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Before It's Too Late: A FERPA Proposal to Improve How College and University Administrators Respond to Suicidal Ideation and Suicide Attempt

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Table of Contents

I. INTRODUCTION.....3

II. THE PROBLEM.....5

 a. The Student Mental Health Crisis.....5

 b. Widespread Misunderstanding of FERPA in Higher Education.....7

III. CURRENT STATE OF THE LAW.....12

IV. THE SOLUTION.....16

V. CONCLUSION.....22

 a. Potential Criticisms to the Proposals.....22

I. INTRODUCTION

A New York Times article from May 12, 2018, chillingly entitled *His College Knew of His Despair. His Parents Didn't, Until It Was Too Late*, told the fatal story of Graham Burton.¹ Burton was a sophomore student at Hamilton College in upstate New York when he died by suicide in his campus residence hall. As the article's title insinuates, a few of the school's administrators were aware that Burton seemed to be struggling but did not share any information with Burton's parents.²

A few warning signs were visible to the College's faculty. When Burton had been struggling to complete his schoolwork and was regularly absent from class, his professors noticed a pattern. Three of his professors, his academic advisor, and his academic dean exchanged emails regarding Burton's lack of consistency in fulfilling his academic responsibilities³. Additionally, his professors submitted four formal academic warnings. One professor even directly suggested that Burton visit the campus counseling center if he was feeling depressed.⁴ Notably, it seems as if none of them were ever aware of suicidal ideation; though, it also seems as if they never asked.⁵

Prior to Graham Burton's death by suicide, his academic advisor had sent an email to the academic dean stating that "Obviously what's happening here is a complete crash and burn. I don't know what the procedures/rules are for contacting parents but if this was my kid, I'd want to know."⁶ Later citing the Federal Educational Rights and Privacy Act (FERPA)⁷, Hamilton College's administrators did not contact Burton's parents.⁸

¹ Anemona Hartocollis, *His College Knew of His Despair. His Parents Didn't, Until it Was Too Late*, NEW YORK TIMES (May 12, 2018), <https://www.nytimes.com/2018/05/12/us/college-student-suicide-hamilton.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Family Educational and Privacy Rights, U.S. Code 20 § 1232g (2011).

⁸ Hartocollis, *supra* note 1.

In an email to the College's president after her child's death, Burton's mother lamented: "The question that will haunt us forever is why didn't she [the academic dean] call us?" That question is the focus of this paper.

As higher education reemerges on the other side of the COVID-19 pandemic, the time has come to forcefully confront an issue that its leaders have evaded for too long: how college and university⁹ administrators respond to student mental health crises, specifically situations which involve suicidal ideation and suicide attempt.

A variety of initiatives are already implemented or being developed to enhance student support,¹⁰ which is encouraging, but significant advances are still needed to create campuses that maximize support in cases of student mental health crises. The legal field must play its part. This paper asserts a practical policy change that benefits college administrators and, more importantly, college students who are most in need of support.

Namely, the health and safety emergency exception to FERPA should be extended to allow certain college and university administrators to provide parents with information related to a student's suicidal ideation or suicide attempt, even if the parents' knowledge of the information is not necessary to protect the health or safety of the student or other individuals. That decision should be discretionary and only permitted with the existence of actual and foreseeable harm. The individuals who ought to be permitted to make discretionary decisions regarding this release of information should be limited to the dean of students, campus security employees, and campus mental health professionals.

⁹ The terms "college" and "university" are not distinguished from one another for the sake of this paper. Thus, they are used interchangeably.

¹⁰ Amy Eva, *How Colleges Today Are Supporting Student Mental Health*, GREATER GOOD MAGAZINE (January 11, 2018), https://greatergood.berkeley.edu/article/item/how_colleges_today_are_supporting_student_mental_health.

This argument will be organized into five sections. After this introduction is a description of the problem, which will cover the national student mental health crisis and general misunderstanding of FERPA in higher education. Next is a survey of the progression and current state of college suicide liability law. The fourth section, the most substantial part of this paper, comprises a detailed discussion of the proposed solution to the problem. Finally, the conclusion will discuss potential criticisms of this proposal and serve as a vital call to action: in short, legislators must act so that parents are included in the conversation regarding students' mental health struggles before it's too late.

