letter from Raymond Simon, Deputy Sec'y, Dep't of Educ. (Dec. 17, 2008), *available at* http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht12-17-08.html (providing that the final regulations are designed "to help [schools] better understand and administer FERPA" and afford "greater flexibility" for administrators to use the emergency exception) [hereinafter FPCO Final Regulations Letter of Dec. 17, 2008].

[93] Family Educational Rights and Privacy, 73 Fed. Reg. 15,574, 15,588–89 (proposed Mar. 24, 2008).

[94] *Id.* at 15,574.

fective on January 8, 2009.[95] These new regulations are the DOE's response to the findings in the HHS Report that "[t]he [DOE] should ensure that parents and school officials understand how and when post-secondary institutions can share information on college students . . . ."[96] The new regulations seek to increase the flexibility of universities to invoke the emergency exception by changing the language in § 99.36(c) that provided the FPCO should strictly construe decisions to disclose information under it.[97] However, the revised regulation merely introduces new ambiguous language for universities to decipher:[98]

> [A]n educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an *articulable and significant* threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals.[99]

The new regulation continues, "[i]f, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution . . . ."[100] Between the proposed regulations of March 2008 and the final regulations of December 2008, the DOE also added a new requirement to impose on universities that invoke the emergency exception.[101] Now, universities must "record [and maintain] the articulable and significant threat that formed the basis for the disclosure . . . for as long as the student's education records are maintained."[102] The final regulation eliminates the strict construction requirement in favor of a rational basis standard that also increased the FPCO's oversight power by requiring the basis for decisions to be recorded and

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[95] Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,806 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99).

[96] HHS REPORT, s*upra* note 7 at 8; *See* Family Educational Rights and Privacy, 73 Fed. Reg. at 15,589 (describing the findings in the HHS Report and the HHS Report's charge to the DOE to increase understanding of when the emergency exception can be invoked).

[97] Family Educational Rights and Privacy, 73 Fed. Reg. at 15,589 ("the Secretary has determined that greater flexibility and deference should be afforded to administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals").

[98] Family Educational Rights and Privacy, 73 Fed. Reg. at 74,854 (providing the complete text of proposed rule for § 99.36(c)).

[99] *Id.* (emphasis added).

[100] *Id.*

[101] *Id.* at 74,837.

[102] *Id.* (referring to the recordation requirements of § 99.32(a)(5) and §99.32(a)(2)).

maintained without clarifying what the FPCO will find "rational."[103]

The new regulations do not change the circumstances when the emergency exception applies, but simply seeks to encourage universities to invoke it more frequently.[104] While the DOE asserts that the new regulations provide "greater flexibility and deference to school administrators" by replacing the strict construction requirement with a rational basis determination, the commentary stresses that "[s]chools should not view FERPA's 'health or safety emergency' exception as a blanket exception."[105] The DOE apparently seeks to prevent "blanket" use of the emergency exception by newly requiring "educational agencies and institutions . . . to record the 'articulable and significant threat'" so schools can justify to "parents, students, and to the [DOE]" the reasons the exception is invoked.[106] The DOE commentary goes on to stress that "the 'rational basis' test does not eliminate the [DOE]'s responsibility for oversight and accountability."[107]

In the time between issuing the proposed regulations and implementation of the final rules, the DOE already faced questions about the meaning of the phrase "significant and articulable."[108] Questions about the meaning of the regulation's text, which still exists only on paper and without practical examples, are only likely to increase when universities put the new standard into practice, and begin to make the difficult decisions about whether a particular situation fits within the text's meaning. The DOE commentary attempted to answer these questions in the final regulations by quoting the dictionary definition of both words: "[t]he word 'articulable' is defined to mean 'capable of being articulated,'" and "'significant' . . . means 'of a noticeably or measurably large amount.'"[109] The regulations explain that a significant threat may be "a threat

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[103] *Id.* at 74,854 *(*failing to list any explicit circumstances that will be considered a "rational basis" for invoking the emergency exception).

[104] Family Educational Rights and Privacy, 73 Fed. Reg. at 15,589 (providing that purpose of amendment is to provide greater flexibility to universities that seek to use the emergency exception by simply clarifying the legal standard that applies); Family Educational Rights and Privacy, 73 Fed. Reg. at 74,837 ("We do not agree that removal of the 'strict construction' standard weakens FERPA or erodes privacy protections").

[105] Family Educational Rights and Privacy, 73 Fed. Reg. at 74,837.

[106] *Id.* (explaining that the records will demonstrate "what circumstances led [the school] to determine that a health or safety emergency existed and how they justified the disclosure"). The agency also noted that "[c]urrently, educational agencies and institutions are required under § 99.32(a) to record any disclosure of personally identifiable information from education records made under § 99.31(a)(10) and § 99.36." *Id.*

[107] *Id.*

[108] *Id.* at 74,838.

[109] *Id.* (citing Articulable- Definition from the Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/articulable (last visited March 11, 2009); Significant- Definition from the Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/significant (last visited March 11, 2009)).

of substantial bodily harm, to any person" and the listed examples of such a threat are "an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli."[110] The list of examples ignores the fact that threats of harm to self or others, like the one posed by Cho, may be more subtle. The regulations do provide that an emergency could be "a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment."[111] Given the provided list of acceptable emergencies and the DOE's use of the words "at any moment" when noting that a student's threat of harm may sometimes constitute an emergency, this new standard is not likely to encourage universities to proactively invoke the emergency exception.[112] Accordingly, the new regulations are unlikely to encourage greater use of the emergency exception when a student, like Cho, is involved in incidents that indicate the student poses a threat to self or others. The new phrase "significant and articulable" does not appear to change the DOE's long-standing policy that only the most severe threats appropriately trigger the emergency exception.[113]

Under FERPA, when the emergency exception is invoked by universities, law enforcement officials, parents, public health officials, and trained medical personnel are generally the parties that may receive otherwise protected records.[114] Disclosure may also be made to teachers and school officials, including teachers and officials in other schools, with "legitimate educational interests" in the student record.[115] Under FERPA, the university is ultimately responsible for determining both when a health or safety emergency exists, and who has a "legitimate educational interest" in the record at issue.[116] The new regulations increase the amount of responsibility on schools by introducing the burden to identify an "articulable and significant threat," record a "rational basis" for disclosure, and maintain that record.[117]

The lack of guidance in FERPA's text and the DOE's regulations about what legitimately triggers the emergency exception and who has an "educational in-

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 74,837–38 ("to be 'in connection with an emergency' means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack").

[114] *Id.* at 74,838–39.

[115] *Id.* at 74,839; 20 U.S.C. § 1232g(b)(2)(h)(2) (2006).

[116] Daggett & Huefner, *supra* note 26, at 7 (citing 20 U.S.C. § 1232g(b)(1)(a); 34 C.F.R. § 99.31(a)(1)) (noting it is the school's responsibility to determine when there is a legitimate educational reason for inspecting student records); FPCO Letter of Nov. 29, 2004, *supra* note 89, at G-8 (maintaining it is the responsibility of the educational institution to make the determination of whether disclosure is necessary to protect the health or safety of the student or other individuals).

[117] Family Educational Rights and Privacy, 73 Fed. Reg. at 74,837.

terest" is a primary reason why administrators err on the side of non-disclosure, and thus fail to effectively use FERPA's emergency exception.[118] Major case law on FERPA similarly provides little guidance to educators seeking to avoid FERPA violations when they invoke the emergency exception.

