

# RECENT DEVELOPMENTS

## DISMANTLING A DUAL-HEADED SYSTEM OF GOVERNANCE: HOW A REGULATORY OVERLAP UNDERCUTS THE SECURITY OF STUDENT HEALTH INFORMATION IN PUBLIC SCHOOLS

BRYAN THURMOND\*

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\* J.D. Candidate 2013, American University Washington College of Law; M. Ed. 2009, George Mason University; B.B.A. 2007, The University of Georgia. I would like to thank the entire editing staff at the ADMINISTRATIVE LAW REVIEW and Professor Lia Epperson for their collective expertise and guidance throughout the writing and editing of this Article. Of course, I thank my mom and dad for their loving support throughout all of my academic endeavors. Finally, and most importantly, I would like to thank my 67 former Pre-Kindergarten students/friends for inspiring me to commit my life’s work of ensuring that all children have the opportunity to succeed through a sound public education.

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## INTRODUCTION

State and local education programs have grown to serve nearly all Americans. As the needs of American students and families change, regulations surrounding public education develop in response. Most notably, the formation of the Department of Education (ED) in 1980, following the passage of the Department of Education Act, signaled the emergence of increased federal regulation of the education system.<sup>1</sup> Federal oversight of state and local education systems has not been limited to the establishment of a federal administrative agency; instead, evolving American culture and technological innovations have precipitated the adoption of various federal statutes that govern key issues in the realm of education. For example, methods for regulating and protecting the use of student health information have necessarily evolved since the reign of the Department of Health, Education, and Welfare, the predecessor of today’s Department of Education. Today, when bullying and student-on-student violence are all too widespread,<sup>2</sup> two separate statutes—the Family Educational Rights and Privacy Act (FERPA)<sup>3</sup> and the Health Insurance

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1. *Historical Highlights*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/about/hhshist.html> (last visited Aug. 7, 2012).

2. See *infra* Part III.C.

3. 20 U.S.C. § 1232g (2006 & Supp. IV 2011).

Portability and Accountability Act (HIPAA)<sup>4</sup>—govern the privacy of student health information. These overlapping statutes ultimately lead to stakeholder confusion, hindering the role that student health information should play in ensuring the safety of students, faculty, and staff at public schools.

FERPA, enacted in 1974, regulates the availability, disclosure, and use of student education records maintained by educational institutions that receive funds from the federal government.<sup>5</sup> In 1996, Congress adopted HIPAA to regulate the privacy and security of health information, including some student health information maintained by FERPA-covered educational institutions.<sup>6</sup> While ED implements FERPA, the Department of Health and Human Services (HHS) implements the HIPAA statute.<sup>7</sup> The implications of these statutes, and the corresponding decisions of the statutes' governing administrative agencies, are far-reaching for all stakeholders in the field of education, including parents, providers of school-based health services (such as school nurses), school administrators, and, of course, students.

Unfortunately, regulating student health information through two separate federal statutes—further monitored by two separate administrative agencies—does little to either protect the privacy of student health information or ensure that this information is used to address student medical needs. In fact, the statutes' complicated provisions and overlapping regulations lead to confusion and, ultimately, stakeholder inaction or error in decisionmaking.<sup>8</sup> This Article explains the inefficiencies

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4. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.).

5. See, e.g., Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 61–63 (2008) (providing an overview of the key functions of the Family Educational Rights and Privacy Act (FERPA)).

6. See CHRISTINE R. WILLIAMS, *FERPA, GLBA, & HIPAA: THE ALPHABET SOUP OF PRIVACY* 9 (2007) (providing the Health Insurance Portability and Accountability Act's (HIPAA's) legislative history).

7. See *HIPAA and FERPA: An Update on Privacy Rules*, CTR. FOR HEALTH & HEALTH CARE IN SCH., <http://www.healthinschools.org/en/News-Room/EJournals/Volume-6/~link.aspx?id=A7F32C8B766A448F8393244FBDCCA240&z=z> (last visited Aug. 7, 2012) (discussing the overlap of HIPAA and FERPA and the administrative agencies that oversee each respective statute).

8. See Abigail English, *The HIPAA Privacy Rule and FERPA: How Do They Work in SBHCs?*, NAT'L ASSEMBLY ON SCH.-BASED HEALTH CARE, [http://ww2.nasbhc.org/RoadMap/PUBLIC/TAT\\_HIPPA\\_FERPA1.pdf](http://ww2.nasbhc.org/RoadMap/PUBLIC/TAT_HIPPA_FERPA1.pdf) (last visited Aug. 7, 2012) (describing common misunderstandings of the FERPA–HIPAA regulatory overlap); *School Health Nurse's Role in Education: Privacy Standards for Student Health Records*, NAT'L ASS'N OF SCH. NURSES (July 2004), <http://www.nasn.org/Portals/0/briefs/2004briefprivacy.pdf> [hereinafter *Privacy Standards for Student Health Records*] (describing the difficulty school nurses encounter when

created by this system of protecting student health information and argues that simplification of the system will have far-reaching advantages for all stakeholders in the field of public education. Among such advantages is an increase in campus safety: simplification of this dual-headed system of governance will empower education stakeholders to avoid schoolhouse tragedies such as the 2007 mass shooting at Virginia Tech, which is commonly attributed in large part to stakeholder misunderstanding of the FERPA–HIPAA regulatory overlap. To begin, Part I of this Article briefly outlines the role of education records in the modern system of American public education. Next, Part II provides background information concerning the adoption and subsequent implementation of both FERPA and HIPAA. Part III discusses the intersection and overlap of these two privacy statutes in the protection of student health information and illuminates the difficulties inherent in this dual-headed system of governance. Likewise, Part IV discusses the contemporary, troubling student–safety implications of this inefficient system of protecting student health information. Finally, Part IV recommends (A) the abandonment of the FERPA statute as it relates to student health records and (B) the subsequent strengthening of the HIPAA statute to achieve a system of protecting student health information that is efficient, purposeful, and unambiguous for all stakeholders working to ensure the success of our public education system and the welfare of our students.

## I. THE ROLE OF STUDENT HEALTH RECORDS IN MODERN PUBLIC EDUCATION

Before analyzing the statutory mechanisms that federal administrative agencies use to monitor and regulate student health records maintained by public schools, it is first necessary to develop an understanding of the role these records assume in the modern-day education system. Such an understanding will highlight the deficiencies inherent in the current system and underscore the urgency with which Congress must revise this dual-headed system of governance.

