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## A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?

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# A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?

Richard Brusca and Colin Ram\*

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### *Introduction*

*While Cho was a student at Virginia Tech, his professors, fellow students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center all had dealings with him that raised questions about his mental stability. There is no evidence that Cho's parents were ever told of these contacts, and they say they were unaware of his problems at school. Most significantly, there is no evidence that Cho's parents, his suitemates, and their parents were ever informed that he had been temporarily detained, put through a commitment hearing for voluntary admission, and found to be a danger to himself. Efforts to share this information were impeded by laws about privacy of information, according to several university officials and the campus police. Indeed, the university's attorney, during one of the panel's open hearings and in private meetings, told the panel that the university could not share this information due to privacy laws.<sup>1</sup>*

#### *— Report of the Virginia Tech Review Panel*

On April 16, 2007, college senior Seung-Hui Cho embarked on a shooting rampage on the Blacksburg campus of the Virginia Polytechnic Institute and State University (Virginia Tech or University).<sup>2</sup> Thirty-two students and faculty members were murdered, and another seventeen were left wounded.<sup>3</sup> As the law enforcement, health care, legal, and academic communities began to evaluate what could have been done to prevent this shooting, a common question emerged: Did privacy laws contribute to the Virginia Tech tragedy?<sup>4</sup> As this Article reveals, the answer is not altogether clear, so perhaps the most accurate response is yes, no, and maybe.<sup>5</sup>

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1. THE VA. TECH REVIEW PANEL, *Chapter V: Information Privacy Laws*, in MASS SHOOTINGS AT VIRGINIA TECH 63, 63 (2007) [hereinafter *Information Privacy Laws*], available at [http://www.vtreviewpanel.org/report/report/12\\_CHAPTER\\_V.pdf](http://www.vtreviewpanel.org/report/report/12_CHAPTER_V.pdf).

2. See THE VA. TECH REVIEW PANEL, *Chapter I: Background and Scope*, in MASS SHOOTINGS AT VIRGINIA TECH 5, 5 (2007) [hereinafter *Background and Scope*], available at [http://www.vtreviewpanel.org/report/report/08\\_CHAPTER\\_I.pdf](http://www.vtreviewpanel.org/report/report/08_CHAPTER_I.pdf) (noting that Cho shot and killed others and himself on April 16, 2007).

3. See *id.* ("On April 16, 2007, one student, senior Seung Hui Cho, murdered [thirty-two] and injured [seventeen] students and faculty in two related incidents on the campus of Virginia Polytechnic Institute and State University ('Virginia Tech').").

4. See *Information Privacy Laws*, *supra* note 1, at 63 (questioning the lack of communication and misunderstanding regarding privacy laws among University administrators, mental health professionals, faculty and staff).

5. The recent shooting in Tucson, Arizona highlights the difficulty in answering this

An examination of the privacy laws in place at the time of the incident reveals that there were no legal barriers preventing anyone with knowledge of Cho's increasingly troubled behavior from notifying his parents.<sup>6</sup> Yet, a common perception among faculty and administrators, both at Virginia Tech and in the academic community-at-large, was that federal laws prohibited teachers and administrators from discussing any information regarding a student outside of a limited group, excluding even a student's parents.<sup>7</sup> Fear is a strong motivating factor, and it was perhaps the fear of violating federal law that prevented many Virginia Tech administrators, law enforcement personnel, mental health care workers, and even a local magistrate from sharing critical information regarding Cho's behavior with his family.<sup>8</sup>

In that vein, this Article evaluates the legal contours of relevant state and federal privacy laws as they existed at the time of the shooting,<sup>9</sup>

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question. In Fall 2010, a twenty-two year old student named Jared Lee Loughner caught the attention of administrators at Pima Community College. See Timothy Noah, *Class Clown: Why Was it So Hard to Kick Loughner out of Pima Community College?*, SLATE.COM, Jan. 10, 2011, available at [www.slate.com/id/2280704](http://www.slate.com/id/2280704). Loughner had a history of disruptive outbursts in the classroom and across campus, so much so that his troubling behavior raised safety concerns among students and faculty alike. *Id.* Consequently, Loughner was suspended from school, and both he and his parents were told that he would be unable to return to class unless he obtained "a mental health clearance indicating that, in the opinion of a mental health professional, his presence at the college does not present a danger to himself or others." See Linda Feldmann, *Why Jared Loughner was Allowed to Buy a Gun*, CHRISTIAN SCI. MONITOR, Jan. 10, 2011. Had Loughner been found to "constitute a danger to himself or others," he not only would have been prohibited from returning to class, but he likely would have been prohibited from purchasing a gun under Arizona state law. *Id.* But Loughner chose not to receive a mental health evaluation, opting instead to drop out of school. And on January 8, 2011, he embarked on a shooting rampage in Tucson that left six people dead and fourteen others wounded. See Noah, *supra*. In this instance, privacy laws did not prevent the college from notifying Loughner's parents of the erratic behavior observed by many; however, this tragic event raises the question of whether these same privacy laws may have discouraged others, particularly those in a position to intervene, from inquiring about Loughner's mental condition at a much earlier point in time.

6. See *Information Privacy Laws*, *supra* note 1, at 63 ("When seen clearly, the privacy laws contain many provisions that allow for information sharing where necessary.").

7. See *id.* (explaining that "professors, fellow students, campus police, the Office of Judicial Affairs, the Care Team, and the Cook Counseling Center all had dealings with [Cho] that raised questions about his mental stability" but "[e]fforts to share this information was impeded by [perceptions concerning] laws about privacy of information").

8. See *id.* ("Privacy laws can block some attempts to share information, but even more often may cause holders of such information to default to the nondisclosure option—even when laws permit the option to disclose . . . . A narrow interpretation of the law is the least risky course . . . .").

9. See *infra* Part I (discussing the privacy laws in effect in 2007).

examines two critical lapses of information sharing regarding Cho's mental health,<sup>10</sup> and explores the pervasive misperceptions regarding student privacy laws that prevented many faculty and administrators from speaking up.<sup>11</sup>

The underlying assumption throughout this discussion, of course, is that Cho's actions could have been forestalled through the sharing of information between Virginia Tech and his parents.<sup>12</sup> While the validity of this assumption necessarily must remain untested, common experience suggests that the disclosure of at least some of the critical incidents leading up to the shooting could have led to greater intervention and treatment by either Cho's family or Virginia Tech.<sup>13</sup> At best, it is clear that nobody had a full understanding of the emotional problems embedded in the shooter's psyche.<sup>14</sup>

### *I. Legal Landscape Governing Student Privacy in 2007*

The privacy of Cho's mental health and educational records—from his early childhood development through his postsecondary education—was governed by a menagerie of state and federal statutes and regulations,<sup>15</sup> including the Health Insurance Portability and Accountability Act

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10. See *infra* Part II (discussing how Cho abandoned care for his mental health when he began attending college and how Virginia Tech failed to appreciate the collective significance of Cho's behavior in college).

11. See *infra* Part II.B.2 (explaining that overly strict interpretations of federal and state privacy laws impeded Virginia Tech faculty and administrators from voicing their concerns).

12. See, e.g., Michael Sluss & Reed Williams, *The Virginia Tech Report: Study It, Kaine Says*, ROANOKE TIMES, Aug. 31, 2007, available at <http://www.roanoke.com/vtinvestigation/wb/wb/xp-130184> (emphasizing that Cho's parents could have been contacted concerning his mental stability despite university officials' failure to do so) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

13. See THE VA. TECH REVIEW PANEL, *Chapter IV: Mental Health History of Seung Hui Cho*, in MASS SHOOTINGS AT VIRGINIA TECH 31, 54 (2007) [hereinafter *Mental Health History*], available at [http://www.vtreviewpanel.org/report/report/11\\_CHAPTER\\_IV.pdf](http://www.vtreviewpanel.org/report/report/11_CHAPTER_IV.pdf) (finding that "[r]epeated incidents of aberrant, dangerous, or threatening behavior [by a student] should be reported to the [Virginia Tech] counseling center and reported to parents").

14. See *Background and Scope*, *supra* note 2, at 10 (noting that the panel "identifie[d] major administrative or procedural failings leading up to the events, such as failing to 'connect the dots' of Cho's highly bizarre behavior").