III. Case Law Defining FERPA's Provisions

Federal case law considering FERPA's provisions is likely another reason why the Virginia Tech Report and the HHS Report found many school administrators unable to correctly identify when FERPA exceptions are appropriate.[119] The Supreme Court has acknowledged that its decisions on FERPA regulations "may not be models of clarity."[120] Members of the Supreme Court have also noted that FERPA's broad language leaves schools uncertain about when they can reveal information in a student record without incurring legal liability.[121] Recent federal precedent seemed to take much of the bite out of liability under FERPA by finding no right of private action.[122] However, other federal decisions reaffirm the broad enforcement rights of the DOE under FERPA[123]

A. *The Supreme Court Accords Deference to Schools Making Decisions under FERPA*

Two recent Supreme Court cases clarified what is protected as an educational record under FERPA, and who may bring actions to enforce purported violations.[124] First, in *Owasso Independent School District v. Falvo*, the Supreme Court found that the Tenth Circuit wrongly determined that the practice of "peer grading" violated FERPA by releasing information in a student's record to the grader.[125] The Supreme Court held that papers graded by other students during class while the teacher read the answers are not part of a FERPA pro-

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[118] *See* Virginia Report, *supra* note 2, at 52, 68–69; HHS Report, *supra* note 7, at 7–8.

[119] *See, e.g.,* Gonzaga Univ. v. Doe, 536 U.S. 273, 278 (2002) (noting that the decisions applying FERPA are confusing).

[120] *Id.*

[121] *Id.* at 292, (Breyer, J., concurring) ("This kind of language leaves schools uncertain as to just when they can, or cannot reveal various kinds of information.").

[122] *Id.* at 289–90. (concluding Congress did not intend to give students a private right of actions against schools under FERPA).

[123] *See* United States v. Miami Univ., 294 F.3d 797, 808 (6th Cir. 2002) (finding Congress intended to create several enforcement rights for the Department of Education including conferring the right of the DOE, at its discretion, to bring a suit to enforce FERPA instead of pursuing administrative remedies).

[124] Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 429 (2002) (considering whether peer grading constituted a violation of FERPA by disclosing information in a student's educational record); *Gonzaga*, 536 U.S. at 276 (considering whether a student may sue a private university for damages to enforce FERPA provisions).

[125] *Owasso*, 534 U.S. at 426, 430.

tected educational record.[126] The decision emphasized FERPA's requirement that protected records must be "maintained by an educational agency or institution or by a person acting for such agency or institution."[127] Student papers that are graded by other students are not yet sufficiently "'maintained' within the meaning of [FERPA]."[128] Moreover, each student grader was not within the category of "a person acting for" an educational institution as required by FERPA.[129] The Court clarified that the term "acting for" implies that the individual must be an agent of the school, "such as teachers, administrators, and other school employees," and held that students do not constitute such an agent.[130]

The *Owasso* Court found that the requirement to "maintain" a record under the regulations implies that "FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled."[131] The Court's finding that "maintained" means records will be kept in a filing cabinet or secure database is not entirely supported by FERPA's regulations, which provide that protected information may include many types of documents that are recorded in several ways, "including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."[132] Justice Scalia, concurring in the judgment, notes that the Supreme Court may not have correctly interpreted what it means to "maintain" a record under FERPA.[133] The concurring opinion concludes that the Supreme Court's inaccurate "central custodian" theory of what constituted an educational record makes the opinion "incurably confusing."[134]

The *Owasso* Court recognized the burden that would be placed on teachers and schools if the peer grading practice at issue violated FERPA.[135] That recognition indicates that the Supreme Court may be willing to interpret the

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[126] *Id.* at 430.

[127] *Id.* at 431 (quoting 20 U.S.C. § 1232g(a)(4)(A).

[128] *Id.* at 432–33.

[129] *Id.* at 433 (citing 20 U.S.C. § 1232g(a)(4)(A)).

[130] *Id.*

[131] *Id.*

[132] Family Educational Rights and Privacy, 34 C.F.R. § 99.3 (2008).

[133] *Owasso*, 534 U.S. at 436–37 (Scalia, J., concurring):

> I cannot agree, however . . . that education records include only documents kept in some central repository at the school . . . . [T]he Court's endorsement of a 'central custodian' theory of records is unnecessary for the decision of this case, seemingly contrary to § 1232g(a)(4)(B)(i), and (when combined with the Court's disclaimer of any view upon the status of teachers' grade books) incurably confusing.

[134] *Id.* at 437.

[135] *Id.* at 435 ("Respondent's construction of the term 'education records' to cover student homework or classroom work would impose substantial burdens on teachers across the country . . . [and] force teachers to abandon other customary practices.").

FERPA provisions in a way that reduces the burdens imposed on schools.[136] The *Owasso* Court did not want "federal power" to "exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country."[137] Further, the *Owasso* majority honed in on the precise words of the DOE regulations to determine whether a record falls within FERPA.[138] The Court's reliance on the dictionary meaning of the language in the regulations demonstrates the importance of each word in the text of FERPA's statute and regulations because courts will rely on them to determine whether a university violates the statute.[139]

In *Gonzaga University v. Doe*, as in *Owasso*, the Supreme Court acknowledged the burden that potential FERPA violations impose on schools, and focused on the exact words in the regulations in an attempt to determine congressional intent.[140] The *Gonzaga* decision also illustrates the Court's readiness to interpret FERPA to limit a school's exposure to liability.[141] *Gonzaga* concerned an issue explicitly reserved by the Court in *Owasso*—"whether a student may sue a private university for damages under . . . 42 U.S.C. § 1983."[142] The Court rejected the claim that a litigant should be allowed to sue under § 1983 by alleging that his or her rights were violated due to a school's release of education records to an unauthorized third party in violation of FERPA.[143] Instead, the Court found that FERPA creates no private right of action enforceable under § 1983.[144] *Gonzaga*'s holding contradicts every prior Court of Appeals decision to consider the same issue.[145] "Nearly all other federal and state courts reaching the issue" prior to *Gonzaga* found that FERPA expressly conferred to private parties the right to sue under § 1983.[146] As the dissent in *Gonzaga* noted, "the Court departs from over a quarter century of settled law in

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[136] *Id.*

[137] *Id.* at 435–36.

[138] *Id.* at 433 (looking to the dictionary meaning of the word "maintain" to determine whether Congress intended to include certain types of records).

[139] *Id.*

[140] 536 U.S. 273, 286 n.5 (2002) (explaining that Congress would not have "intended FERPA's nondisclosure provisions to confer individual rights on millions of school students from kindergarten through graduate school without having ever said so explicitly. This conclusion entails a judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local officials . . . ").

[141] *Id.* at 287 (finding "there is no question that FERPA's nondisclosure provisions fail to confer enforceable rights," that conclusion limited school exposure to liability by preventing private litigants from bringing suits against a school for claimed FERPA violations).

[142] *Id.* at 276.

[143] *Id*.

[144] *Id.* at 287.

[145] *Id.* at 299 (Stevens, J., dissenting).