Public schools across the country accumulate a wide range of information about students.<sup>9</sup> Understandably, some commentators defend

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navigating the FERPA–HIPAA regulatory overlap); *see generally* Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141 (2010) (discussing the difficulties experienced by Virginia Tech stakeholders in the interpretation of HIPAA and FERPA guidelines and the resultant procedural inaction that led to the 2007 campus shooting).

9. *See* Louis P. Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73, 73–74 (2005) (detailing the “sundry of personal information” that public schools collect and maintain about students, including “residential data, discipline reports, test scores and

the assimilation of varied student information as necessary to aid educators in their quest to push students to “their fullest educational potential.”<sup>10</sup> Additionally, as public schools are an extension of the government, record keeping in the public education sector is sometimes viewed as an indispensable administrative task.<sup>11</sup>

A substantial portion of the record keeping occurring in public schools concerns student health information.<sup>12</sup> Student health records are frequently developed, reviewed, and disposed of by various stakeholders within the field of education, including school nurses, guidance counselors, school psychologists, and special education teachers. While some of the information contained within student health records is undoubtedly personal in nature, many experts contend that the maintenance of such records is necessary to ensure “efficient and effective school health service programs.”<sup>13</sup> Student health records may have importance outside of the schoolhouse setting as well.<sup>14</sup> For example, for those students who rely on school-based medical professionals<sup>15</sup> for the entirety of their respective health care needs, student health records represent the only documentation of a student’s personal medical history.<sup>16</sup> Additionally, in our increasingly

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comparative rankings, registration and classification records, medical accounts and psychological assessments”).

10. Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1195 (2006).

11. *See id.* (noting that record keeping in schools is necessary to “sustain the schools’ governmental function”).

12. *Cf.* Gregory E. Siegler, *What Should Be the Scope of Privacy Protections for Student Health Records? A Look at Massachusetts and Federal Law*, 25 J.L. & EDUC. 237, 238 (1996) (delineating the types of student health information that schools frequently document); *School Nurse Role in Education: School Health Records*, NAT’L ASS’N OF SCH. NURSES (July 2004), <http://www.nasn.org/Portals/0/briefs/2004briefrecords.pdf> [hereinafter *School Nurse Role in Education*] (describing the types of student health records that school nurses commonly maintain, including “immunization records, screening records, progress notes, physician orders, physical examination records, medication and treatment logs, individualized health care plans, emergency health care plans, third party medical records, consent forms, Medicaid and other insurance billing forms, and flow charts”).

13. Siegler, *supra* note 12, at 238; *accord* Stuart, *supra* note 10, at 1181 (describing the “health and safety purposes” of maintaining adequate student health records in public schools).

14. The National Association of School Nurses reports that school-based health professionals maintain student health records for a variety of purposes, including purposes related to accrediting and licensing, research, and education functions. *See School Nurse Role in Education*, *supra* note 12.

15. For the purposes of this Article, “school-based medical professionals” refers to those stakeholders working within the public education field that use and generate student health information in the completion of their duties. Such positions include, but are not limited to, school nurses, special education teachers, and guidance counselors.

16. *See* Siegler, *supra* note 12, at 237 (noting that students who do not visit medical

litigious society, school-based health professionals increasingly rely on comprehensive and complete student health documentation to protect themselves from liability in malpractice lawsuits.<sup>17</sup>

While student health information is valuable for a multitude of reasons both inside and outside the school setting, all stakeholders must recognize the importance of maintaining the privacy of sensitive student health information.<sup>18</sup> Further, professional organizations such as the National Association of School Nurses frequently advocate for increased protection of student health information.<sup>19</sup> Unfortunately, complicated federal statutes that fail to adequately and effectively regulate the use of student health information countermand the important privacy interests of these stakeholders and practitioners.

## II. A BRIEF HISTORY—AND CRITIQUE—OF THE FERPA AND HIPAA STATUTES

### A. *The Family Educational Rights and Privacy Act (FERPA)*

President Gerald Ford signed FERPA, sometimes referred to as the Buckley Amendment, into law in August 1974.<sup>20</sup> FERPA serves to protect student information contained within education records by controlling access to such records, enabling authorized individuals to amend these records, and empowering protected parties to review their own records.<sup>21</sup>

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professionals outside of the school setting rely on the detailed medical information contained within their respective student health records). Reliance on student health records is perhaps especially important for college students, as these students frequently attend campuses away from their hometown health care providers and, consequently, rely exclusively on services offered by school-based medical professionals.

17. *Id.* at 238 (quoting NADINE SCHWAB, NATIONAL ASSOCIATION OF SCHOOL NURSES, GUIDELINES FOR SCHOOL NURSING DOCUMENTATION: STANDARDS, ISSUES, AND MODELS 8–9 (1991)) (“Inadequate or absent documentation has been a critical factor in several cases decided against school nurses.”).

18. For instance, school-based medical professionals argue that the integrity of physician–patient privilege is compromised when schools do not adequately protect student health records. Similarly, parents and students may have an interest in preventing the disclosure of sensitive student health information from public schools to other government agencies, such as U.S. Immigration and Customs Enforcement. *See* Siegler, *supra* note 12, at 241.

19. *See, e.g., School Nurse Role in Education, supra* note 12 (recommending protective measures that school nurses should undertake to ensure the protection of student health records in an era of increasing reliance on technology).

20. *See, e.g., CLIFFORD A. RAMIREZ, FERPA CLEAR AND SIMPLE: THE COLLEGE PROFESSIONAL’S GUIDE TO COMPLIANCE* 16 (2009) (detailing the origins and history of FERPA).

21. *See* DANIEL R. MURPHY & MIKE L. DISHMAN, EDUCATIONAL RECORDS: A

Further, as spending clause legislation, ED enforces FERPA's provisions through the disbursement or rescission of federal education funds.<sup>22</sup> Specifically, the Family Policy Compliance Office (FPCO) within ED is charged both with investigating and reviewing complaints of institutional noncompliance and with providing support to those educational entities seeking to achieve greater compliance with the mandates of the Act.<sup>23</sup> The FPCO maintains the exclusive burden of enforcing FERPA compliance, as the Supreme Court has held that individuals do not have the right to bring action under FERPA when an educational institution violates the Act's provisions.<sup>24</sup>

### 1. *Defining Education Records: Ambiguity in FERPA's Provisions*

The provisions of FERPA have been contested and questioned frequently since the Act's inception nearly four decades ago. Particularly, debate has recurrently focused on the meaning of "education records"<sup>25</sup>—

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PRACTICAL GUIDE FOR LEGAL COMPLIANCE 2 (2010) (commenting that, insofar as such access to records is concerned, FERPA "remains the primary federal law governing educational records"); *see also* Daggett, *supra* note 5, at 62 (discussing the "essential requirements" of the Act).