15. See *Information Privacy Laws*, *supra* note 1, at 63–68 (discussing the privacy laws pertaining to troubled students).

(HIPAA),<sup>16</sup> the Family Educational Rights and Privacy Act (FERPA),<sup>17</sup> and various regulations issued by the U.S. Departments of Education and Health and Human Services.<sup>18</sup> Taken together, the prohibitions on disclosure embodied in these laws created an atmosphere that discouraged critical information sharing among Virginia Tech administrators, mental health providers, and Cho's parents.<sup>19</sup>

### A. Privacy of Health Records

The privacy of an individual's personal health information is governed by the Health Insurance Portability and Accountability Act and related federal regulations issued by the U.S. Department of Health and Human Services.<sup>20</sup> In many areas, federal law is further supplemented by state medical privacy laws.<sup>21</sup> Together, these laws govern whether "covered entities,"<sup>22</sup> such as physicians, nurses, therapists, counselors, and social

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16. See 45 C.F.R. §§ 160, 162, 164 (2006) (outlining the provisions of HIPAA).

17. See 20 U.S.C. § 1232g (2006) (outlining the provisions of FERPA).

18. See *Information of Privacy Laws*, *supra* note 1, at 65 (stating that "[t]he federal Health Insurance Portability and Accountability Act of 1996 and regulations by the Secretary of Health and Human Services establish the federal [medical privacy] standards").

19. See *id.* at 68 (stating that "[t]he problems presented by a seriously troubled student often require a group effort" but "[i]nformation privacy laws cannot help students if the law allows sharing but agency policy or practice forbids necessary sharing").

20. See *id.* at 65 ("The federal Health Insurance Portability and Accountability Act of 1996 and regulations by the Secretary of Health and Human Services establish the federal standards [that govern information privacy laws]. Together, the law and regulations are commonly known as 'HIPAA.'").

21. See *id.* ("Both state and federal law govern privacy of medical information."). In the Commonwealth of Virginia, the disclosure of patient health information is governed by the Virginia Health Records Privacy Act ("VHRPA"), a state law analogue to HIPAA. *Id.* The VHRPA and HIPAA offer similar protections over patient health information and, in many respects, can be analyzed congruently. See THE VA. TECH REVIEW PANEL, *Appendix H: Summary of Information Privacy Laws and Guidance from U.S. Department of Education*, in MASS SHOOTINGS AT VIRGINIA TECH 63 app. at H-3 (2007) [hereinafter *Summary of Laws*], available at [http://www.vtreviewpanel.org/report/report/26\\_APPENDIX\\_H.pdf](http://www.vtreviewpanel.org/report/report/26_APPENDIX_H.pdf) ("In most respects, the federal and state laws are similar and can be analyzed together."). Nonetheless, HIPAA preempts VHRPA wherever the state law offers less protection over health information than federal law. See *id.* at H-3 ("HIPAA can pre-empt a state law, making the state law ineffective. This generally occurs when state law is less protective of privacy than federal law."); see also VA. CODE ANN. § 32.1-127.1:03(A)(3) (2006) (stating that Virginia's redisclosure prohibition does not prevent health care entities from making subsequent disclosures pursuant to HIPAA).

22. 45 C.F.R. § 160.103 (2006) (defining a "covered entity" as a "health care provider," which is "a provider of medical or health services").

workers, may disclose protected health information that "relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment of the provision of health care to an individual."<sup>23</sup> The "protected health information"<sup>24</sup> covered by these laws is broad, and includes information memorialized in records as well as information communicated orally or otherwise learned in the course of a patient's treatment.<sup>25</sup>

The use or disclosure of protected health information by covered entities must be done in compliance with the HIPAA "Privacy Rule."<sup>26</sup> Under the Privacy Rule, disclosure of protected health information can be made with consent of the patient or under narrowly defined statutory exceptions.<sup>27</sup> For example, health care providers are required to release health records to patients upon request;<sup>28</sup> however, disclosure of health information to third parties is permitted only under limited exceptions.<sup>29</sup> Relevant exceptions for the disclosure of protected health information include disclosures made to a patient's relatives under emergency circumstances,<sup>30</sup> disclosures made when a patient has authorized release of

23. 42 U.S.C. § 1320(d)(4)(B) (2006); *see also Summary of Laws, supra* note 21, at app. at H-3 (stating that HIPAA, regulations interpreting HIPAA, and VHRPA govern the circumstances under which "doctors, nurses, therapists, counselors, and social workers, as well as HMOs, insurers, and other health organizations" may disclose protected health information).

24. *See* 45 C.F.R. § 160.103 (2006) (defining "[p]rotected health information" as "individually identifiable health information").

25. *See Summary of Laws, supra* note 21, at app. at H-3–H-6 (stating that HIPAA, HIPAA regulations, and VHRPA allow disclosure of information contained in medical records or obtained through personal knowledge in certain circumstances).

26. *See* 45 C.F.R. § 164.502(a) (2006) (outlining the general rules governing use and disclosure of protected health information).

27. *See* Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1098–1103 (2006) (describing the circumstances under which private health information may be disclosed to requestors other than the patient).

28. *See* 45 C.F.R. § 164.502(a)(2)(i) (2006) ("A covered entity is required to disclose protected health information [t]o an individual[] when requested."); *see also* VA. CODE ANN. § 32.1-127.1:03(A)(1) (2006) ("Health care entities shall disclose health records to the individual who is the subject of the health record.").

29. *See* 45 C.F.R. §§ 164.50–164.514 (2006) (discussing when disclosure to a third party is acceptable); *see also* VA. CODE ANN. § 32.1-127.1:03(D)(1) (2006) (stating that discussion of an individual's health records with a third party may only occur if the patient gives consent (or his parent or guardian if he is a minor) or pursuant to an individual's oral authorization if, during an emergency, written authorization is impractical).

30. *See* 45 C.F.R. § 164.510(a)(ii)(B)(3) (2006) (stating that disclosure may be made

information to a third party,<sup>31</sup> disclosure among health care providers when necessary for a patient's care,<sup>32</sup> and disclosures made when an individual presents a "serious and imminent threat" to the health and safety of individuals and the public.<sup>33</sup>

Most importantly, when protected health information is maintained by health care entities operated by post-secondary academic institutions receiving federal funding, such as university student health clinics or counseling centers, the privacy of protected health information related to students is governed by FERPA and applicable state privacy laws, rather than by HIPAA.<sup>34</sup> As discussed further below, the less-rigorous restrictions guiding the privacy analysis under FERPA would have permitted a greater sharing of information related to Cho's deteriorating mental health prior to the April 2007 shooting.<sup>35</sup>

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in emergency circumstances to a patient's relatives if the disclosure aligns with the patient's prior, expressed preference or if the health provider determines, within his professional judgment, that disclosure serves the patient's best interests).

31. See 45 C.F.R. § 164.502(a)(1)(iv) (2006) (stating that a covered provider may disclose a patient's information pursuant to prior authorization).

32. See 45 C.F.R. § 164.506(c)(4) (2006) ("A covered entity may disclose protected health information to another covered entity . . . if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is [for treatment] . . ."); see also VA. CODE ANN. § 32.1-127.1:03(D)(7) (2006) (stating that health care entities may disclose the health records of an individual "[w]hen necessary in connection with the care of the individual").

33. See 45 C.F.R. § 164.512(j)(i)(A) (2006) (stating that a covered entity may disclose protected health information if "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public"); see also VA. CODE ANN. § 32.1-127.1:03(D)(6) (2006) (stating that health care providers may disclose medical records if there is a serious threat to the health and safety of others); see also VA. CODE ANN. § 32.1-127.1:04(A)(iii) (2006) (stating that disclosure of protected health records is required when "necessary to prevent serious harm and serious threats to the health and safety of individuals and the public").

34. See 45 C.F.R. § 160.103 (2006) ("*Protected health information* excludes individually identifiable health information in . . . education records covered by [FERPA]." (emphasis added)). For Virginia Tech students, FERPA and VHRPA governed the privacy of protected health information maintained by the University. See *supra* note 21 and accompanying text (discussing the privacy laws governing Virginia Tech).