[146] *Id.*

concluding that FERPA creates no enforceable rights."[147] The majority simply concluded that FERPA's provisions lack the "rights-creating" language needed to show that Congress intended to create new rights under § 1983.[148]

Gonzaga focused on whether FERPA created any implied rights because, as an initial matter, the Court found that Congress did not speak clearly enough to evince the "'unambiguous' intent [required] to confer individual rights" under a federal funding provision.[149] The Court clarified that § 1983 "provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States," and not for merely benefits or interests.[150] Despite the Joint Statement's reference to "privacy rights," and the numerous references to "rights" conferred in the text itself, *Gonzaga* found that FERPA's text did not support a legislative intent "to confer individual rights upon a class of beneficiaries."[151] *Gonzaga* appeared to effectively strip FERPA of much of its power by denying individual plaintiffs the right to bring a lawsuit against universities for alleged violations.[152]

In 2003, Congress responded to *Gonzaga* by considering, but never passing, a bill to modify FERPA "to provide parents and students with the right to sue institutions for releasing information that . . . harm[s] the student."[153] Many college officials opposed the bill, fearing that it would expose universities to "frivolous lawsuits" and increase costs through litigation and large settlement agreements.[154] Besides the chilling effects on the rights of individuals to sue under FERPA, the *Gonzaga* decision also raised the issue of whether schools would be more willing to risk violating FERPA because there was no exposure to private litigation.[155] Since the Court's ruling in *Gonzaga*, while some schools have proven more willing to risk violating FERPA,[156] many schools remain overly cautious in disclosing information even where it seems clearly appropriate.[157] One likely reason for the continued caution of administrators is that FERPA's broad language makes it hard to be sure when provisions or

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147 *Id.*

148 *Id.* at 290.

149 *Id.* at 280 (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981)).

150 *Id.* at 283.

151 *Id.* at 285.

152 *See id.* at 276.

153 Britton White, *Student Rights: From In Loco Parentis to Sine Parentibus and Back Again? Understanding the Family Educational Rights and Privacy Act in Higher Education*, 2007 BYU EDUC. & L.J. 321, 341 (2007) (citing H.R. 1848, 108th Cong. (2003)).

154 *Id.*

155 Sabrina Tavernise, *In College and in Despair, With Parents in the Dark*, N.Y. TIMES, Oct. 26, 2003, at 1.

156 *Id.*

157 HHS REPORT, *supra* note7, at 7.

exceptions apply.[158] Another reason may be that even though *Gonzaga* found that private litigants may not sue, federal court precedent still gives the DOE the right to bring claims against schools in court.[159]

B. *The Government Retains Broad Enforcement Power for FERPA Violations*

In *United States v. Miami University*, the Sixth Circuit reaffirmed that FERPA guarantees robust protections for documents in a student's educational record.[160] The *Miami University* decision emphasized the public interests that FERPA was intended to protect:

> [M]illions of people in our society have been or will become students . . . and those people are the object of FERPA's privacy guarantees. Accordingly, systematic violations of . . . FERPA . . . result in appreciable consequences to the public and no doubt are a matter of public interest.[161]

Miami University declared that courts may go further in granting or withholding relief to further the public interest than they can when only private interests are involved.[162] The Sixth Circuit ordered a permanent injunction on Miami University's release of records in student disciplinary files because the release caused irreparable harm to the DOE's protection of privacy interests in violation of the public interest.[163]

College administrators paid close attention to the outcome of *Miami University*.[164] Many were pleased that the case protected the privacy of campus disciplinary proceedings.[165] The administrators watching the outcome of the case surely also noted that the DOE has standing to bring lawsuits to enforce FERPA compliance.[166] That ruling provided incentive to create university policies that err on the side of nondisclosure because it reinforced the DOE's broad power to enforce FERPA violations.[167] *Miami University* also adopts the rule

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[158] Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring) ("Much of the statute's key language is broad and nonspecific.").

[159] *See, e.g.,* United States v. Miami Univ., 294 F.3d 797, 808 (6th Cir. 2002).

[160] *Id.* at 818 (holding that disciplinary records may not be released without consent because they are part of a student's educational record and noting the DOE's power to enforce the privacy interests Congress sought to protect by enacting FERPA).

[161] *Id.*

[162] *Id.* at 818–19.

[163] *Id.* at 819.

[164] White, *supra* note 153, at 335.

[165] *Id.* at 338.

[166] United States v. Miami Univ., 294 F.3d at 818.

[167] *See* Daggett & Huefner, *supra* note 26, at 20 (noting that the district court in *Miami University* "held that the [DOE] and the United States have standing to bring civil actions to enforce FERPA" (citing United States v. Miami Univ., 91 F. Supp. 2d 1132, 1137–46 (S.D. Ohio 2000)).

that disclosing disciplinary records to third parties violates FERPA, despite FERPA's provision that campus police records are not subject to similar restrictions.[168]

Relying on the DOE's interpretations on when FERPA applies, *Miami University* carefully distinguished between a record created for law enforcement purposes and a record created as part of a disciplinary proceeding.[169] The court found that amendments to FERPA that allow for release of disciplinary information only in limited circumstances indicate that disciplinary records generally should not be disclosed.[170] The court did note that the emergency exception permits the disclosure of protected disciplinary records for conduct that poses a significant risk to the safety of the student or the school community.[171] *Miami University* construed this as a "narrow exemption" that provides for disclosure only to teachers and school officials, but which "[o]bviously . . . does not contemplate release of . . . disciplinary records to the general public."[172] The court found that Congress intended to recognize a student's privacy interest in disciplinary records even when "those records reflect that the student poses a significant safety risk."[173] The Sixth Circuit simultaneously found that the DOE can enforce FERPA violations in court, and that courts may take a narrow view of when the emergency exception applies.[174] These two findings may make administrators reluctant to litigate claimed FERPA violations in the courts.[175]

The reasoning in *Miami University* relied heavily on the definitions of law enforcement records and disciplinary proceedings promulgated by the DOE.[176] In the absence of a clear definition from Congress, the court deferred to the "reasonable and permissible constructions of the relevant statute" provided by the DOE regulations.[177] The court found the "broad" definition of education records in FERPA ambiguous,[178] and deferred to the DOE's rigorous protection of records.[179] Adopting the DOE's position, the Sixth Circuit concluded that

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[168] *Id.* at 21–22.

[169] *Miami Univ.*, 294 F.3d at 815.

[170] Daggett & Huefner, *supra* note 26, at 21.

[171] *Miami Univ.*, 294 F.3d at 813 (citing 20 U.S.C. § 1232g(h)(2)).

[172] *Id.*

[173] *Id.*

[174] *Id*. at 808, 813.

[175] HHS REPORT, *supra* note 7, at 7 (finding that "significant misunderstanding about the scope and application of [FERPA]" and reporting "[I]t was almost universally observed that these fears and misunderstandings likely limit the transfer of information in more significant ways than is required by law.").

[176] *Miami Univ.*, 294 F.3d at 813–15.

[177] *Id.* at 814.

[178] *Id.* at 812, 814 (adopting the district court's approach of turning to the DOE's regulations for interpretive assistance because the question of whether student disciplinary records are law enforcement records was left ambiguous by Congress).

[179] *Id.* at 815.