22. By enacting FERPA pursuant to its spending power, Congress conditioned the receipt of federal education funds on an educational institution's compliance with FERPA student privacy regulations. *See* 20 U.S.C. § 1232g(f) (2006) (empowering the Secretary of the Department of Education (ED) to "terminate assistance . . . if the Secretary finds there has been a failure to comply with this [Act], and he has determined that compliance cannot be secured by voluntary means"); *see also* Robert W. Futhey, Note, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 278 (2008) (noting that Congress enacted FERPA "pursuant to its spending power under Article I of the U.S. Constitution").

23. *See* 34 C.F.R. § 99.60 (1993) (designating the Family Policy Compliance Office (FPCO) as responsible for handling complaints and providing "technical assistance to ensure compliance with the Act"); *see also* 20 U.S.C. § 1232g(g) (providing authority for the Secretary of Education to "establish . . . an office . . . for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA]").

24. *See* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (holding that FERPA does not provide students or other interested parties a private right to sue universities for damages resulting from violations of the FERPA privacy provisions); Futhey, *supra* note 22, at 309 (noting that the only action a parent or student may take to ensure that an educational entity complies with the provisions of FERPA is to file a complaint with the FPCO, which may subsequently review and investigate the complaint).

25. Currently, FERPA defines "education records" as "those records, files, documents, and other materials 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." *See* 20 U.S.C. § 1232g(a)(1)(D)(4)(A). There are six exceptions to this definition of education records: sole possession records; law enforcement records; employment records; medical records; alumni records; and peer-graded papers before they are collected and recorded by a teacher. RAMIREZ, *supra* note 20, at 36.

the very interest that the Act purports to protect. In fact, within only six weeks of the Act's adoption, Congress amended FERPA to better identify the types of student information that constitute education records.<sup>26</sup> Subsequent amendments and litigation have focused on various exceptions to FERPA's amended definition of education records. Most famously, the Supreme Court in *Owasso Independent School District v. Falvo*<sup>27</sup> considered whether education records under FERPA included peer-graded papers.<sup>28</sup> Ultimately, the Court found that such papers do not constitute education records within the meaning of FERPA.<sup>29</sup> Additionally, the Court in *Falvo* implied that education records under FERPA should be limited to those records maintained in a central file by a "central custodian."<sup>30</sup> While the Court announced this interpretation of student records as mere dicta,<sup>31</sup> leading scholars contend that such a definition of education records is incorrect and counter to the purpose of FERPA.<sup>32</sup> In fact, ED has declined to accept the Court's interpretation.<sup>33</sup> Likewise, lower courts have not adopted the Supreme Court's dicta in any subsequent decisions.<sup>34</sup> Due to amendments and evolving case law, practitioners in the field of public education—and even the Justices of the Supreme Court—struggle to uniformly interpret the basic provisions of FERPA.

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26. See 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, 13 (2001) (calling FERPA's original definition of education records a "laundry list" and noting that the amended definition remains in place today).

27. 534 U.S. 426 (2002).

28. *Id.* at 428.

29. *Id.* at 436 (holding that, when the peer-grading method is used in the classroom, "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them" in a grade book).

30. *Id.* at 435 (stating that "FERPA implies that education records are institutional records kept by a single central custodian" and differentiating such a custodian from the student graders at issue in the case).

31. Daggett, *supra* note 5, at 72.

32. See *id.* at 70, 73–75 (noting that the Court's interpretation "is not supported by, and in fact is inconsistent with, the plain language of FERPA's current definition of education records").

33. See *id.* at 74 (noting that ED has not "interpreted FERPA records to be limited to those in a central file").

34. See, e.g., *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (holding that student discipline records, although not maintained in a central file, constitute education records under FERPA); see also Daggett, *supra* note 5, at 74 (reporting that "courts . . . before and after *Falvo* have [not] interpreted FERPA records to be limited to those in a central file").

## 2. *Aligning FERPA with the Needs of a Changing Society*

Legislation ensuring the privacy of student records and personal information necessarily must evolve as society and the operational needs of educational institutions change over time. Over the past several decades, FERPA has required updates and amendments in order to remain relevant in the shifting educational landscape.<sup>35</sup> Major events such as the launch of the War on Drugs, the terrorist attacks of September 11, 2001, and the 2007 Virginia Tech shootings have precipitated various modifications of FERPA's provisions.<sup>36</sup> Since its inception, the FERPA regulations have been amended at least ten times to meet the changing needs of society and students.<sup>37</sup> Most recently, in April 2011, ED issued yet another notice of proposed rulemaking for FERPA, highlighting the ongoing need to align FERPA's privacy protections with the needs of a changing society.<sup>38</sup>

### *B. The Health Insurance Portability and Accountability Act of 1996 (HIPAA)*

The 104th Congress enacted HIPAA in August 1996.<sup>39</sup> The Act was adopted to serve various enumerated purposes; among these purposes, the Act seeks to combat waste and fraud in the insurance field, to improve access to health care services, to simplify the administration of health

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35. See RAMIREZ, *supra* note 20, at 18 (noting that “changing business and social landscape[s]” have necessitated the modification of FERPA); Megan M. Davoren, Comment, *Communication as Prevention to Tragedy: FERPA in a Society of School Violence*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 425, 455–56 (2008) (arguing that prevalent social issues within schools—here, school violence—compel the amendment of FERPA).

36. See, e.g., Brusca & Ram, *supra* note 8, at 167–68 (discussing changes to FERPA regulations and guidance documents promulgated following the shootings at Virginia Tech); see also RAMIREZ, *supra* note 20, at 18–19 (listing various national events that precipitated changes to the text of FERPA); cf. Lloyd I. Sederer & Henry Chung, *So, Your Child Is Going Off to College . . . Drinking, Drugs, Depression and Dealing with Colleges and Universities*, HUFFINGTON POST (Aug. 13, 2009, 11:34 PM), [http://www.huffingtonpost.com/lloyd-i-sederer-md/so-your-child-is-going-of\\_b\\_258998.html](http://www.huffingtonpost.com/lloyd-i-sederer-md/so-your-child-is-going-of_b_258998.html) (describing the nuanced role of privacy regulations in the reporting of illegal student drug and alcohol use).