35. See *Information Privacy Laws*, *supra* note 1, at 68–69 (suggesting changes to be made to FERPA privacy laws to promote greater clarity and communication within educational institutions).



### B. Privacy of Educational Records

The Family Educational Rights and Privacy Act of 1974 is the key federal statute governing the privacy of student records maintained by educational institutions.<sup>36</sup> The law applies to student records maintained by all federally-funded educational institutions, public or private, including most elementary and secondary schools, and almost all post-secondary institutions.<sup>37</sup> In conjunction with regulations issued by the U.S. Department of Education,<sup>38</sup> FERPA requires covered institutions to obtain written consent from parents or students prior to releasing protected education records.<sup>39</sup> Absent written consent, records may be released only under limited exceptions.<sup>40</sup>

The "education records" protected under FERPA include all records "which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."<sup>41</sup> Though broadly defined, the term "education record" is limited to "records, files, documents, and other tangible materials."<sup>42</sup> Notably absent from this definition, observations regarding a student's behavior are not protected under FERPA, unless such observations are memorialized in a record, file, or document.<sup>43</sup> Similarly,

36. See *Summary of Laws*, *supra* note 21, at app. at H-4 ("Privacy of educational records is primarily governed by federal law, the Family Educational Rights Privacy Act of 1974, as well as regulations that interpret the law."). For further discussion of FERPA privacy provisions, see Katrina Chapman, *A Preventable Tragedy at Virginia Tech: Why Confusion Over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 352-70 (2009) (discussing the history and implications of FERPA).

37. See 20 U.S.C. § 1232g(a)(3) (2006) (addressing the conditional availability of federal funds to educational institutions); see also 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) (noting that FERPA's privacy protections apply to educational institutions receiving federally-guaranteed student loans).

38. See generally 34 C.F.R. §§ 91.1-91.67 (2006) (listing privacy regulations of the Department of Education).

39. See 20 U.S.C. § 1232g(b) (2006) (stating that parental consent is required to release educational records unless certain statutory exceptions apply).

40. See *id.* (listing the exceptions under which educational records of a student may be released).

41. 20 U.S.C. § 1232g(a)(4)(A) (2006).

42. *Id.*

43. See *id.* (limiting the definition of "educational records" to "information directly related to the student").

observations gleaned from conversations with a student are not protected unless later documented in a record.<sup>44</sup>

As noted *supra*, FERPA, together with state health privacy laws, governs exclusively the privacy of student records maintained by school health clinics and counseling centers.<sup>45</sup> These records are considered "education records" and are not protected by HIPAA.<sup>46</sup> Yet FERPA was drafted primarily to regulate the privacy of education records, not health care information—and its success in balancing health care privacy against public safety was, at best, mixed in the years leading up to the Virginia Tech shootings.<sup>47</sup> Similarly, guidance provided by the U.S. Department of Education regarding disclosure of student health records struggled to establish clear standards under FERPA.<sup>48</sup>

The privacy rights afforded under FERPA belong to the parents of an eligible student until the student attains eighteen years of age.<sup>49</sup> Thus,

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44. See *Information Privacy Laws*, *supra* note 1, at 66 ("Personal observations and conversations with a student fall outside FERPA.").

45. See *supra* note 36 and accompanying text (stating that FERPA is the federal law that governs educational privacy records); see also *Summary of Laws*, *supra* note 21, at app. at H-4 ("State laws about health records also apply [to disclosure of education records]. Disclosure is not permitted when a state law is less protective of health records privacy than FERPA. However, state law can be more protective than FERPA. State law can restrict disclosure that FERPA authorizes.").

46. See 45 C.F.R. § 160.103 (2006) (noting that state law and FERPA govern protection of education records).

47. See, e.g., *Shin v. MIT*, No. 02-0403, 2005 WL 1869101, at \*1–5 (Mass. Super. Ct. June 27, 2005) (observing that university psychiatrists failed to pay serious attention to a student's repeated threats of suicide); see also *Jain v. State*, 617 N.W.2d 293, 294 (Iowa 2000) (noting that university officials failed to notify a student's parents of their child's self-destructive behavior); see also *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 602 (W.D. Va. 2002) (observing that university officials failed to take adequate precautions against a student's self-destructive behavior). For an excellent analysis of these cases, see Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625 (2008).

48. See Letter from LeRoy S. Looker, Dir. of the Family Policy Compliance Office, Dep't of Educ., to the Associate University Counsel at the University of New Mexico (Nov. 29, 2004) [hereinafter Letter from Looker], available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html> (advising that a student's suicidal comments coupled with unsafe conduct and threats may trigger the emergency exception) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

49. See 20 U.S.C. § 1232g(d) (2006) ("[W]henver a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student."); see also 34 C.F.R. § 99.5(a) (2006) ("When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.").

information from educational records cannot be disclosed without consent of a parent or a legal-aged student.<sup>50</sup> Absent consent, FERPA authorizes disclosure of education records under limited circumstances.<sup>51</sup> Relevant statutory exceptions permit disclosure of education information to parents of legal-aged students who claim the student as a dependant for tax purposes,<sup>52</sup> to "school officials . . . who have been determined . . . to have legitimate educational interests [in receiving the information],"<sup>53</sup> and, as discussed below, to appropriate persons in connection with an emergency, so long as "the knowledge of such information is necessary to protect the health or safety of the student or other persons."<sup>54</sup>

The FERPA exception permitting disclosure under an "emergency exception" was tempered at the time prior to the Virginia Tech shootings by federal regulations restricting application of the exception to "circumstances involving imminent, specific threats to health or safety."<sup>55</sup> Moreover, according to federal regulations in place in 2007, the "emergency exception" was to be "narrowly construed" by administrators.<sup>56</sup> Critically, FERPA and U.S. Department of Education regulations in force at the time left unclear the circumstances under which student health records could be disclosed.<sup>57</sup> For example, in a November 2004 letter from the U.S. Department of Education's Family Policy Compliance Office, the federal

50. See *Information Privacy Laws*, *supra* note 1, at 66 ("Information from educational records cannot be shared unless authorized by law or with consent of a parent, or if the student is enrolled in college or is 18 or older, with that student's consent.").

51. See *infra* notes 52–54 and accompanying text (discussing the circumstances under which protected information may be disclosed without consent of the individual).

52. See 20 U.S.C. § 1232g(b)(1)(H) (2006) (stating that records may be released to "parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986").

53. 20 U.S.C. § 1232g(b)(1)(A) (2006); see also 34 C.F.R. § 99.31(a)(1) (2006) (stating that disclosure without consent is permissible "to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests").

54. 20 U.S.C. § 1232g(b)(1)(I) (2006).

55. See *Information Privacy Laws*, *supra* note 1, at 67 (noting that the FERPA "exceptions have been construed to be limited to circumstances involving imminent, specific threats to health or safety").

56. See *id.* ("Although [the emergency] exception does authorize [disclosure] to a potentially broad group of parties, the regulations specifically state that it is to be narrowly construed").

57. See *id.* (stating that "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").

office responsible for interpreting FERPA provisions, to the University of New Mexico, regulators explained:

[T]he University may disclose personally identifiable, non-directory information from education records under the "health or safety emergency" exception only if it has determined, on a case-by-case basis, that a *specific situation presents imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law.<sup>58</sup>

In the face of such guidance, many school administrators were simply unwilling to release student health information in the absence of clearly articulable evidence establishing an imminent danger or threat.<sup>59</sup> The limitation that the "narrowly tailored" release of information be made only to "parties who can address the specific emergency" further discouraged administrators from making precautionary disclosures and thereby placing federal funding at risk.<sup>60</sup> Given that the release of student records under FERPA's "emergency exception" is discretionary for administrators,<sup>61</sup> school administrators were left to weigh the risk of loss of federal funding against releasing records in the face of unclear standards.<sup>62</sup> As the Virginia Tech Review Panel noted, the lack of clarity in guidance regarding the

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58. Letter from Looker, *supra* note 48 (emphasis added).

59. See *Information Privacy Laws*, *supra* note 1, at 69 (explaining that FERPA contains an emergency exception that is to be strictly construed, but characterizing the strict construction requirement as unhelpful because it "merely feeds the perception that nondisclosure is always a safer choice").