"all disciplinary records, including those related to non-academic or criminal misconduct by students," are protected education records.[180] The court further noted that education records do not lose their status as protected records while in the possession of a law enforcement unit.[181] The court's protection of disciplinary records, and strict limits on when they may be released, may lead university administrators to adopt policies that err on the side of nondisclosure of student records, and thus are stricter than what federal law requires.[182]

IV. Policy Considerations in Support of Congressional Amendment

University policies that err on the side of nondisclosure when students threaten violence may not sufficiently respond to the risk to the campus community that those threats create.[183] When a student "[a]ctively contemplate[es] suicide (also known as suicidal ideation)" there is a correlation with several other high-risk behaviors including weapons possession and drug use.[184] A student's suicidal ideation poses a serious threat to the health and safety of a campus community because the act of attempting suicide also often "involves violence against others."[185] Suicides, threats of violence, and serious mental-health issues are increasing on college campuses.[186] Further, a DOE and U.S. Secret Service study of all homicidal shootings between 1974 and 2000 perpetrated by students on school grounds found that "many [attackers] had considered or attempted suicide."[187] The link between suicidal ideation and homicide was evident in the Virginia Tech shootings, where Cho reported suicidal thoughts to classmates and campus police before killing 32 students and faculty

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[180] *Id.* (quoting 60 Fed. Reg. 3,464, 3,465 (Jan. 17, 1995)).

[181] *Id.* at 814 (citing 34 C.F.R. § 99.8(c)(2)).

[182] HHS Report, *supra* note 7, at 7.

[183] Carrie Elizabeth Gray, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 Law & Psychol. Rev. 137, 138 (2007) (noting that actively contemplating suicide, also known as suicidal ideation, correlates with several other high-risk behaviors including weapons possession and drug use).

[184] *Id.*

[185] *Id.*

[186] Peter Lake & Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 Stetson L. Rev. 125, 126 (2002) (noting that "[t]he rates of suicide among young people have been increasing dramatically . . . research indicates that the number of students coming to campus with mental-health issues will continue to increase"); Tamar Lewin, *Laws Limit Colleges' Options When a Student Is Mentally Ill*, N.Y. Times, Apr. 19, 2007, at A1 (noting that these incidents, in comparison with the Virginia Tech shooting, are not rare).

[187] Bryan Vossekuil et al., U.S. Secret Service & U.S. Dep't of Educ., The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States 8, 11 (2002), *available at* http://www.treas.gov/usss/ntac/ssi_final_report.pdf [hereinafter Final Report of the Safe School Initiative].

members.[188]

Research supports implementing school policies that allow administrators to identify and share student risk factors as a means to prevent targeted violence.[189] A guide to implementing effective school policy, prepared at the direction of the DOE and the U.S. Secret Service, concluded that individuals who consider or act on "ideas of suicide or violence toward others, or both, should be considered persons of increased concern."[190] The guide emphasized that it is important for departments within schools to share information with each other and work together under an "integrated systems approach" to deal with the risk posed by students who express thoughts of violence towards oneself, or others.[191] In addition, the guide asserted that a school threat assessment team should interview parents when a student threatens violence in order to develop a clearer picture of the threat that student poses.[192] The guide's recommendations support the position that both suicidal ideation and a threat of violence to others should trigger FERPA's emergency exception.[193] Yet as currently drafted, FERPA does not explicitly include "suicidal ideation" as an appropriate trigger for invoking the health and safety exception.[194] As a result, FERPA's text does not encourage universities to employ the exception when a student threatens violence to self, despite research that shows the correlation between suicidal ideation and large-scale tragedies like the one at Virginia Tech.[195]

Court decisions also fail to encourage universities to invoke FERPA's emergency exception when a student expresses suicidal ideation, because courts are traditionally reluctant to find universities liable for a student's suicide.[196] The

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[188] VIRGINIA REPORT, *supra* note 2, at 47. Cho expressed suicidal thoughts to classmates and campus police, prompting his transfer to a local psychiatric hospital for observation and determination about whether he posed an imminent danger of threat to himself. *Id.*

[189] ROBERT A. FEIN ET AL., U.S. SECRET SERVICE & U.S. DEP'T OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 30, 32, 35 (2002) , *available at* http://www.treas.gov/usss/ntac/ssi_guide.pdf [hereinafter THREAT ASSESSMENT IN SCHOOLS].

[190] *Id.*

[191] *Id.* at 32.

[192] *Id.* at 52–53.

[193] *Id.* at 32, 35; *see also* Gray, *supra* note 1833, at 151–52 (noting an argument that FERPA should be amended to create a "duty" for universities to notify parents if a student threatens suicide and arguing that if a university decides to notify parents about the student's "health emergency" that the university should make a determination to contact parents about a threat in dorm room or on campus separately from the decision of a mental health counselor to notify parents about the student's threat).

[194] *See* 20 U.S.C. § 1232g(b)(1)–(2); Family Educational Rights and Privacy, 73 Fed. Reg. at 74,854 (providing current text of 34 C.F.R. § 99.36 (2008), the health or safety emergency exception).

[195] FINAL REPORT OF THE SAFE SCHOOL INITIATIVE, *supra* note 187 at 11.

[196] *See* Lake & Tribbensee, *supra* note 186, at 129–30, 135 (describing the traditional rule that there is no university liability for student suicide unless the universities may only

leading case on the issue of a university's failure to notify parents about their child's suicide attempts, *Jain v. State*, held that the university was not negligent when it failed to enforce its own "unwritten" policy of parental notification for student suicide attempts.[197] After a student committed suicide on the campus of the University of Iowa, the Iowa Supreme Court rejected his father's wrongful death lawsuit against the university.[198] The court held the university's failure to notify the parents about their son's first suicide attempt and the student's threats of suicide did not increase the risk of the student's death.[199] A recent case, *Mahoney v. Allegheny College*, similarly dismissed a claim brought against a university by the family of a student who hung himself at a fraternity house after being counseled for depression on campus for three years.[200] However, the *Mahoney* court also noted that "failure to create a duty is not an invitation to avoid action," and indicated that a university has a responsibility to adopt proactive programs regarding suicide injury threats.[201] The *Mahoney* court's reasoning supports the argument that FERPA must be amended to encourage universities to adopt policies that invoke FERPA's emergency exception in response to suicidal ideation.[202] *Mahoney* indicates that university administrators must not allow fear of FERPA violations to cause a failure to promptly and thoroughly address student threats of violence, whether against self or others.[203]

Modern suicide prevention theory provides that the involvement of family members is a key step to lower the risk of students causing harm to themselves or to others.[204] Studies that show that family involvement helps prevent student violence support an explicit trigger of FERPA's emergency exception in the event a student threatens suicide on campus.[205] Further, some recent case law,

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have liability if they are physically responsible for the act or if there was a special duty, which does not arise from suicidal ideation, and noting that though the traditional rule may be eroding there are still many instances when universities escape liability,); *see also* Jain v. State, 617 N.W.2d 293, 300 (Iowa 2000) (the leading case on university liability for student suicide, holding that the university did not have to provide information about the student's suicide attempt when the student refused to provide consent).

[197] *Jain*, 617 N.W.2d at 296, 300.

[198] *Id.* at 295.

[199] *Id.* at 300.

[200] Mahoney v. Allegheny Coll., No. AD 892-2003, slip op. at 3–4, 25 (Pa. Ct. Com. Pl. Dec. 22, 2005); Joy Blanchard, *University Tort Liability and Student Suicide: Case Review and Implication for Practice*, 36 J.L. & EDUC. 461, 473 (2007).

[201] Blanchard, *supra* note 200, at 474 (citing *Mahoney*, No. 892-2003 at 25).

[202] *Id.* at 474 (noting that after the court's reasoning in *Mahoney*, "campus administrators should not use ignorance or a fear of FERPA-related litigation as an excuse not to act prudently when a credible threat exists that a student might commit suicide").

[203] *Id.*

[204] Lake & Tribbensee, *supra* note 186, at 142.