37. See RAMIREZ, *supra* note 20, at 19 (discussing historical modifications and revisions of the FERPA statute).

38. See Family Educational Rights and Privacy, 76 Fed. Reg. 75,604 (Dec. 2, 2011) (to be codified at 34 C.F.R. pt. 99). The amendments adopted by ED, following the completion of the requisite notice-and-comment period, aim to more closely align the provisions of FERPA with the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act (COMPETES Act) and the American Recovery and Reinvestment Act of 2009 (ARRA). See America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2011); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

39. See JUNE M. SULLIVAN, *HIPAA: A PRACTICAL GUIDE TO THE PRIVACY AND SECURITY OF HEALTH DATA* 93 (2004) (relaying the history of HIPAA).

insurance, and to expand the continuity of health insurance coverage.<sup>40</sup>

To accomplish its goals, HIPAA's many provisions are separated into two independent titles.<sup>41</sup> Title I of HIPAA, which concerns the portability of health insurance, ensures health insurance coverage for workers and their dependent family members during periods of transition between jobs.<sup>42</sup> Title II of HIPAA provides administrative simplification procedures that ensure the privacy and security of health information.<sup>43</sup> Additionally, Title II seeks to "improve the efficiency and effectiveness of the health care system" in a period of growing reliance on electronic technology in the health care field.<sup>44</sup> The provisions of this title of HIPAA apply to covered entities, which fall into one of three categories: health plans, health care clearinghouses, or health care providers that transmit health information in specific categories of electronic transactions.<sup>45</sup> Because Title II of HIPAA concerns the privacy of health information, any remaining discussion of HIPAA in this Article will concern provisions from Title II of the Act.

At first glance, public elementary, secondary, and post-secondary schools may not appear to exhibit the traditionally perceived qualifications of health plans, health care clearinghouses, or health care providers.<sup>46</sup> However, ED and HHS have declared that "when a school provides health care to students in the normal course of business, such as through its health clinic," the school may qualify as a health care provider under HIPAA.<sup>47</sup>

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40. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

41. *Id.*

42. See SULLIVAN, *supra* note 39, at 93–95 ("Title I of HIPAA protects health insurance coverage for workers and their families when they change or lose their jobs.").

43. See *id.* at 95–96 (recounting that Congress was especially concerned with the protection of "sensitive information contained in a person's medical record" when it adopted Title II of HIPAA).

44. *HIPAA Administrative Simplification Statute and Rules*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/ocr/privacy/hipaa/administrative/index.html> (last visited Aug. 7, 2012); see also WILLIAMS, *supra* note 6, at 9 (detailing the increasing reliance on electronic record keeping and electronic transactions characteristic of the 1990s); Jacqueline Klosek, *Exploring the Barriers to the More Widespread Adoption of Electronic Health Records*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 429, 436–38 (2011) (describing various ways that electronic health information remains "vulnerable" to "unauthorized parties").

45. See Health Insurance Portability and Accountability Act of 1996, § 1173, 110 Stat. at 2023 (defining the applicability of the HIPAA statute); see also *id.* at 2025 (delineating the electronic transactions that render health care providers subject to the provisions of HIPAA).

46. HIPAA considers a health care provider "a provider of services . . . a provider of medical or health services . . . and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103 (2011).

47. U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996

Determining whether the health care services provided at a school meet the definition of health care provider under HIPAA, however, requires an exacting, case-specific analysis.<sup>48</sup> As the next part of this Article discusses, when a school does, in fact, qualify as a health care provider under the provisions of HIPAA, its responsibilities related to protecting the health information of its students become increasingly fact-specific and muddled.

### III. THE OVERLAP OF FERPA AND HIPAA IN THE PROTECTION OF STUDENT HEALTH INFORMATION: UNCERTAINTIES AND UNKNOWNNS

As previously mentioned, educational entities including public elementary, secondary, and post-secondary schools often fall within the statutory definition of health care providers under HIPAA.<sup>49</sup> When performing the role of health care provider, it is easy to imagine the breadth of health records that school-based medical professionals maintain in the performance of their professional duties. This function of specialized school personnel is important, of course, as student health records are necessary to document the types of “assessments, plans, interventions, and evaluations” that have been conducted to meet a particular student’s needs.<sup>50</sup> Furthermore, school-based medical professionals are charged not only with the maintenance of student health records but, depending on the needs of a student and his or her guardians, with the disclosure, transfer, or destruction of these records, as well.<sup>51</sup>

Unfortunately, the FERPA–HIPAA framework for protecting student health records is complex. Although school functions may render an educational entity a health care provider under the provisions of HIPAA, FERPA privacy standards often also govern student health records maintained by such educational entities.<sup>52</sup> This counterintuitive result derives from an exception within HIPAA stating that individually

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(HIPAA) TO STUDENT HEALTH RECORDS 3 (2008) [hereinafter FERPA/HIPAA JOINT GUIDANCE], available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/hipaferpajointguide.pdf>.

48. See April Besl & David J. Lampe, *Understanding the Privacy Rights of HIPAA & FERPA in Schools*, MARTINDALE (Dec. 29, 2010), [http://www.martindale.com/health-care-law/article\\_Dinsmore-Shohl-LLP\\_1212926.htm](http://www.martindale.com/health-care-law/article_Dinsmore-Shohl-LLP_1212926.htm) (stating that the relevant inquiry concerns whether a school “furnishes, bills or receives payment for healthcare in the normal course of its business” or “transmits these covered transactions electronically”).

49. See *supra* Part II.B.

50. Siegler, *supra* note 12, at 238.

51. See *Privacy Standards for Student Health Records*, *supra* note 8 (reporting that “[m]anagement of student health records is one of the most challenging responsibilities of school nurses”).