60. See *id.* at 67 ("[T]he 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.").

61. See 20 U.S.C. § 1232g(b)(1)(I) (2006) (stating that disclosure in an emergency situation is permitted when "necessary").

62. See THE VA. TECH REVIEW PANEL, *Chapter IV: Mental Health History of Seung Hui Cho, in MASS SHOOTINGS AT VIRGINIA TECH* 31, 52 (2007) [hereinafter *Mental Health History*], available at [http://www.vtreviewpanel.org/report/report/11\\_CHAPTER\\_IV.pdf](http://www.vtreviewpanel.org/report/report/11_CHAPTER_IV.pdf) (defining the problem as one of "overly strict interpretations of . . . privacy laws").

application of FERPA to student health information "discourage[d] disclosure in all but the most obvious cases."<sup>63</sup>

Of note, law enforcement records held exclusively by campus police departments are not covered under FERPA,<sup>64</sup> and may be publicly disclosed in various forms at the discretion of police officials.<sup>65</sup> Notwithstanding this exception, once campus law enforcement records are disclosed to university officials for nonlaw enforcement purposes, the FERPA provisions apply to the records.<sup>66</sup> Regardless, to the extent that FERPA applies to student law enforcement records, it does not prohibit officers from discussing with parents observed conduct, behavior, or incidents involving their children that are not memorialized in law enforcement records.<sup>67</sup>

Finally, FERPA allows school officials to release otherwise protected education records to parents who claim their adult child as a dependent for tax purposes.<sup>68</sup> In a university setting, it is possible that this exception would apply to a vast majority of education records.<sup>69</sup> Given that a college

63. See *Information Privacy Laws*, *supra* note 1, at 67 ("[T]he boundaries of the emergency exceptions [in privacy laws] have not been defined by privacy laws or cases, and these provisions may discourage disclosure in all but the most obvious cases.").

64. See 20 U.S.C. § 1232g(a)(4)(B)(ii) (2006) (stating that educational records do not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement").

65. See 34 C.F.R. § 99.8(d) (2006) ("[FERPA] neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records."); see also VA. CODE ANN. § 2.2-3706(F) (2006) (stating that "reports submitted in confidence to . . . campus police departments of public institutions of higher education" are "excluded from [disclosure], but may be disclosed by the custodian, in his discretion, except where such disclosure is prohibited by law").

66. See 34 C.F.R. § 99.8 (2006) (stating that FERPA does not require or prohibit disclosure of law enforcement records, and further noting that law enforcement records do not include "[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution").

67. See *Information Privacy Laws*, *supra* note 1, at 66 ("Personal observations and conversations with a student fall outside FERPA.").

68. See 20 U.S.C. § 1232g (2006) (stating that education records may be released to "parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986"); see also 34 C.F.R. § 99.31(a)(8) (2006) ("An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent" if the student is a dependent of the parents).

69. See Internal Revenue Service, A "Qualifying Child", <http://www.irs.gov/newsroom/article/0,,id=133298,00.html> (last visited Oct. 4, 2010) (stating that any student may be a qualifying child if under the age of twenty-four and "a full-time student for at least five months of the year") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

student's tax dependent status is subject to change from matriculation to graduation,<sup>70</sup> university officials will often not know whether this exception applies to a particular student at a given moment.<sup>71</sup> Nonetheless, this information can easily be acquired through a simple query to parents. And, at a minimum, such a query may alert parents that the school is seeking to disclose to them important information regarding their child.<sup>72</sup>

### C. Virginia Law Regarding Student Suicide Threats

Shortly before the Virginia Tech shootings took place, the Commonwealth of Virginia enacted a law requiring all public universities to adopt policies and procedures for handling students who present a danger to themselves or others.<sup>73</sup> Though the law did not take effective until July 1, 2007, its adoption just three weeks prior to the massacre highlighted the need at the time for comprehensive policies addressing students with suicidal ideation.<sup>74</sup>

The governing boards of each public institution of higher education shall develop and implement policies that advise students, faculty, and staff, including residence hall staff, of the proper procedures for identifying and addressing the needs of students exhibiting suicidal tendencies or behavior. The policies shall ensure that no student is penalized or expelled solely for attempting to commit suicide, or seeking mental health treatment for suicidal thoughts or behaviors. Nothing in this section shall preclude any public institution of higher education from establishing policies and procedures for appropriately dealing with

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70. *See id.* (discussing factors relevant to the determination of dependant-child status for tax purposes, and suggesting that this status may change from year-to-year).

71. *See generally* FERPA QUESTIONS FOR LEE ROOKER: DIRECTOR OF THE FAMILY POLICY COMPLIANCE OFFICE, U.S. DEPARTMENT OF EDUCATION para. 3, <http://www.theasca.org/attachments/wysiwyg/525/FERPAQUESTIONSanswered.doc> (last visited Oct. 5, 2010) (discussing possible solutions to the difficulty in determining a student's tax dependent status) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

72. *See, e.g., Mental Health History, supra* note 13, at 49 (suggesting that if Virginia Tech had attempted to contact Cho's parents, his parents would likely have sought help because "they were dedicated to getting [Cho] to therapy consistently and also consented to psychopharmacology when the need arose").

73. *See* VA. CODE ANN. § 23-9.2:8 (2007) (explaining the policies and procedures applicable to public universities handling suicidal or dangerous students).

74. *See Mental Health History, supra* note 13, at 60 (concluding that "the [Virginia] mental health system has major gaps in its entirety . . . . These gaps prevent individuals from getting the psychiatric help when they are getting ill, during the need for acute stabilization, and when they need therapy and medication management during recovery").

students who are a danger to themselves, or to others, and whose behavior is disruptive to the academic community.<sup>75</sup>

Whatever policies would have been adopted by Virginia Tech prior to the shootings is unknown, but it is not unreasonable to suggest that such policies would have included greater information sharing among University faculty and administrators who have daily contact with students.<sup>76</sup> At a minimum, policies could have included parental notification of student behavior under FERPA's tax-dependent student<sup>77</sup> or emergency exceptions.<sup>78</sup> As a review of the events leading up to the shooting reveal, there were ample opportunities for greater information sharing regarding Cho's troubling behavior in the months and years before the shootings.<sup>79</sup>

## II. Cho's Mental Health History: Two Critical Communication Lapses

Many individuals knew that gunman Seung-Hui Cho was a disturbed young man who had difficulty interacting with others.<sup>80</sup> Indeed, Cho's persona of extreme shyness and social isolation emerged at a very young age.<sup>81</sup> From early childhood onward, Cho displayed "inordinate shyness."<sup>82</sup> He had few, if any, friends, and fell into a self-imposed isolation.<sup>83</sup> As Cho

75. VA. CODE ANN. § 23-9.2:8 (2007).

76. See THE VA. TECH REVIEW PANEL, *Summary of Key Findings, in MASS SHOOTINGS AT VIRGINIA TECH 1, 2* (2007) [hereinafter *Summary of Key Findings*], available at [http://www.vtreviewpanel.org/report/report07\\_SUMMARY.pdf](http://www.vtreviewpanel.org/report/report07_SUMMARY.pdf) (suggesting that a key problem with Virginia Tech's polices was that "[n]o one knew all the information and no one connected all the dots [regarding Cho's mental instability]").

77. See 20 U.S.C. § 1232g (2006) (stating that education records may be released to "parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1986"); see also 34 C.F.R. § 99.31(a)(8) (2006) ("An educational agency or institution may disclose personally identifiable information from an education record of a student" to his or her parents without the consent if the student is a dependent of the parents).

78. See 45 C.F.R. § 164.510 (a)(ii)(B)(3) (2006) (explaining the circumstances under which the emergency exception applies).

79. See *Mental Health History*, *supra* note 13, at 31–54 (describing the mental health history of Cho and the opportunities for intervention and communication).

80. See *id.* at 53 (discussing Cho's shyness, isolation, and aberrant behavior).

81. See *id.* at 33 (observing that during Cho's childhood, he was shy, preferred not to speak, and was ostracized by his peers).