[205] *Id.* (providing that modern suicide prevention theory shows that notifying parents helps "lowe[r] the risk of, particularly for students of traditional college age").

notably *Shin v. Massachusetts Institute of Technology*, suggests that courts are now more willing to hold that universities should address suicidal ideation by disclosing it to third parties, like parents, before it results in violence to self or others.[206] Many universities closely followed the outcome in *Shin*, viewing it as a case that set precedent on how schools should address the issues arising from the growing number of troubled students on campuses.[207]

The *Shin* decision held that Elizabeth Shin's parents could continue a negligence suit against individual administrators and campus medical center employees.[208] The Shins filed a 25 count complaint against M.I.T., M.I.T. counselors, and M.I.T. administrators after their daughter committed suicide in an M.I.T. dorm room.[209] Medical personnel at M.I.T. treated Elizabeth Shin for depression, and a university team of administrators who evaluated at-risk students received advance notice of her suicide threat.[210] The Massachusetts Superior Court declared that M.I.T. counselors and administrators may have entered into the kind of "special relationship" with Elizabeth Shin that gave rise to a duty to act or protect a person.[211] In finding this "special relationship," the *Shin* decision identified a need for universities to develop proactive policies to address issues raised by student suicide: "[a]s the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the 'special relationships' upon which the common law will base tort liability for the failure to take affirmative action with reasonable care."[212] The court's language suggests that universities must take action to prevent dangerous situations to protect against liability in later tort suit.[213]

Despite the growing call for universities to increase the amount of information-sharing when a student threatens violence to self or others, university administrators remain reluctant to use FERPA's emergency exception.[214] This reluctance is contrary to research that shows effective information sharing among university departments, and with third parties such as mental health pro-

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[206] Shin v. Mass. Inst. of Tech., No. 020403, 2005 WL 1869101, at *14 (Mass. Super., June 27, 2005) (finding "sufficient evidence of a genuine issue of material fact as to whether the MIT Administrators were grossly negligent in their treatment of [the student]" after she committed suicide on campus).

[207] Deborah Sontag, *Who Was Responsible for Elizabeth Shin?*, N.Y. TIMES MAGAZINE, Apr. 28, 2002, at 1, *available at* http://www.nytimes.com/2002/04/28/magazine/who-was-responsible-for-elizabeth-shin.html?sec=health&pagewanted=1.

[208] *Shin*, 2005 WL 1869101, at *9, *14.

[209] *Id.* at *5–6.

[210] *Id.*

[211] *Id.* at *13.

[212] *Id.* at *12.

[213] *Id.* at *13 (finding a duty existed to exercise reasonable care to prevent the student from harm).

[214] HHS REPORT, *supra* note7, at 7.

fessionals, police, and parents, is essential to prevent shootings like the one at Virginia Tech.[215]

V. Analysis: The Need to Amend FERPA's Emergency Exception

A. *Lack of Communication among Virginia Tech Departments Indicates Incorrect Implementation of FERPA*

The Virginia Tech Report found several instances where FERPA allowed for greater information sharing between schools and administrators regarding the potential danger that Cho's conduct posed to the campus community.[216] First, FERPA allows inter-school record transfers, which could have provided Virginia Tech with critical information from Cho's education records at previous schools.[217] Had the records been transferred, Virginia Tech administrators would have learned that in high school Cho received treatment for the extreme social anxiety disorder, selective mutism, and that in middle school he expressed homicidal ideation after the Columbine shootings.[218] As discussed in section IV of this note, students who express homicidal and suicidal ideation are much more likely to pose a serious threat to a campus community.[219] After Cho began to show signs of suicidal ideation at Virginia Tech, his prior educational records would have allowed administrators to more accurately assess whether he posed a risk to the campus community.[220] The DOE's Notice of Proposed Rule-Making, published in May 2008, acknowledged that the Virginia Tech shooting showed that confusion about FERPA's provisions prevented effective information-sharing between schools.[221] The final FERPA regulations of December 2008 also seem to acknowledge that the failure to transfer records to new schools is a major concern by specifically clarifying that

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[215] Threat Assessment in Schools, *supra* note 189, at 32 ("Relationships with agencies and service systems within the school and the surrounding community are critical to identifying, assessing, and managing students who are on a path toward carrying out a school attack.").

[216] Virginia Report, *supra* note 2, at 63–67 (outlining several instances when records could have been disclosed under FERPA but administrators chose to adopt a conservative non-disclosure approach).

[217] *See* 20 U.S.C. § 1232g(b)(1)(B) (2006); Family Educational Rights and Privacy, 34 C.F.R. § 99.34(b) (2008).

[218] Virginia Report, *supra* note 2, at 21–22 (providing a timeline of Cho's life including his diagnosis with selective mutism and his known homicidal and suicidal ideations).

[219] Final Report of the Safe School Initiative, *supra* note 187, at 22.

[220] Threat Assessment in Schools, *supra* note 189, at 35 (finding information sharing among entities critical to put together all the pieces and adequately assess the safety risk posed by an individual student).

[221] Family Educational Rights and Privacy, 73 Fed. Reg. 15,574, at 15,581 (proposed Mar. 24, 2008) ("in the aftermath of the shooting at Virginia Tech, some questions have arisen about whether FERPA prohibits the disclosure of certain types of information from students' education records to new schools or postsecondary institutions.").

FERPA allows for such transfers.[222] The DOE commentary to the December 2008 regulations explains that the provisions governing transfer of records permits school officials to "disclose any records or information, including health records and information about disciplinary proceedings" to the new school.[223]

Cho's interactions with several departments at Virginia Tech also indicated that he could pose a serious risk to the community.[224] The Virginia Tech Police Department knew that approximately four months before the shootings Cho was involuntarily admitted to a mental health hospital. The police department did not share that information with university administrators, however, even though FERPA allowed such a disclosure.[225] This information would have allowed Virginia Tech's centralized panel—designed to deal with individual student health, safety, and academic issues (known as "the Care Team")—to more accurately evaluate Cho's behavior and determine what risk he posed to the campus community.[226] Although the Care Team is responsible for assessing the health and safety risks presented by individual students, the team could not act effectively when missing critical information about Cho's mental health.[227]

Although university administrators reported to the Virginia Tech Report panel that FERPA prohibited them from sharing disciplinary records with the campus police, in reality this belief was wrong because FERPA allows such disclosure.[228] The administrators were unaware that, consistent with FERPA's provisions, Virginia Tech actually had a policy in place providing that administrators should share disciplinary records with campus police because the campus police had a "legitimate educational interest" in student disciplinary records.[229] FERPA provides that disciplinary records may be disclosed to "other school officials" who the university determines have a "legitimate educational interest" in the records.[230] The failure of administrators to correctly imple-

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[222] Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,818 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (clarifying that under §§ 99.31 and 99.34(a) schools do not violate FERPA by disclosing any and all education records to a subsequent school where the student enrolls).

[223] *Id.* (noting that under § 99.31(a)(2) and § 99.34(a) school officials may disclose records to the new school even after the student has already enrolled there).

[224] VIRGINIA REPORT, *supra* note 2, at 52–53 (noting that though academic, administrative, and campus police entities at Virginia Tech had interactions that raised concerns, lack of information sharing contributed to the failure to see the big picture of the risk that he posed).

[225] *Id.* at 46–48, 64–65.

[226] THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35 (finding it desirable to gather information from a variety of departments and store in a central location so a threat assessment team may accurately assess the risk posed by a student).