52. See, e.g., RAMIREZ, *supra* note 20, at 37–41 (describing various exceptions and exclusions created in the regulatory overlap of the HIPAA and FERPA privacy statutes).

identifiable health information contained within education records is not considered protected health information under HIPAA.<sup>53</sup> As such, because FERPA regulates the contents of education records, FERPA also governs individually identifiable health information contained in education records.<sup>54</sup> However, several provisions within HIPAA further complicate the framework by providing caveats to the Act's own education records exception. For example, when treatment records maintained by a school psychologist or counselor are disclosed to another entity that is HIPAA-covered (such as a hospital), HIPAA provisions protect the treatment records.<sup>55</sup> Similarly, FERPA does not protect health records maintained by school-based health clinics operating as primary-care providers because these clinics' records are not considered education records.<sup>56</sup>

#### A. Problems Inherent in the FERPA–HIPAA Overlap

Since the adoption of Title II of HIPAA in 2002, stakeholders in the field of education have expressed confusion regarding the relationship between FERPA and HIPAA in the protection and regulation of student health information.<sup>57</sup> In fact, a joint study conducted by three federal administrative agencies identified further confusion about the interplay of the FERPA–HIPAA framework and the “broad patchwork of state laws and regulations [that] also impact how information is shared on the state level.”<sup>58</sup> The difficulty inherent in the FERPA–HIPAA framework leads key stakeholders to avoid making important decisions regarding the

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53. 45 C.F.R. § 160.103 (2011).

54. *See id.* (defining “individually identifiable health information” as “information that is a subset of health information, including demographic information collected from an individual”); *see also* FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 4 (explaining that, “Because student health information in education records is protected by FERPA, the HIPAA Privacy Rule excludes such information from its coverage”); WILLIAMS, *supra* note 6, at 16 (noting that once individually identifiable health information maintained within education records is shared, it is protected by FERPA).

55. *See* RAMIREZ, *supra* note 20, at 40–41 (discussing the contours of HIPAA's treatment records exception).

56. *See* Martha Dewey Bergren, *HIPAA Hoopla: Privacy and Security of Identifiable Health Information*, 17 J. SCH. NURSING 336, 337 (2001) (detailing various implications of the FERPA–HIPAA overlap in the protection of student health records).

57. *See* *Privacy Standards for Student Health Records*, *supra* note 8 (describing the difficulties raised by the ambiguities of the FERPA–HIPAA overlap for school nurses); *see generally* Brusca & Ram, *supra* note 8, at 150 (commenting that many school-based medical professionals are “left unclear [about] the circumstances under which student health records [can] be disclosed” under the current regulatory framework).

58. U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7 (2007) [hereinafter HHS REPORT TO THE PRESIDENT], available at <http://www.hhs.gov/vtreport.pdf>.

disclosure of student health information for fear of either incurring fines or losing federal education funds in the event of a wrongful disclosure.<sup>59</sup> In essence, instead of incurring penalties and public embarrassment for their respective educational institutions, many stakeholders in the field of public education choose inaction over incorrect action when faced with difficult questions concerning student privacy regulations.

*B. The 2007 Massacre at Virginia Tech: A Case Study in Ineffective Regulation of Student Health Information Under FERPA and HIPAA*

The regulatory overlap between FERPA and HIPAA has left many educators and other stakeholders in the field of education unclear about the scope of their responsibilities in the protection of student health information.<sup>60</sup> Unfortunately, this confusion has led to dramatic consequences. For instance, many commentators have blamed the 2007 school shootings at Virginia Tech—“the deadliest shooting rampage in American history”<sup>61</sup>—on the lack of clarity inherent in the overlap of the federal privacy statutes.<sup>62</sup> These scholars argue that, although the student gunman’s parents, public school teachers, and college administrators individually possessed information concerning the student’s fragile mental

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59. See Brusca & Ram, *supra* note 8, at 151–52 (noting that “school administrators [are] left to weigh the risk of loss of federal funding against releasing records in the face of unclear standards”); Katrina Chapman, Note, *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, 367 (2009) (arguing that ambiguity in federal privacy statutes causes “many schools [to] remain overly cautious in disclosing information even where it seems clearly appropriate”); Davoren, *supra* note 35, at 429 (noting that school administrators “often find that determining what qualifies as an ‘educational record’ . . . [is] difficult” under the FERPA–HIPAA regulatory overlap).

60. See *supra* Part III.A.

61. Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, <http://nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all>.

62. See generally Brusca & Ram, *supra* note 8 (detailing education stakeholder misunderstandings of privacy laws, including HIPAA and FERPA, at the time of the school shooting); Celina Muñoz, Note, *Privacy at the Cost of Public Safety: Reevaluating Mental Health Laws in the Wake of the Virginia Tech Shootings*, 18 S. CAL. INTERDISC. L.J. 161 (2008) (discussing the complicated overlap of federal privacy statutes and Virginia state statutes that precipitated the shootings at Virginia Tech); Matthew Alex Ward, Comment, *Reexamining Student Privacy Laws in Response to the Virginia Tech Tragedy*, 11 J. HEALTH CARE L. & POL’Y 407 (2008) (highlighting weaknesses in FERPA’s safety and health emergency exceptions); Daniel Silverman, *Student Privacy Versus Campus Security: An Overstated Conflict*, 35 HUM. RTS. MAG., no. 3, 2008, available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol35\\_2008/human\\_rights\\_summer2008/hr\\_summer08\\_silverman.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_summer2008/hr_summer08_silverman.html) (detailing the “direct conflict” between student privacy laws and campus security that may have precipitated the Virginia Tech shootings).

health, a breakdown in communication between these key stakeholders ultimately resulted in deadly acts of violence.<sup>63</sup> More specifically, commentators uniformly contend that teachers and family members of student gunman Seung-Hui Cho were aware of Cho's "emotional issues" and "mental instability" as early as elementary school.<sup>64</sup> However, when Cho enrolled at Virginia Tech, neither his high school nor his parents informed the university of his fragile mental health or past treatment.<sup>65</sup> Similarly, when Cho exhibited troubling behaviors during his first semesters of college, Virginia Tech officials failed to communicate those observations to Cho's family.<sup>66</sup> Even after Cho was forced to participate in an involuntary commitment hearing at a mental health facility, Virginia Tech officials did not contact the student's parents to discuss his rapidly deteriorating mental health.<sup>67</sup> Had these stakeholders properly understood the roles of the HIPAA and FERPA privacy statutes in the disclosure and protection of student health information, perhaps they would have shared Cho's mental health information with one another, potentially avoiding the tragedy at Virginia Tech.<sup>68</sup>

Misunderstandings around the scope of HIPAA and FERPA privacy laws prevented key stakeholders from sharing information about the unstable student assailant who ultimately took the lives of over thirty individuals.<sup>69</sup> In fact, following the Virginia Tech tragedy, a joint report<sup>70</sup> promulgated by both the Secretaries of ED and HHS and the Attorney General underscored this sentiment.<sup>71</sup> Following the publication of this

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63. See, e.g., Brusca & Ram, *supra* note 8, at 154–55.