82. See *id.* ("Cho's early development was characterized by physical illness and inordinate shyness.").

83. See *id.* at 32–33 (discussing Cho's lack of social interaction and isolation).

grew older, his elementary school teachers grew concerned over his emotional issues and recommended to his parents that he undergo therapy.<sup>84</sup>

Though Cho received counseling and support during his adolescent years, he abandoned his support structure once he entered college.<sup>85</sup> As discussed below, Cho's mental instability had been diagnosed well before he became a student at Virginia Tech, yet this critical information was never communicated to University administrators.<sup>86</sup> As Cho's mental health deteriorated during his junior and senior years at Virginia Tech,<sup>87</sup> University administrators failed to inform each other, or his parents, of his increasingly troubled behavior.<sup>88</sup> It is likely that these failures in communication resulted from a poor understanding of student privacy rights and the obligations of school administrators under various privacy laws.<sup>89</sup>

### A. High School-to-College Transition

#### 1. Key Facts: Cho's Middle School and High School Years

In mid-1997, the summer before Cho entered seventh grade, his parents arranged for him to receive mental health counseling on advice from teachers,<sup>90</sup> and he was subsequently diagnosed with severe social

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84. *See id.* at 34 (noting that "[t]he summer before Cho started seventh grade, his parents followed up on a recommendation from the elementary school that they seek therapy for Cho").

85. *See id.* at 38 ("Before Cho left high school, the guidance counselor made sure that Cho had the name and contact information of a school district resource whom Cho could call if he encountered problems at college. As is now known, Cho never sought that help while at Virginia Tech.").

86. *See id.* ("Neither Cho nor his high school revealed that he had been receiving special education services as an emotionally disabled student, so no one at the university ever became aware of these pre-existing conditions.").

87. *See id.* at 41 ("The fall semester of Cho's junior year (2005) was a pivotal time. From that point forward, Cho would become known to a growing number of students and faculty not only for his extremely withdrawn personality and complete lack of interest in responding to others, in and out of the classroom, but for hostile, even violent writings along with threatening behavior.").

88. *See id.* at 49 ("Cho's family did not realize what was happening with him in Blacksburg that fall 2005 semester . . . . They were unaware that their son had been committed for a time to St. Albans Hospital or that he had appeared in court . . . . The university did not inform [them].").

89. *See id.* at 52 ("The [multidisciplinary] Care Team was hampered by overly strict interpretations of federal and state privacy laws (acknowledged as being overly complex).").

90. *See supra* note 84 and accompanying text (stating that Cho's parents enrolled him



anxiety disorder.<sup>91</sup> Though Cho did not exhibit any reported behavioral problems at school,<sup>92</sup> he continued to isolate himself during his early middle-school years.<sup>93</sup> He remained on this quiet path until March 1999, the spring semester of his eighth grade year.<sup>94</sup>

At that point, Cho began exhibiting a marked change in behavior, and his therapist became concerned that he had begun harboring homicidal or suicidal thoughts.<sup>95</sup> She asked Cho to inform her, his parents, or someone at school if he experienced any such thoughts.<sup>96</sup> The next month, shortly after the Columbine High School shootings, Cho penned an essay for his English class in which he indicated that he wanted to "repeat Columbine."<sup>97</sup> The middle school immediately contacted Cho's parents and asked them to arrange psychiatric counseling for their son.<sup>98</sup> They did so, and two months later the psychiatrist diagnosed Cho as suffering from selective mutism and major depression and he was placed on antidepressant medication.<sup>99</sup> He responded well to the medication and began to exhibit a more positive disposition.<sup>100</sup> He continued on the medication during his freshman year

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in counseling after a recommendation from his elementary school).

91. *See Mental Health History*, *supra* note 13, at 34 (stating that a psychiatrist diagnosed Cho with severe emotional anxiety disorder and concluding that "Cho's problems were rooted in acculturation challenges—not fitting in and difficulty with friends").

92. *See id.* at 34 (noting that, in early middle school, Cho "had no reported behavioral problems and did not get into any fights").

93. *See id.* ("Cho continued to isolate himself in [early] middle school.").

94. *See id.* at 34–35 (noting that "in March 1999, when Cho was in the spring semester of eighth grade, his art therapist observed a change in his behavior").

95. *See id.* at 35 (stating that as Cho "suddenly became more withdrawn and showed symptoms of depression[,] his art therapist became "concerned and asked him whether he had any suicidal or homicidal thoughts").

96. *See id.* (noting that although Cho denied having violent thoughts, "his art therapist drew up a contract with him anyway [stating] he would do no harm to himself or to others, and she told him to communicate with his parents or someone at school if he did experience any ideas about violence").

97. *See id.* (stating that shortly after the Columbine murders, Cho wrote a paper that "expressed generalized thoughts of suicide and homicide, indicating that 'he wanted to repeat Columbine,' according to someone familiar with the situation" though "no one in particular was named or targeted").

98. *See id.* ("The school contacted Cho's sister [because] she spoke English and explained what had happened. The family was urged to have Cho evaluated by a psychiatrist.").

99. *See id.* (noting that the psychiatrist "diagnosed Cho with 'selective mutism' and 'major depression: single episode'" and "prescribed [Cho] the antidepressant Paroxetine 20 mg").

100. *See id.* ("Cho did quite well on this regimen [of medication]; he seemed to be in a

of high school, where his school records indicate no reported behavioral problems.<sup>101</sup> By July 2000, Cho's disposition appeared to improve, and his psychiatrist discontinued the medication.<sup>102</sup>

One month into his sophomore year, Cho's teachers referred him to the school's guidance office because his speech was barely audible in class.<sup>103</sup> Cho lied when asked by the guidance counselor whether he had received any mental health counseling in middle school, though his parents later informed the school that he was receiving therapy.<sup>104</sup> The following month, the school developed an Individual Educational Plan for Cho to accommodate his shyness and lack of responsiveness in the classroom.<sup>105</sup> He no longer had to make oral presentations and his grades were unaffected by his lack of oral and group participation.<sup>106</sup> Cho was also permitted to provide oral responses in private sessions with teachers rather than in front of classmates, and he was allowed to eat lunch alone.<sup>107</sup> In conjunction with these accommodations, Cho continued regular therapy and was reported to have adjusted reasonably well in school.<sup>108</sup> During his junior year, Cho resisted continuing his therapy, so his weekly therapy sessions ended.<sup>109</sup>

Cho graduated from high school in June 2003.<sup>110</sup> At the time, his therapist recommended to his parents that he attend a small college close to home, but Cho insisted on attending the much larger Virginia Tech.<sup>111</sup> Though his parents acceded to his request, his school guidance

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good mood, looked brighter, and smiled more.").

101. *See id.* at 36 (stating that Cho exhibited no unusual behavioral problems during his high school years).

102. *See id.* at 35 (finding that, by July 2000, "[t]he doctor stopped the medication because Cho improved and no longer needed the antidepressant").

103. *See id.* at 36 (reporting that Cho was not verbally communicative in class).

104. *Id.*

105. *See id.* (describing in detail Cho's Individual Education Plan).

106. *See id.* (suggesting that a modified grading scale for group and oral presentations was an important part of Cho's Individual Education Plan).

107. *See id.* at 37 (discussing Cho's Individual Education Plan).

108. *See id.* (stating that Cho made progress while in therapy).

109. *See id.* (quoting Cho allegedly telling his parents and therapist, "There is nothing wrong with me. Why do I have to go?").

110. *See id.* (discussing Cho's transition from high school to college in 2003).

111. *See id.* at 37-38 (describing Cho's insistence on attending Virginia Tech despite warnings that it was too large an institution for him).

counselor gave him contact information for a school counselor should he have any problems in college.<sup>112</sup>

## 2. *First Critical Communication Lapse: High School-to-College Transition*

Until Cho's high school graduation, his parents and the local school system worked together to effectively treat and monitor his mental health.<sup>113</sup> At the time Cho entered college, however, he had ceased regular therapy and was no longer receiving medication.<sup>114</sup> His high school transcript contained no indication that he was given special accommodations in the classroom, and no one requested continued accommodations from Virginia Tech on his behalf.<sup>115</sup> Virginia Tech had no knowledge of Cho's long history of mental problems, nor did the University enquire about it.<sup>116</sup> Critically, there was no affirmative obligation on Cho or his family to report his condition to Virginia Tech, yet no law preventing Virginia Tech from inquiring about it postadmission.<sup>117</sup>

This failure to share key information regarding Cho's mental health history was largely preventable.<sup>118</sup> The laws affecting disclosure of

112. *See id.* at 38 ("Before Cho left high school, the guidance counselor made sure that Cho had the name and contact information of a school district resource who Cho could call if he encountered problems at college.")