[227] VIRGINIA REPORT, *supra* note 2, at 2, 43–44.

[228] *Id.* at 68.

[229] *Id.*

[230] 34 C.F.R. § 99.31(a)(i)(A) (2008) (otherwise protected information may be disclosed

ment the university's policy to give campus police relevant information from student files limited the campus police's access to crucial information about a troubled student, and prevented them from providing input on appropriate security measures.[231]

Although *Owasso* confirmed that only information "maintained" in a student's educational record is protected from disclosure by FERPA, Virginia Tech officials also failed to take advantage of that distinction.[232] Under FERPA, campus police, teachers, administrators, and residence life staff who knew about Cho's threatening behavior, including threatening writings, threats made to other students, and suicidal ideation, could have discussed his behavior with other school officials.[233] They also could have notified Cho's parents to report the behavior they witnessed without risking a FERPA violation.[234] Cho's parents told the Virginia Tech Report panel that they would have sought mental health treatment for Cho if Virginia Tech administrators told them about Cho's "behavioral incidents," including stalking a female student and threatening suicide.[235] Indeed, before Cho's enrollment at Virginia Tech, his parents had previously worked with counselors and mental health professionals to address any of their son's reported "episodes of unusual behavior."[236]

The Virginia Tech Report found it most significant that Cho's parents and suitemates were never told that Cho was "temporarily detained, [subject to] a commitment hearing for involuntary admission to a hospital, and found a danger to himself" by a licensed clinical social worker.[237] A student's involuntary commitment to a mental health hospital because that student expresses suicidal ideation is exactly the type of situation that should trigger FERPA's emergency exception.[238] In Cho's case, the emergency exception was not invoked and the lack of information sharing about his dangerous behavior prevented effective intervention, which is best achieved through the collaboration of family members, school officials, medical and mental health professionals and law enforcement officials.[239]

The Virginia Tech Report concluded that privacy laws and court decisions fail to define the boundaries of the emergency exception, and that university

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"to other school officials . . . within the [school] . . . whom the [school] has determined to have legitimate educational interests")

[231] VIRGINIA REPORT, *supra* note 2, at 13.

[232] *Id.* at 52–53, 66–67.

[233] *Id.*

[234] *Id.*

[235] *Id.* at 70.

[236] *Id.*

[237] *Id.* at 63.

[238] *Id.* at 47; *see also id.* at 69 (recommending that the DOE give FERPA's emergency exception more flexibility because the "strict construction" requirement leads administrators to conclude that non-disclosure is the best choice).

[239] *Id* at 68; THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35.

policies may discourage disclosure of student threats "in all but the most obvious cases."[240] That conclusion shows that schools are not consistently adopting an effective means to prevent campus violence.[241] The failure of several departments at Virginia Tech to correctly interpret FERPA is a clear example of why Congress should amend the statute to clarify when an emergency disclosure is appropriate.[242] Such an amendment serves the policy purpose of encouraging university officials to abandon a culture of nondisclosure in favor of a more collaborative approach that can both effectively meet the needs of troubled students, and protect the safety of the university community.[243]

B. *FERPA's Text and Regulations Fail to Clearly Define the Emergency Exception*

Ambiguity in FERPA's text and in the DOE's regulations leaves universities unable to effectively implement the health or safety emergency exception.[244] The DOE's new regulations attempt to give universities greater flexibility to invoke the emergency exception.[245] Yet, the regulations are not likely to encourage more universities to invoke the emergency exception because they continue to provide examples that suggest it should only be used in extreme examples of "actual, impending, or imminent emergency, such as a terrorist attack . . . ."[246] The DOE's long-standing emphasis that protecting student privacy necessitates using the emergency exception very infrequently continues in the new regulations, which provide that the "rational basis" standard does

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[240] VIRGINIA REPORT, *supra* note 2, at 67.

[241] THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35.

[242] VIRGINIA REPORT, *supra* note 2, at 67–69 (documenting the communication failures and asserting that FERPA must be made clearer).

[243] *Id.* at 68. The Virginia Tech Report concludes:

> Effective intervention often requires participation of parents or other relatives, school officials, medical and mental health professionals, court systems, and law enforcement. The problems presented by a seriously troubled student often require a group effort. The current state of information privacy law and practice is inadequate to accomplish this task. The first major problem is the lack of understanding about the law. The next problem is inconsistent use of discretion under the laws. Information privacy laws cannot help students if the law allows sharing but agency policy or practice forbids necessary sharing. The privacy laws need amendment and clarification.

Id.

[244] 20 U.S.C. § 1232g(b)(1)(I)(providing the text of the health or safety emergency exception); 34 C.F.R. § 99.36 (providing the DOE regulations which governs the usage of the health or safety emergency exception).

[245] *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,838 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (eliminating the strict construction requirement in 34 C.F.R. § 99.36(c)).

[246] *Id.* (health or safety emergency exception may only be invoked in relation "to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting").

not "weake[n] FERPA or erod[e] privacy protections."[247] The DOE's policy position that an emergency exists when there is an "actual, impending, or imminent" threat of something like a "terrorist attack," "natural disaster," or "school shooting"[248] stands contrary to research sponsored by the DOE itself that shows a student's risk to the school community is often more subtle.[249] Most student perpetrators of homicide never directly threaten the targets of the violence, but many do present less obvious indicators that they pose a risk to the campus community (ex. suicidal ideation).[250] The DOE's position that the exception must be used only in clear cases of "actual, impending, or imminent emergency" also runs counter to findings that effective intervention for troubled students is best accomplished when administrators are free to share information in the student record with appropriate parties.[251] The revised regulations fail to give concrete examples that the "rational basis" standard actually increases university flexibility to invoke the exception, and the full burden remains on universities to make appropriate determinations about what constitutes an emergency.[252] The DOE underscores the burden on universities in the new regulations by creating a new requirement to maintain a record justifying why the exception was invoked.[253]

The FPCO encourages university officials to turn to FPCO policy guidance letters to explain how to apply the emergency exception.[254] Given the ambiguity in FERPA's text and regulations, the FPCO's policy interpretations provide needed guidance. The FPCO's policy guidelines on how to apply the emergency exception, however, fail to encourage universities to employ the emergency exception when a student threatens violence to self or others.[255] An FPCO advisory letter that concluded the emergency exception can sometimes be triggered when a student makes suicidal comments or threatens other students also emphasized that such a determination was not a blanket grant to disclose infor-

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[247] *Id.* at 74,837.

[248] *Id.* at 74,838.

[249] FINAL REPORT OF THE SAFE SCHOOL INITIATIVE, *supra* note 187, at 23, 25

[250] *Id.*

[251] VIRGINIA REPORT, *supra* note2, at 68.

[252] Family Educational Rights and Privacy, 73 Fed. Reg. at 74,837 (noting that universities now have the additional requirement to record and keep on file the circumstances that led them to make the determination that a health or safety emergency was warranted).

[253] *See id.* (describing new requirement to make universities record reasons for invoking exception).

[254] *See* About the FPCO, *supra* note 29 (providing link to key policy letters and indicating that the DOE intends the FPCO letters to serve as policy guidance for schools that seek to invoke the emergency exception).