64. *Id.* at 155.

65. *Id.* at 158.

66. *Id.* at 163–64.

67. *Id.*

68. See Davoren, *supra* note 35, at 450 (arguing that amending the landscape of federal privacy statutes to provide increased clarity for education stakeholders will result in more communication among stakeholders and, ultimately, "more at-risk students . . . get[ting] help before it is too late").

69. See Brusca & Ram, *supra* note 8, at 164 (arguing that although "[i]t is clear that federal privacy laws allowed Virginia Tech to share information internally or with Cho's family . . . the laws as they had been understood in 2005 and 2006 made non-disclosure the likelier course"); Chapman, *supra* note 59, at 350 (noting that "'information silos' among educators, health providers, and public safety officials due to misinterpretations of privacy laws prevent[ed] the necessary sharing of information" about Cho and ultimately led to the Virginia Tech shootings).

70. It is important to note that the REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY did not discuss the specifics of the events at Virginia Tech, but instead provided insight regarding the breakdown between federal privacy legislation and the stakeholders charged with enforcing the terms of the statutes. See HHS REPORT TO THE PRESIDENT, *supra* note 58, at 1.

71. See *id.* at 7 (citing "significant misunderstanding about the scope and application of"

joint report responding to the Virginia Tech tragedy, the Secretaries of ED and HHS again joined forces to develop guidance on the shared role of their agencies' respective federal privacy statutes in the protection of student health records.<sup>72</sup> This eleven-page guidance document both provides an overview of the individual FERPA and HIPAA statutes and responds to common questions about the scope of the statutes' overlapping provisions.<sup>73</sup> While this document has likely helped guide some stakeholders in the field of public education, commentators remain uncertain whether it provides sufficient guidance to unravel all ambiguities inherent in the FERPA–HIPAA regulatory overlap.<sup>74</sup> Indeed, more recent examples of violence on public school campuses further call into question the effect of this joint guidance.

### C. Future Concerns About the Protection of Student Health Information

Sadly, acts of horrific school-based violence are not historically limited to post-secondary campuses;<sup>75</sup> in fact, such violence has occurred on elementary, secondary, and post-secondary campuses alike since the 2007 massacre at Virginia Tech.<sup>76</sup> Additionally, the prevalence of both student bullying and student suicide in schools has caused a sensation in the media

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HIPAA and FERPA).

72. See FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 1 (declaring that the joint guidance is meant “to address apparent confusion on the part of school administrators, health care professionals, and others as to how [HIPAA and FERPA] apply to records maintained on students”).

73. The guidance document details situations that school-based health professionals frequently encounter in the performance of their duties and further provides recommendations concerning the role of FERPA and HIPAA in any corresponding analysis concerning the privacy of student health records. The document's scope is fairly limited, however, and the agency authors advise school officials seeking additional clarification to contact FPCO for “technical assistance.” See FERPA/HIPAA JOINT GUIDANCE, *supra* note 47, at 11.

74. See Brusca & Ram, *supra* note 8, at 168 (noting that the ultimate effect of the joint guidance document remains unclear).

75. Perhaps two of the most widely known instances of student shootings at the secondary school level are the 1999 shootings at Columbine High School in Littleton, Colorado and the shooting at an Amish school in rural Pennsylvania in 2006. Cf. Randy Borum et al., *What Can Be Done About School Shootings? A Review of the Evidence*, 39 EDUC. RESEARCHER 27 (2010), available at <http://youthviolence.edschool.virginia.edu/pdf/school-shootings-article-by-borum-cornell-2010.pdf> (discussing high-profile school shootings over the past several decades that have generated interest in the issue of school violence).

76. See *infra* notes 77–79 and accompanying text. See generally *Fast Facts*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=49> (last visited Aug. 7, 2012) (documenting, through statistical analysis, different forms of school-based violence that occurred between 2009 and 2010 alone).

in recent years.<sup>77</sup> In the face of such continued violence in schools, concerns similar to those expressed following the Virginia Tech tragedy remain pertinent in the regulation of student health records on public school campuses. For example, T.J. Lane, the seventeen-year-old student assailant who fatally shot three students at his Ohio high school in February 2012, exhibited a history of violence against others.<sup>78</sup> Even more recently, Alexander Song, a student at the University of Maryland who posted violent threats against the campus community on a social networking website in March 2012, exhibited signs of emotional distress mere days before his arrest for threatening to “kill enough people to make it to national news.”<sup>79</sup>

These recent occurrences illustrate both the continued threat to student safety on public school campuses and the potential role of student health information in identifying future disruptions to campus safety.<sup>80</sup> Further, these case studies underscore the urgency with which the FERPA–HIPAA regulatory framework protecting student health information must be amended to avoid future stakeholder confusion and, perhaps, prevent another campus tragedy. In light of such continued and contemporary concerns for the protection of student health information, reform of the FERPA–HIPAA regulatory overlap is necessary to ensure adequate regulation of student health information—and even student safety on school campuses.

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77. See generally John Cloud, *Prosecuting the Gay Teen Murder*, TIME Feb. 18, 2008, <http://www.time.com/time/nation/article/0,8599,1714214,00.html> (reporting the shooting of a gay middle school student, while the student was in his classroom, by another student); Erik Eckholm & Katie Zezima, *9 Teenagers Are Charged After Suicide of Classmate*, N.Y. TIMES, March 30, 2010, at A14; Susan Donaldson James, *Boy Assaults Gay Student as Cellphone Captures Attack*, ABC NEWS Oct. 28, 2011, <http://abcnews.go.com/Health/ohio-bully-beating-gay-student-caught-cell-phone/story?id=14834057#.Tr8QJRxyL8> (reporting the assault of a gay high school student that was captured on a cell phone video camera).

78. See, e.g., Sabrina Tavernise & Jennifer Preston, *School Shooting Suspect Was Accused of Earlier Assault*, N.Y. TIMES, Feb. 29, 2012, [http://www.nytimes.com/2012/03/01/us/school-shooting-suspect-was-accused-of-earlier-assault.html?\\_r=2&ref=schoolshootings](http://www.nytimes.com/2012/03/01/us/school-shooting-suspect-was-accused-of-earlier-assault.html?_r=2&ref=schoolshootings) (recounting Lane’s personal and criminal history).

79. See, e.g., Associated Press, *University of Maryland Student Charged in Internet Shooting Threat*, FOX NEWS, Mar. 12, 2012, <http://www.foxnews.com/us/2012/03/12/university-maryland-student-charged-over-internet-shooting-threat/>.