113. *See id.* at 36–37 (describing the collaboration between Cho's parents and the school system in monitoring his mental health).

114. *See id.* at 38 (noting that, when Cho entered Virginia Tech, he was no longer taking medication or receiving counseling).

115. *See id.* ("Neither Cho nor his high school revealed that he had been receiving special education services as an emotionally disabled student . . .").

116. *See id.* at 38–39 (describing how Cho's history of mental problems went unreported to Virginia Tech upon his enrollment).

117. *See id.* at 38–39 (observing that the law does not require a student to report disabilities unless he is seeking an academic adjustment). *See also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2010) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."). Notably, once an admissions decision is made, the Rehabilitation Act of 1973 does not prevent an educational institution from inquiring about an incoming student's disability status in order to make accommodations. *See* 34 C.F.R. § 104.42(b)(4) (2010) (allowing educational institutions to make confidential inquiries after a student has been admitted).

118. *See* discussion *infra* Part II.A.2 (discussing warning signs exhibited by Cho).

student health information did not prevent Cho or his family from informing Virginia Tech of his problems and need for accommodation.<sup>119</sup> And, although, under law, Virginia Tech could make confidential enquiries to incoming students regarding the existence of disabilities or the need for special accommodation, the burden remains on the student to prove the existence of the disability and to request the appropriate accommodation.<sup>120</sup> Yet, reliance on self-identification of a disability is particularly suspect when an incoming student suffers from a mental illness exhibited by severe communication disabilities.<sup>121</sup>

In the aftermath of the Virginia Tech shooting, it is clear that postsecondary institutions should query incoming students—and their parents, if possible—of the need for ongoing mental health counseling or classroom accommodation. With the recognition that some students in need may nonetheless fail to self-identify their history of mental illness, universities should also take steps to closely monitor students who display troubling behavior after matriculation and contact parents whenever appropriate. As the Cho case highlights, Virginia Tech's failure to take this latter step after Cho repeatedly became a cause of concern on campus forms the basis of the second critical communication lapse.

## B. College Incidents

### I. Key Facts: Cho's College Years

During his freshman and sophomore years at Virginia Tech, Cho continued exhibiting extreme quietness and social isolation.<sup>122</sup> Though he had few friends and very little interaction with his roommates, his parents maintained close ties with him through weekly visits.<sup>123</sup> But Cho had not resumed mental health counseling.<sup>124</sup> Nonetheless, there were no reported

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119. See discussion *infra* Part II.B.2 (analyzing privacy laws relating to Cho's admission to Virginia Tech and his subsequent behavior as a student).

120. See Rehabilitation Act of 1973, 29 U.S.C. §794 (2010) (requiring students to request accommodations for disabilities).

121. See discussion *supra* Part II.A.1 (discussing the nature of Cho's mental illness).

122. See *Information Privacy Laws*, *supra* note 1, at 40–41 (revealing Cho's ongoing anti-social behavior).

123. See *id.* at 42 (noting that Cho was reluctant to interact with other students, despite the efforts of his roommates).

124. See *id.* at 40 ("[Cho's] parents visited him every weekend on Sundays during the

behavioral problems or incidents involving Cho during his first two years of college.<sup>125</sup>

In Fall 2005, however, as Cho entered his junior year, serious behavioral problems began to surface.<sup>126</sup> While attending a party with his roommates, Cho removed a small knife from his pocket and began stabbing at the carpet in a female student's room.<sup>127</sup> Cho also began exhibiting disruptive behavior in the classroom.<sup>128</sup> His poetry teacher, Professor Nikki Giovanni, expressed concern over the violent nature of his writings and his obstinate in-class behavior.<sup>129</sup> Cho's classroom confrontations with Professor Giovanni reached the point that she offered to place him in another class.<sup>130</sup> When Cho refused, Giovanni informed Dr. Lucinda Roy, the Chair of Virginia Tech's English Department, that she would resign her professorship if Cho was not removed from her class.<sup>131</sup>

Dr. Roy agreed to withdraw Cho from Professor Giovanni's class and tutor him herself.<sup>132</sup> She also offered to provide Professor Giovanni with security. Dr. Roy then notified a number of Virginia Tech administrators and departments regarding Cho's violent writings, including the Dean of Student Affairs, the Cook Counseling Center, the Virginia Tech police department, and the College of Liberal Arts and Human Sciences.<sup>133</sup> Dr. Roy further requested that Cho's writing be evaluated from a psychological point of view and personally urged him to seek counseling.<sup>134</sup> Though the Dean of Student Affairs shared Cho's writing with a University counselor,

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first semester . . .").

125. *See id.* (noting that Cho appeared to have adjusted to college life by his second semester).

126. *See id.* at 41 (describing Fall 2005 as the start of Cho's downward spiral).

127. *See id.* at 42 (describing Cho's behavior in a female student's dorm room).

128. *See id.* at 42-43 (noting that Cho's troubling behavior was not limited to social situations).

129. *See id.* at 43 (describing Professor Giovanni's concerns).

130. *See id.* (noting that Professor Giovanni offered to transfer Cho to another English class).

131. *See id.* ("[Professor Giovanni] contacted the head of the English Department, Dr. Roy, about Cho and warned her that if he were not removed from her class, she would resign.").

132. *See id.* at 44 (describing Dr. Roy's offer to tutor Cho as an alternative to his continued enrollment in Professor Giovanni's class).

133. *See id.* at 43 (discussing the Care Team assembled by Dr. Roy to address concerns regarding Cho's behavior).

134. *See id.* at 44 ("Twice during the meeting with Cho, Dr. Roy asked him if he would like to talk to a counselor.").

the counselor "did not pick up on a specific threat."<sup>135</sup> The counselor did, however, suggest to the Dean of Student Affairs that Cho seek mental health counseling at Virginia Tech's Cook Counseling Center.<sup>136</sup>

Cho's problems in Professor Giovanni's class were also discussed among the University's Care Team, a group of administrators charged with monitoring students with problems.<sup>137</sup> After Cho was removed from Professor Giovanni's class, the Care Team concluded that the "situation was taken care of" and did not refer his case to the Cook Counseling Center for evaluation.<sup>138</sup> The Care Team never again discussed Cho's case.<sup>139</sup>

In November 2005, Cho's behavior again raised concerns within the Virginia Tech community.<sup>140</sup> Between late November and early December, Cho had two encounters with the Virginia Tech Police Department.<sup>141</sup> In the first incident, on November 27, a female student reported that Cho had engaged in unwanted communication with her online, by phone, and in person.<sup>142</sup> She declined to press charges, and the Virginia Tech police referred the matter to the school's disciplinary system through the Office of Judicial Affairs.<sup>143</sup> Three days later, Cho contacted the Cook Counseling Center, presumably at the recommendation of Dr. Roy and other professors, and requested an appointment with a psychologist.<sup>144</sup> He was given a preliminary telephone screening, and an appointment was scheduled for December 12, 2005.<sup>145</sup>

Cho missed his appointment with the University psychologist, but was triaged again later that day by telephone.<sup>146</sup> The Counseling Center,

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135. *Id.* at 43.

136. *See id.* (discussing the counselor's recommendation).

137. *See id.* (stating that the Care Team was aware that Cho exhibited disruptive behavior in the classroom).

138. *Id.*

139. *See id.* ("There were no referrals to the Care Team later that fall semester . . .").

140. *See id.* at 45 (noting that Cho had several encounters with the Virginia Tech Police Department beginning in November 2005).

141. *See id.* (describing two incidents involving female students).

142. *See id.* (describing Cho's harassment of a female student on November 27, 2005).

143. *See id.* ("[T]he police officer warned Cho not to bother the female student anymore, and told him they would refer the case to Judicial Affairs.").

144. *See id.* at 45-46 ("This is the first record of Cho's acting upon professors' advice to seek counseling, and it followed the interaction he had had with campus police three days before.").

145. *Id.* at 46.