[255] *See* Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Educ. to Superintendent, New Bremen Local Schools (Sept. 22, 1994), *reproduced in* VIRGINIA REPORT, *supra* note 2, at app. G, G-15–16 [hereinafter FPCO LETTER OF SEPT. 29, 2004].

mation.[256] The advisory letter was produced in response to a student's legal guardian filing a complaint that the New Bremen Public School System improperly released information from his grandson's educational record.[257] The FPCO found that it was appropriate for the school to make an initial disclosure of the student's protected disciplinary records to the juvenile court system because the student "made suicidal statements, [threatened] another student, and engaged in unsafe conduct . . . ."[258] The disclosure by New Bremen Public School was deemed appropriate only because of a "pressing need" to bring the matter to the attention of appropriate authorities.[259] In fact, the FPCO ultimately concluded that the school violated FERPA when it continued to provide information to the juvenile court, even though the school made those disclosures on the express request of the appointed juvenile judge.[260] The FPCO justified this finding by declaring that the juvenile court did not continue to be an "appropriate authority" to deal with the emergency after the initial disclosure.[261] The court's standing as an "appropriate authority" ceased when it declined to detain the juvenile in custody pending further proceedings.[262] The FPCO claimed "the court did not address the matter in an immediate manner, as commonly implied by the word 'emergency,'" though the case was heard approximately one month after it was first filed.[263]

The FPCO's letter in response to the New Bremen school disclosure shows how strictly it traditionally construes the health and safety emergency exception and demonstrates why, in the wake of the Virginia Tech shooting, so many administrators reported being more cautious to disclose records than required by law.[264] Given the narrow view of the emergency exception's applicability taken by the FPCO, the regulatory agency that enforces FERPA, schools cannot be expected to invoke the exception at signs of student suicidal ideation or student threat of harm to others without a clear directive that it is permissible in FERPA's text or regulations. The FPCO's historically strict interpretation of FERPA may be explained by the Joint Statement's limit of the emergency exception at FERPA's enactment: "[i]n order to assure there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will

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[256] *Id.* at G-18–20 (finding a FERPA violation because the school subsequently disclosed information to a court after the FPCO deemed the "emergency" situation had passed).

[257] *Id.* at G-14.

[258] *Id.* at G-16.

[259] *Id.*

[260] *Id.* at G-17–18.

[261] *Id.* at G-18.

[262] *Id.*

[263] *Id.*

[264] *See* HHS REPORT, *supra* note 7, at 7 (noting that "[i]n a number of discussions, participants reported circumstances in which they incorrectly believed that they were subject to liability or foreclosed from sharing information under law").

strictly limit the applicability of this exception."[265] The Joint Statement evidences a congressional intent that the DOE, through the FPCO, will strictly limit the emergency exception.[266] It appears that the FPCO has accomplished that task. Now, in the face of the HHS Report and Virginia Tech Report's findings that fear of FERPA violations makes universities unable to effectively implement FERPA, there is a clear need for Congress to act and amend the statute.[267]

Nothing in FERPA, as written, would conflict with additional statutory language that provides student suicidal or homicidal ideation constitutes a genuine risk to the health or safety of the student and the campus community.[268] An amendment to FERPA's text that explicitly provides that universities may invoke the emergency exception for a student's suicidal and homicidal ideation would increase effective intervention by allowing universities to disclose those threats to families and other appropriate parties.[269] Such an amendment accords with current suicide prevention theory—that the involvement of a support system lowers the risk of student harm to themselves or to others.[270] The amendment would make it easier for universities to effectively implement FERPA by giving a precise example of what constitutes a health or safety threat, as opposed to the vague "significant and articulable" standard currently in place under the DOE regulations.[271]

C. *Case Law Fails to Clearly Define the Emergency Exception*

The need for Congress to amend the emergency exception is more pressing because universities cannot look to case law to provide guidance. The Supreme Court and federal circuit courts have not addressed the issue of whether student suicide threats and threats of violence to others trigger FERPA's emergency

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[265] LEGISLATIVE HISTORY OF FERPA, *supra* note 25, at 7 (citing 120 CONG. REC. S39,863 (daily ed. Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell)).

[266] FPCO LETTER OF SEPT. 29, 2004, *supra* note 255, at G-18 (providing policy guidance that limits the applicability of the emergency exception); *see generally* VIRGINIA REPORT, *supra* note 2, app. H "Summary of Information Privacy Laws" at H-7 (noting that "Congress specifically addressed how education records should be protected under FERPA.").

[267] *See* VIRGINIA REPORT, *supra* note 2, at 67; HHS REPORT, s*upra* note 7, at 7.

[268] *See* 20 U.S.C. § 1232g (2006).

[269] THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35.

[270] Lake & Tribbensee, *supra* note 186, at 142; THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35.

[271] Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,837 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99); THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35 (noting the importance of understanding the legal issues related to the threat assessment inquiry); *see* VIRGINIA REPORT, *supra* note 186, at 69 (finding the current confusion about FERPA makes effective implementation of the emergency exception difficult).

exception.[272] In *Owasso*, the Supreme Court recognized the potential burden to schools if the Court found that peer-grading violated FERPA.[273] The Court also expressed an unwillingness to allow federal law to interfere so broadly with a school's educational practices.[274] Similarly, in *Gonzaga*, the Supreme Court interpreted FERPA to limit school exposure to liability.[275] Together, these cases suggest that the Court would look favorably upon a congressional amendment to FERPA that expressly states that suicidal ideation or threats to others constitutes a health or safety emergency. The amendment limits potential liability for universities by clearly specifying when disclosure is allowed. The Supreme Court could rely on the express language of the statute to find congressional intent that student suicidal and homicidal ideation appropriately triggers the emergency exception.

Miami University provides a stark example of why it is necessary for Congress to amend FERPA to explicitly clarify when the emergency exception may be invoked.[276] The *Miami University* decision emphasizes the narrow applicability of the emergency exception as currently drafted.[277] The *Miami University* court relied on the DOE's view of when FERPA exceptions should apply because the text of FERPA as written made congressional intent unclear.[278] The DOE adopts the position that the exception applies only in cases of "actual, impending, or imminent emergency," which may lead to a finding that more subtle threats do not appropriately trigger disclosure.[279] A congressional amendment to the text of FERPA with examples of when the emergency exception can be invoked ensures that courts will find disclosure appropriate in the specified situations, and will ease concern that disclosure may risk FERPA violations.[280] Until Congress modifies the statutory language to make its intent clear, courts will be forced to continue to construe the meaning of the provisions and rely on the strict regulations adopted by the DOE for primary gui-

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[272] *See, e.g.,* Owasso v. Falvo, 534 U.S. 426, 427 (2002); Gonzaga Univ. v. Doe, 536 U.S. 273, 281 (2002). The only two recent United States Supreme Court decisions interpreting FERPA dealt with the issue of what constitutes a document in an education record and whether FERPA confers a private right of action, respectively.

[273] *Owasso*, 534 U.S. at 435.

[274] *Id.*

[275] *Gonzaga Univ.*, 536 U.S. at 287.

[276] United States v. Miami Univ., 294 F.3d 797, 813 (6th Cir. 2002).

[277] *Id.*

[278] *Id*. at 814.

[279] *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,837 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (allowing that the emergency exception may be invoked for threats to self or others but doing it in the context of a list of extreme emergencies and with emphasis that it must be used 'sparingly').