80. Arguably, had health information about these student assailants been utilized appropriately, these recent breaches of school security could have been avoided.

#### IV. ENSURING THE PRIVACY OF STUDENT HEALTH INFORMATION THROUGH THE ABANDONMENT OF THE DUAL-HEADED SYSTEM OF GOVERNANCE

The current system of protecting student health information through two separate statutes—which are governed by two separate administrative agencies—is inefficient and fails to serve the purpose of either HIPAA or FERPA. In fact, providing for the protection of health information of any kind through FERPA, a statute designed to protect general education records, is counterintuitive and has led to questionable results.<sup>81</sup> Therefore, instead of providing for a complicated system of dual-headed governance, Congress should uphold its interest in promulgating an effective education system by providing for the protection of student health records in a single, unambiguous federal statute. Specifically, the federal government should both abandon the protection of student health information under the FERPA statute and strengthen the provisions of HIPAA to ensure adequate regulation of student health information in public schools.

##### A. *Abandoning FERPA in the Protection of Student Health Records*

Providing for the regulation of student health information through two completely independent statutes—promulgated by two distinct administrative agencies—is illogical. To simplify the current system of protecting student health records, the federal government should thus abandon its current practice of protecting student health records through the provisions of FERPA. A brief comparison of the respective histories, enforcement procedures, and historical effectiveness of HIPAA and FERPA indicates the reasonableness inherent in the decision to abandon the ED-enforced statute and instead rely solely upon HIPAA and, consequently, HHS administrative oversight.

##### 1. *FERPA Was Not Designed to Protect Student Health Records*

Allowing HIPAA to exclusively govern the security of student health information is logical given the original legislative purposes of the HIPAA and FERPA privacy statutes.<sup>82</sup> While both statutes undoubtedly address the privacy of personal information, HIPAA and FERPA are intended to protect vastly different types of private information. More specifically, while HIPAA concerns the privacy and security of personal health

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81. See Brusca & Ram, *supra* note 8, at 149 (noting that FERPA’s “success in balancing health care privacy against public safety [is], at best, mixed”).

82. See WILLIAMS, *supra* note 6, at 18 (highlighting that “FERPA protects education records” while “HIPAA protects . . . individually identifiable health information”).

information,<sup>83</sup> the intent of FERPA is to protect general education records.<sup>84</sup> Therefore, it makes sense, in light of these intended legislative purposes, to abandon FERPA in the protection of student health records and, instead, regulate this subcategory of student information through the more relevant provisions of HIPAA.<sup>85</sup> This contention is bolstered further by the fact that commentators frequently criticize FERPA for its ineffectiveness at protecting student health records—as evidenced in the wake of the Virginia Tech tragedy.<sup>86</sup>

## 2. *FERPA's Enforcement Procedures Are Too Weak*

The Supreme Court has held that there is no private remedy for students whose FERPA rights are violated.<sup>87</sup> Instead, the only recourse afforded aggrieved students under FERPA is the ability to file a complaint with the FPCO.<sup>88</sup> However, while allowing the filing of complaints with the FPCO, no provision of FERPA “require[s] that complaints be processed” or provides a timeline for investigating processed complaints.<sup>89</sup> In short, therefore, there is no guarantee that ED, through the FPCO, will even consider alleged violations of a student’s FERPA privacy rights. Even where a complaint is processed, FPCO decisions indicate that FERPA violations are only addressed by the Office in instances of repeated, systemic noncompliance.<sup>90</sup>

Conversely, the enforcement provisions of HIPAA provide for both civil

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83. *See supra* Part II.B.

84. The original definition of “education records” under FERPA contained a list of examples of protected student information including attendance data, completed academic assignments, scores on standardized tests, family background information, and “verified reports of serious or recurrent behavior patterns.” *See* Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484 (codified as amended at 20 U.S.C. § 1232g (1976)). While this “laundry list” definition did initially include “health data,” subsequent amendments to the Act have provided for the exemption of “mental or physical health treatment records” from the definition of education records. *See* Daggett & Huefner, *supra* note 26, at 13–16.

85. *See* Siegler, *supra* note 12, at 259–64 (stating that “health care documentation is . . . not appropriate as part of an educational record” and, further, that “[o]nly those student health records which relate directly to a pupil’s classroom experience are legitimately educational in nature”).

86. *See supra* Part III.B.

87. *See supra* Part II.A.

88. *See supra* Part II.A.

89. Daggett, *supra* note 5, at 66.

90. *See id.* at 67 (stating that courts frequently find violations of FERPA only where there is a “pattern or policy of misconduct, rather than individual violations”); *cf.* Ward, *supra* note 62, at 417 n.81 (noting that ED, through the FPCO, has never rescinded federal funds from a college or university as the result of a FERPA record keeping violation).

and criminal penalties in the event of a HIPAA privacy violation.<sup>91</sup> The more stringent enforcement policies of HIPAA can even require the incarceration of violators.<sup>92</sup> Obviously, HIPAA's stricter enforcement provisions provide greater incentive for stakeholders to protect sensitive health information in accordance with federal law. Given the high stakes involved in the regulation of sensitive student information, regulating student health information exclusively through HIPAA's provisions properly serves the privacy interests of students and, as such, is more logical than the current, complicated regulatory scheme.

### 3. *FERPA's Provisions Are Difficult for Stakeholders to Interpret*

As mentioned previously, the individual provisions of FERPA, standing alone, are frequently difficult for practitioners to interpret.<sup>93</sup> As can be expected, such difficulty is only compounded when the often incoherent provisions of FERPA overlap with HIPAA privacy provisions to regulate the security of student health information.<sup>94</sup> Unfortunately, the incomprehensibility of the FERPA–HIPAA overlap leads to confusion among stakeholders and, sometimes, tragic results in schools.<sup>95</sup> To simplify this complicated system, Congress should abandon the FERPA regulatory framework for protecting student health information. Following removal of the FERPA statute from the regulatory framework, stakeholders faced with difficult decisions concerning the disclosure of student health records will be more likely to understand the legal protections afforded to student health information and, consequently, act both in accordance with the law and in the best interest of students. Furthermore, because time is often of the utmost importance in issues involving student-on-student violence and school security, simplification of the regulatory framework will lessen the time education stakeholders spend engaging in complicated analysis to determine the appropriate handling of student health records.

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91. See WILLIAMS, *supra* note 6, at 18 (contrasting the penalties afforded complainants under the FERPA and HIPAA statutes).