146. *See id.* (describing a triage as a brief interview with a prospective patient for the purpose of collecting data necessary to evaluate the level of intervention required).

however, made no referral or follow-up appointment for Cho.<sup>147</sup> Yet, on that same day, Virginia Tech police received a second complaint from a female student regarding unwanted communications from Cho.<sup>148</sup> The Virginia Tech police met with Cho and informed him that although the student had declined to press charges, he was to have no further contact with her.<sup>149</sup> The incident received significant attention from staff members and administrators of the Office of Residence Life and the Office of Judicial Affairs, though no one brought the matter to the attention of the University's Care Team.<sup>150</sup>

Later that evening, Cho told one of his roommates, "I might as well kill myself."<sup>151</sup> The roommate immediately contacted Virginia Tech police, who returned to Cho's suite for the third time in as many weeks.<sup>152</sup> Cho was taken for evaluation by a licensed clinical social worker, who described him on an evaluation form as "mentally ill" and "an imminent danger to self or others."<sup>153</sup> The social worker recommended involuntary hospitalization and obtained a temporary detaining order from a local magistrate later that evening.<sup>154</sup> Cho was then transported by Virginia Tech police to Carilion St. Albans Psychiatric Hospital for an overnight stay and mental evaluation.<sup>155</sup>

The following morning, Cho received an independent, albeit brief, evaluation from a licensed clinical psychologist, who concluded that Cho was mentally ill but did not present an imminent danger to himself and did not require continued involuntary hospitalization.<sup>156</sup> Cho subsequently met

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147. *See id.* (noting that the Cook Counseling Center conducted a second triage, but failed to make a follow-up appointment with Cho).

148. *See id.* (describing a second incident involving Cho and the Virginia Tech police).

149. *See id.* ("[A] campus police officer met with Cho and instructed him to have no further contact with the young woman.").

150. *See id.* at 46–47 (noting that the matter was not reported to the Care Team, despite being brought to the attention of many university administrators).

151. *Id.* at 47.

152. *See id.* (noting that the Virginia Tech police returned to speak with Cho after learning of his comment regarding suicide).

153. *Id.*

154. *See id.* (noting that a local magistrate issued a temporary detaining order because Cho was unwilling to receive voluntary treatment).

155. *See id.* ("Police officers transported Cho to St. Albans where he was admitted at 11:00 p.m.").

156. *See id.* (finding that Cho was "mentally ill"; that he [did] not present an imminent danger to (himself/others) or is not substantially unable to care for himself, as a result of mental illness; and that he [did] not require involuntary hospitalization").

with a St. Albans psychiatrist, who also concluded that he was not a danger to himself or others.<sup>157</sup> The psychiatrist suggested outpatient therapy for Cho—a decision based in part on Cho's denial of previous mental health treatment.<sup>158</sup>

Later that morning, at Cho's commitment hearing, a special justice concluded that Cho presented "an imminent danger to himself as a result of mental illness," and ordered follow-up outpatient treatment.<sup>159</sup> St. Albans arranged for Cho to make an appointment with the Cook Counseling Center that afternoon, but as it turned out, he again received only a brief triage.<sup>160</sup> Although this was Cho's third contact with the Cook Counseling Center in fifteen days, the facility declined to arrange any follow-up treatment on his behalf or convey any information to the University's Care Team or his parents.<sup>161</sup> Cho would never return to the Cook Counseling Center for treatment.<sup>162</sup>

Cho's mental health continued to deteriorate in the Spring and Fall of 2006.<sup>163</sup> Like Professors Giovanni and Roy, several of Cho's writing teachers expressed concern over the content of his essays, one of which anticipated details of the forthcoming shooting.<sup>164</sup> Though several faculty members raised their concerns with Mary Ann Lewis, Associate Dean of Liberal Arts and Sciences, no one in the English Department was informed of Cho's prior interactions with the Virginia Tech Police Department or the concerns raised among Residence Life staff regarding his behavior.<sup>165</sup> More surprisingly, Dean Lewis informed a professor just months before the shooting that she was unaware of any "mental health issues or police

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157. *See id.* ("[T]he psychiatrist did not recall anything remarkable about Cho, other than that he was extremely quiet.")

158. *See id.* at 47–48 (describing the psychiatrist's decision to recommend that Cho receive outpatient therapy).

159. *Id.* at 48.

160. *See id.* at 49 (noting that "[Cho] was triaged again, this time face-to-face, but no diagnosis was given").

161. *See id.* (discussing the collective failure by many to notify either Cho's parents or the Care Team of Cho's admission to St. Albans and his subsequent mental health evaluation).

162. *Id.*

163. *See id.* (noting that, in the Spring of 2006, "[t]he trend of disturbing themes continued to be apparent in many of Cho's writings, along with his selective mutism").

164. *See id.* at 23 (noting that the protagonist in an essay Cho drafted for a creative writing class "hates the students at his school and plans to kill them and himself").

165. *See id.* at 52 (highlighting the communication gaps between the Care Team, the administration and the Virginia Tech police).



reports" involving Cho, despite being aware of the incident involving Professor Giovanni in Fall 2005 and recognizing a pattern of similar behavior.<sup>166</sup>

## 2. *Second Critical Communication Lapse: Red Flags in College Ignored*

Despite the awareness among Virginia Tech administrators, faculty, police, and mental health counselors of these troubling incidents, no one sought to discuss Cho's behavior with his family.<sup>167</sup> University administrators with knowledge of Cho's conduct appear to have failed to assess the collective significance of his repeated entanglements with faculty, Virginia Tech police, and the Cook Counseling Center. To be sure, it is unlikely that anyone at Virginia Tech had a full understanding of Cho's problems.<sup>168</sup> Still, the independent significance of these events—three encounters with Virginia Tech police in three weeks, coupled with three mental health triages at the Cook Counseling Center and an involuntary commitment hearing—should have sounded alarm bells with University administrators.

It is unclear why administrators failed to reach out to Cho's parents after these troubling events in 2005. While it cannot be known whether greater awareness of Cho's behavior among Virginia Tech administrators or his family could have forestalled his violence, it is likely that disclosure of any of the incidents leading up to the shooting would have resulted in mental health treatment or his withdrawal from school.<sup>169</sup> It is clear that federal privacy laws allowed Virginia Tech to share information internally or with Cho's family, but it is certainly possible that the laws as they had been understood in 2005 and 2006 made non-disclosure the likelier course.<sup>170</sup>

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166. *Id.* at 24.

167. *See id.* at 49 ("Cho's family did not realize what was happening with him in Blacksburg that fall 2005 semester . . .").

168. *See id.* (demonstrating the lack of knowledge regarding the extent of Cho's problems among the University community).

169. *See id.* at 49 (noting that, if Cho's father had been made aware of his son's troubling behavior in college, "he would have taken him home and made him miss a semester to get this looked at . . . but [he] just did not know . . . about anything being wrong").

170. *See id.* at 64 (acknowledging that Virginia Tech police were not prevented by law from sharing certain information about Cho with University administrators or his parents).

With the exception of documents relating to Cho's commitment hearing, all of the pertinent records involving Cho's conduct were either subject to FERPA privacy restrictions or to no restrictions at all.<sup>171</sup> For example, documents maintained by the University's Care Team relating to the incidents involving Professor Giovanni and other faculty members could have been disclosed under FERPA's parental-notification exception.<sup>172</sup> To the extent the Care Team felt constrained by FERPA prohibitions, it could have requested simply that Professor Giovanni, Dr. Roy, or others contact Cho's parents directly to discuss their concerns in a manner that would not implicate the privacy rule.<sup>173</sup> As it stood, FERPA applied only to documents or records related to or created in response to the classroom incidents and encompassed personal observations only to the extent they had been documented in such records.<sup>174</sup>

Likewise, the Virginia Tech police were not prohibited from disclosing to administrators or Cho's parents information regarding his unwanted contact with female students in Fall 2005.<sup>175</sup> Law enforcement records are not governed by FERPA, and those maintained by the VTPD were subject to privacy restrictions only to the extent that they had been shared with University officials for non-law enforcement purposes.<sup>176</sup> There is no evidence that such sharing occurred with respect to the three interviews campus police conducted with Cho in November and December 2005, or with respect to their transportation of him to St. Albans Psychiatric Hospital pursuant to the temporary detaining order. Thus, the VTPD was free to disclose to Cho's family or University officials the nature of its interactions with him.<sup>177</sup> Though the incidents involving unwanted communication with

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171. *See id.* at 66 (explaining that campus health clinics are subject only to FERPA requirements).