[280] *See* HHS REPORT, s*upra* note 7, at 7 (noting the current caution among administrators with using the emergency exception).

dance.[281]

Courts that have tried to construe FERPA acknowledge that the statute's broad language renders congressional intent ambiguous.[282] For example, in *Gonzaga*, the Supreme Court conducted an analysis of whether FERPA created an implied right of action because it found that Congress did not expressly address the issue.[283] The need for clearer statutory language is also aptly illustrated by *Owasso*, where the Court took a more formal approach to how records are "maintained" than is required under federal regulations due to the absence of direct congressional guidance.[284] Without a clear showing of congressional intent about when the emergency exception applies, courts will have to construe the meaning of the provision and rely on the DOE's regulations for guidance.[285]

The *Miami University* decision noted that Congress is the appropriate body to address when certain FERPA provisions should apply.[286] Twenty-four members of Congress, recognizing the need for amendments to FERPA, co-sponsored a bill to create a new section that allows for disclosure to parents in the event that a student poses a significant mental health risk to a campus community.[287] After being introduced on May 8, 2007, the bill was referred to the Subcommittee on Higher Education but never further acted upon.[288] Though never passed, the bill shows congressional sensitivity to the need for FERPA amendments.[289] The proposed bill allowed schools to disclose protected records to parents in the case of suicidal threats or serious mental health issues, but did not address the broader issue of the lack of information sharing between schools, among school departments, and with relevant outside entities.[290] An amendment to the emergency exception that provides that threats of violence to self or others constitutes a legitimate emergency would simply clarify what is

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[281] *See Miami Univ.*, 294 F.3d at 813 (relying on DOE guidelines in the absence of clear congressional intent).

[282] *See id.* at 814.

[283] Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002).

[284] Owasso v. Falvo, 534 U.S. 426, 433 (2002)

[285] *See Miami Univ.*, 294 F.3d at 813 (describing that under *Chevron* a court must rely on the agency's interpretation for guidance if the statute is ambiguous).

[286] *Id*.

[287] Mental Health Security for America's Families in Education Act of 2007, H.R. 2220, 110th Cong. (2007).

[288] GovTrack.Us: A Civic Project to Track Congress, H.R. 2220; Mental Health Security for America's Families in Education Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=h110-2220.

[289] H.R. 2220.

[290] H.R. 2220; *see* Virginia Report, *supra* note 2, at 2 (noting the problems of communication among university departments and with other relevant third parties).

allowed under FERPA's current law, not create new rights.[291] It also promotes greater information sharing not just with parents, but with campus police, counseling centers, and other schools where the student has been enrolled.[292]

VI. CONCLUSION

FERPA's text, legislative history, and case law all foster ambiguity about when the emergency exception applies, and lead to overly strict university policies of nondisclosure.[293] The Virginia Tech and HHS Reports uncovered the prevailing confusion about FERPA's provisions.[294] This confusion contradicts the assertion in *Miami University* that "a participant who accepts federal education funds is well aware of the conditions imposed by FERPA and is clearly able to ascertain what is expected of it."[295] Given the public policy interests at stake in correctly applying FERPA, Congress should make sure that universities are, in practice, "clearly able to ascertain" what is expected of them as contemplated by the *Miami University* decision.[296] The best way for Congress to meet that goal is to amend FERPA to provide "that student threats of suicide or threats against the lives of other students constitutes a health or safety emergency," and permit universities to disclose information about those threats to appropriate third parties without the student's consent.[297]

FERPA's only major legislative history indicates that when Congress enacted the statute it wanted enough clarity in the text to prevent administrators from interpreting its provisions in a wide variety of ways.[298] Unfortunately, the HHS Report and the Virginia Tech Report conclude that that concern is now realized, as educators across the country report different and often misguided views of when FERPA restrictions apply.[299] The information silos described in the HHS Report, where each school department keeps its knowledge about troubling student behavior separate from the others out of feared FERPA violations, proved prevalent at Virginia Tech after the investigation into university

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[291] *See* 20 U.S.C. § 1232g(b)(1)(I) (2006). The text of the emergency exception does not prohibit it from being invoked in the case of threats of violence to self or others. *Id.*

[292] *See* THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 35 (noting "the importance of sharing information about a student who may pose a risk of violence").

[293] *See* VIRGINIA REPORT, *supra* note 2, at 69 (arguing that the emergency requirement should be an effective tool to deal with dangerous students but is currently not serving that goal).

[294] *See* VIRGINIA REPORT, *supra* note 2, at 69, HHS REPORT, *supra* note 7, at 7.

[295] United States v. Miami Univ., 294 F.3d 797, 809 (6th Cir. 2002).

[296] *Id.* at 818 (noting the public policy issues at stake are high because millions of people will at one time or another be students affected by FERPA's privacy guarantee).

[297] *See* THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 32 (noting the desirability of entities being able to work together to assess a threat of student violence).

[298] Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002) (quoting 120 CONG. REC. S39,858, 39,863 (daily ed. Dec. 13, 1974) (statement of Sen. Buckley and Sen. Pell)).

[299] HHS REPORT, s*upra* note 7, at 7; VIRGINIA REPORT, *supra* note 2, at 68–69.

policies following the events of April 16th, 2007.[300] The lack of clarity in FERPA's language and the DOE regulations discourages schools from disclosing disciplinary records even when student threats should trigger the health and safety exception.[301]

The DOE's robust enforcement power to remedy perceived FERPA violations raises legitimate concerns among administrators about the effect of a FERPA violation.[302] While the reluctance of many university administrators to disclose documents for fear of FERPA violations is understandable, it has tragic consequences. In the months before the Virginia Tech shootings, administrators, teachers, and law enforcement officers had many opportunities to disclose information about Cho's behavior that could have led him to receive mental health support well before the events of April 16, 2007.[303] Research showing a strong link between suicidal ideation and campus homicides raises the stakes of appropriate implementation of FERPA's health and safety exception.[304] The study of effective threat assessment in schools, commissioned by the DOE and the U.S. Secret Service, describes why timely invocation of the emergency exception is essential to prevent attacks:

[B]its of information might be viewed as pieces of a puzzle. Each bit may appear inconsequential or only slightly worrisome by itself. But, when the pieces are put together . . . the behaviors and communications of a student may coalesce into a discernible pattern that indicates a threat of violence.[305]

The DOE's most recent revisions to the FERPA regulations do not accomplish the stated goal of providing universities with greater flexibility to invoke the emergency exception because the DOE remains imbedded in the policy that the exception should be used only when the threat is most imminent.[306] Yet, the Virginia Tech shootings are a stark example of why FERPA must allow for early disclosure in the event students display suicidal or homicidal ideation.[307] Congress should amend FERPA's text to provide that threats of violence to self or others constitutes a legitimate emergency. That amendment will encourage

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[300] *See* VIRGINIA REPORT, *supra* note 2, at 52 (noting that the "Care Team" set up for the purpose of addressing problems with students on campus proved to be ineffective because departments did not share information).

[301] *Id.* at 68–69.

[302] United States v. Miami Univ., 294 F.3d 797, 808 (6th Cir. 2002).

[303] VIRGINIA REPORT, *supra* note 2, at 63.

[304] Gray, *supra* note 1833, at 138.

[305] THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 32.

[306] *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,837–38 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99).

[307] VIRGINIA REPORT, *supra* note 2, at 69 (concluding that the investigation into the events that precipitated the Virginia Tech shootings indicates that the DOE should amend FERPA regulations governing the emergency exception).

universities to create disclosure policies that promote greater sharing about risky student behavior, and allow educators to accurately assemble the threat to safety posed by an individual student.[308]

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[308] *See* THREAT ASSESSMENT IN SCHOOLS, *supra* note 189, at 32.