92. See *id.* (discussing the criminal penalties imposed upon violators of HIPAA, “includ[ing] jail sentences and significant monetary fines”).

93. See *supra* Part II.A.1; see also Chapman, *supra* note 59, at 363–64 (calling a “lack of guidance in FERPA’s text and [ED’s] regulations . . . a primary reason” that education stakeholders fail to use the relevant provisions of FERPA effectively); Stuart, *supra* note 10, at 1164 (describing FERPA as “an incoherent maze of legislative double-talk” and explaining the difficulty inherent in attempts to interpret the Act); MURPHY & DISHMAN, *supra* note 21, at 2 (implying that the complicated and intricate provisions of FERPA make it “difficult for schools not to violate FERPA” in the performance of educational duties).

94. See *supra* Part III.A.

95. See *supra* Part III.B.

*B. Strengthening HIPAA's Provisions to Ensure the Protection of Student Health Information*

Abandoning the complicated dual-headed system of governance that results from the FERPA–HIPAA statutory overlap will simplify federal efforts to protect and regulate student health information.<sup>96</sup> To achieve such simplification, it is imperative that Congress eliminates FERPA from this regulatory scheme and, instead, ensures the protection of student health information solely through the HIPAA privacy provisions. Relying on the HIPAA statute in its current form, however, would not serve to regulate the use of student health information to the fullest extent necessary. As demonstrated, ambiguity in privacy statutes leads to inefficiency and inaction on the part of key stakeholders across educational institutions.<sup>97</sup> As such, the amended HIPAA statute should include definite, explicit provisions for the maintenance, protection, and use of student health records.

First, the amended HIPAA provisions should include a stipulation that encourages both state and local governments to supplement the baseline HIPAA protections to more completely address the specific needs of their local school systems, students, and school-based health care providers.<sup>98</sup> Further, incentives should be built into the revised HIPAA statute to encourage local and state decisionmakers to legislate specific privacy provisions for student health records that extend beyond those provided for general education records. As HIPAA privacy regulations will protect student records in more than 13,000 school districts across the country,<sup>99</sup> allowing for differentiation in this way will empower state governments to protect and prescribe the use of sensitive student health information in a manner that is responsive to the realities of their local public school systems.

Second, although eliminating FERPA from the regulation of student health information will greatly streamline the regulatory framework for practitioners, it will remain important to provide support to stakeholders

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96. See *supra* Part IV.A.

97. See *supra* Part III.A.

98. Currently, HIPAA permits state laws to offer privacy protections that serve to enhance those protections provided by the federal statute as long as the state law is not contrary to the HIPAA Privacy Rule. See *Health Information Privacy, Frequently Asked Questions*, U.S. DEP'T OF HEALTH & HUMAN SERVS., [http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption\\_of\\_state\\_law/405.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/405.html) (last updated Dec. 11, 2006).

99. See *Numbers and Types of Public Elementary and Secondary Local Education Agencies from the Common Core of Data: School Year 2009–10*, NAT'L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/pubs2011/pesagencies09/tables/table\\_01.asp](http://nces.ed.gov/pubs2011/pesagencies09/tables/table_01.asp) (last visited Aug. 7, 2012) (displaying statistics regarding the number and type of local education agencies across the United States).

that clearly and effectively explains the amended HIPAA privacy provisions. In the past, to the detriment of student privacy, little guidance has been offered to school-based health professionals and other stakeholders about their responsibilities under the federal framework for protecting sensitive student information.<sup>100</sup> Moving forward, it is imperative to educate these important stakeholders about relevant procedures, responsibilities, and guidelines in the protection and use of student health records.<sup>101</sup> Additionally, the HIPAA statute should provide for some form of continued certification or education for school-based medical professionals whose daily responsibilities concern the maintenance, distribution, and destruction of student health documents.<sup>102</sup>

Finally, as mentioned above, privacy statutes must be responsive to evolving societal needs and values.<sup>103</sup> As such, the amended HIPAA regulation should provide for the periodic re-evaluation of the privacy provisions regulating student health information in public schools. By mandating such re-evaluation, the standards and provisions of HIPAA will remain responsive to changing societal needs.<sup>104</sup> By removing FERPA from the regulatory framework and augmenting the provisions of HIPAA in these delineated ways, Congress will greatly improve the regulatory framework used to protect student health information.

#### CONCLUSION

HIPAA and FERPA both regulate the privacy of student health information through a complicated, ambiguous, and unwieldy system of exceptions and overlapping provisions. The shortcomings of this dual-headed system have been demonstrated in dramatic ways, perhaps most

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100. See, e.g., Stuart, *supra* note 10, at 1161 (stating that, historically, “local educational agencies, who must implement the protections, are left to their own devices to untangle the incoherency of the statutory privacy [regulations]”); see also *supra* Part III.A.

101. See Muñoz, *supra* note 62, at 187 (recommending that “clarification about the limits and boundaries of current federal . . . privacy laws needs to be provided to those involved in the educational system”).

102. Such requirements should arguably mirror the types of “continuing education credits” required of other medical professionals, such as those laws that require doctors to complete a designated number of hours of education in a given field of medicine in order to retain certification to practice. See Philip M. Rosoff & Doriane Lambelet Coleman, *The Case for Legal Regulation of Physicians’ Off-Label Prescribing*, 86 NOTRE DAME L. REV. 649, 665 (2011).

103. See *supra* Part II.A.2.

104. Further, in the event of another catastrophe similar to the 2007 school shooting at Virginia Tech, such amendment of HIPAA will ensure that the Department of Health and Human Services has the infrastructure in place to both promptly investigate the breakdown of the regulatory scheme and augment the provisions of HIPAA in a responsive manner.

famously in the aftermath of the Virginia Tech shootings of 2007.<sup>105</sup> As attempts by both ED and HHS to mitigate these shortcomings for practitioners have proven ineffective, Congress must reform the current, dual-headed system of governance to avoid further mistakes and to ensure the safety and integrity of school campuses.

HIPAA regulatory provisions should exclusively protect student health records. Additionally, Congress should strengthen HIPAA's provisions to ensure the effectiveness of the streamlined regulatory framework. The implementation of this new system ensures that stakeholders in the field of public education will be better positioned to navigate federal privacy regulations, helping to ensure both that sensitive student health information is protected and that future tragedies like the 2007 shooting at Virginia Tech do not recur in schoolhouses across America.

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105. *See supra* Part III.B.