172. *See* 20 U.S.C. § 1232g (2006) (describing FERPA's parental notification exceptions); *see also* 34 C.F.R. § 99.31(a)(8) (2006) (same).

173. *See id.* at 66 ("In this case, several of Cho's professors and the Residence Life staff observed conduct by him that raised their concern. They would have been authorized to call Cho's parents to report the behavior they witnessed.")

174. *See id.* (noting that "[p]ersonal observations and conversations with a student fall outside FERPA").

175. *See id.* (noting that FERPA "does not apply to records created and maintained by campus law enforcement for law enforcement purposes").

176. *See id.* (explaining that records maintained by the Virginia Tech police regarding Cho "were created for the law enforcement purpose of investigating a crime").

177. *See id.* at 67 ("[T]he VTPD was not prohibited from contacting the university administration or Cho's parents to inform them that Cho was under a temporary detention order and had been transported to Carillion St. Albans Behavioral Health.")

other students may have appeared relatively benign on such a large campus, had VTPD been made aware of Cho's early entanglements with Professor Giovanni or known of his violent writings, it might have been in a better position to assess the need for disclosure.<sup>178</sup>

HIPAA privacy rules did not prohibit the Cook Counseling Center from disclosing to Cho's family or University administrators the nature or frequency of his requests for treatment.<sup>179</sup> As a campus health care provider, the Center was obliged to observe FERPA's, not HIPAA's, privacy rules for its records.<sup>180</sup> Though Cho never received treatment at Cook, he had requested and received three triage appointments in just over two weeks.<sup>181</sup> This fact alone, had it been disclosed, might have been sufficient to alert the University's Care Team or Cho's family that his mental health was deteriorating at a rapid pace.

Finally, neither FERPA nor HIPAA prevented the magistrate who granted the temporary detaining order or the special justice overseeing Cho's commitment hearing from notifying Virginia Tech or Cho's family that Cho presented a danger to himself.<sup>182</sup> Though state law requires that records of commitment hearings remain confidential, the name of the person subject to the commitment and the fact of the commitment hearing itself is not private.<sup>183</sup> In fact, commitment hearings in the Commonwealth of Virginia are open to the public; existing law protects only the records of the hearing.<sup>184</sup> Likewise, no law prohibited the Virginia Tech police, who escorted Cho to St. Albans, or the Cook Counseling Center, which was notified following Cho's release, from notifying Cho's parents of his commitment hearing.<sup>185</sup>

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178. *See id.* at 70 (discussing how disclosure of information to the campus police could have better equipped them to evaluate the threat Cho posed to the community).

179. *See id.* at 66 ("[R]ecords maintained by campus health clinics are not covered by HIPAA.").

180. *See id.* ("FERPA provides the basic requirements for disclosure of health care records at campus health clinics . . .").

181. *Id.* at 49.

182. *See id.* at 64 (noting that information regarding commitment hearings for involuntary admission is public, though the records of such hearings are sealed).

183. *See id.* ("Although their records are confidential, the hearings themselves must be open to the public and certain information is, at least in theory, publicly available.").

184. *See id.* (explaining that although commitment hearings must be open to the public, the records of such hearings can be released only by court order).

185. *See id.* at 64–65 (arguing that the campus police were aware of Cho's commitment hearing, and "they could have shared this information with university administration or Cho's parents, though they did not").

Collectively, the independent decisions not to share critical information regarding Cho's behavior likely reflected a broader misunderstanding of the privacy protections afforded to students.<sup>186</sup> Student privacy is an important concept, and an essential component of academic freedom, but privacy laws permit disclosure when it is necessary to protect the health and safety of the community or to communicate important information to the parents of tax-dependent students. In the aftermath of the shooting, it became clear that Virginia Tech, like many institutions, was "hampered by overly strict interpretations of federal and state privacy laws."<sup>187</sup>

### III. Conclusion

The privacy laws in place at the time of the Virginia Tech shooting provided few legal barriers to the disclosure of key information relating to the shooter's deteriorating mental health condition.<sup>188</sup> Nonetheless, a presumption of nondisclosure permeated the campus, as it did most university campuses at the time.<sup>189</sup> Faculty and administrators, as well as other Virginia Tech officials, appear to have felt hamstrung by the strong presumption in favor of student privacy.<sup>190</sup>

Since the Virginia Tech shooting, student privacy laws have undergone significant clarification.<sup>191</sup> The U.S. Department of Education

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186. *See id.* at 63 ("The panel's review of information privacy laws governing mental health, law enforcement, and educational records and information revealed widespread lack of understanding, conflicting practice, and laws that were poorly designed to accomplish their goals.").

187. *Id.* at 52.

188. *See* discussion *supra* Part II.B.2 (discussing the nature of the privacy laws applicable to Cho's case).

189. *See Information Privacy Laws, supra* note 1, at 63 (noting that the University was plagued with a misunderstanding of privacy laws).

190. *See id.* ("Privacy laws can block some attempts to share information, but even more often may cause holders of such information to default to the nondisclosure option—even when laws permit the option to disclose.").

191. *See generally* U.S. DEP'T. OF HEALTH & HUMAN SERVS., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 8 (2007) ("[T]he U.S. Departments of Education and Health and Human Services should consider whether further actions are needed to balance more appropriately the interests of safety, privacy and treatment implicated by FERPA and HIPAA."); *see also* Allison B. Newhart & Barbara F. Lovelace, *FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information Under the Health and Safety Emergency Exception*, UNIV. RISK MGMT. & INS. ASS'N J. 19, 19 (2009) ("[FERPA] amendments give higher education institutions greater

("DOE") has backed away from requiring a strict construction of FERPA's "health and safety" exception, and today permits institutions to "take into account the totality of the circumstances" when making privacy disclosure decisions.<sup>192</sup> Further, the DOE has removed the fear of loss of funding from institutions making precautionary disclosures.<sup>193</sup> So long as an educational institution has a "rational basis" for availing itself of the "health and safety" exception, the government "will not substitute its judgment" for that of the institution making the disclosure.<sup>194</sup> The DOE, in conjunction with the U.S. Department of Health and Human Services, also published revised guidance in November 2008 to supplant the out-of-date and confusing standards promulgated in 2004.<sup>195</sup> The revised guidelines contain answers to common but important questions of student privacy.<sup>196</sup> Whether these revised guidelines will result in greater disclosure is unclear, however, as anecdotal evidence suggests that the FERPA privacy analysis is still "very much an art, not a science."<sup>197</sup>

Today, it remains the burden of colleges and universities to educate their faculty, staff, and administrators on the requirements governing privacy law disclosures. Equally important, however, is the responsibility of school administrators and faculty to seek clarification whenever a potential disclosure situation arises. While few are in a position to prevent a mass shooting such as the one experienced in Blacksburg, Virginia, many in academia should educate themselves on the limitations and exceptions to student privacy laws. This act alone may help prevent another tragedy.

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freedom in working to protect students from themselves and from potentially dangerous behavior of others without the fear of violating confidentiality laws.").

192. See 34 C.F.R. § 99.36 (2010) (allowing disclosure of confidential information to certain parties in emergency situations).

193. See *id.* (stating that nothing shall prevent an educational institution from disclosing information to appropriate parties in emergency situations).

194. *Id.*

195. See generally U.S. DEP'T. OF EDUC. & U.S. DEP'T. OF HEALTH & HUMAN SERVS., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) TO STUDENT HEALTH RECORDS (Nov. 2008) [hereinafter JOINT GUIDANCE]; see also *supra* note 48 and accompanying text (noting that suicidal comments and dangerous behavior may be examples of situations that could trigger the emergency exception).

196. See generally JOINT GUIDANCE, *supra* note 195 (addressing common questions concerning student privacy issues).

197. Kyle Mianulli, *Balancing UW Safety, Privacy 'Tightrope Walk'*, THE BADGER HERALD, May 6, 2010, available at [http://badgerherald.com/news/2010/05/06/balancing\\_uw\\_safety\\_php](http://badgerherald.com/news/2010/05/06/balancing_uw_safety_php) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).