II. THE PROBLEM

The issue being addressed in this paper stems from two outwardly distinct concerns. First, student mental health troubles, specifically cases of suicidal ideation, are at an all-time high and trending upward.¹¹ Second, FERPA often puzzles higher education administrators trying to follow its direction in practice. As cases of suicidal ideation and death by suicide continue to increase on college campuses, legislators must clarify – or, more accurately, are way overdue on clarifying – FERPA's impact on how higher education administrators should respond to concerns related to suicide.

a. The Student Mental Health Crisis

Simply, college student mental health is the largest concern facing higher education administrators today. By every measure, student mental health has been declining over the past decade. One study which observed trends in student mental health from 2013 to 2021 found a 50%

¹¹ Sarah Lipson, *Trends in college student mental health and help-seeking by race/ethnicity: Findings from the national healthy minds study, 2013–2021*, 306 JOURNAL OF AFFECTIVE DISORDERS 138 (2022). <https://pubmed.ncbi.nlm.nih.gov/35307411/>.

increase in prevalence of students receiving treatment for their mental health.¹² That study also found disparities in mental health related to ethnic identity. American Indians had the largest increase in seeking mental health help.¹³ Asian, Black, and Latinx students showed the highest rate of treatment, while White students showed the lowest rate of treatment.¹⁴ A subsidiary difficulty is that more students seeking help for mental health results in more appointments for the people dedicated to helping student mental health.¹⁵ According to the Center for Collegiate Mental Health's 2021 Annual Report, college psychological counselors' typical annual caseload is approximately 120 students – some counselors see up to 300 students annually.¹⁶ That strain on counseling centers at universities, naturally, makes it more difficult to combat the mental health crisis.¹⁷

It would be remiss not to mention that the COVID-19 pandemic worsened student mental health.¹⁸ The pandemic began during a critical developmental period for students currently enrolled in higher education: they were either in college, transitioning into college, or in high school preparing for college. The isolation and lack of social interaction caused by the pandemic made that developmental stage tough.¹⁹ According to the American Psychological Association, more than 60% of college students met the criteria for at least one mental health problem during

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 2021 Annual Report, (2021), <https://ccmh.psu.edu/assets/docs/2021-CCMH-Annual-Report.pdf>. The Center for Collegiate Mental Health Annual Report surveyed 685 member institutions. Missing data and incomplete audits resulted in a sample size of 626. The purpose is to “provide accurate and consistent comparable supply-demand metric that describes the landscape of staffing levels” in college and university counseling centers.

¹⁷ Zara Abrams, *Student mental health is in crisis. Campuses are rethinking their approach*, 53 *MONITOR IN PSYCHOLOGY* 60 (2022).

¹⁸ Nicholas Grubic, Shaylea Badovinac & Amer Johri, *Student mental health in the midst of the COVID-19 pandemic: A call for further research and immediate solutions*, 66 *INTERNATIONAL JOURNAL OF SOCIAL PSYCHIATRY* 517 (2020).

¹⁹ *Id.*

the 2020-2021 academic year.²⁰ In another study during that same year, nearly 75% of students reported moderate or severe psychological distress.²¹ It is also likely that the pandemic has not yet made its full impact on student mental health in higher education, as students who were taking virtual classes in younger developmental phases are not yet college students.²² While leaders in higher education may have been able to avoid solving the mental health crisis prior to the pandemic, supplementary struggles caused by COVID-19 brought light to the lack of support for student mental health and put pressure on administrators – and legislators – to act now.

The worst result of declining student mental health is increasing suicidality. In an analysis of 55,156 student clients in the 2021 Center for Collegiate Mental Health Annual Report, clinicians reported that suicidality was the top concern for 1.2% of clients and a concern for 9.2%.²³ More than 5,000 college students, then, were considered suicidal based on data reported by professional clinicians – just based on the students who sought help. It is important to note that while many students show signs of depression or anxiety, others suffer silently.^{24 25} From 2012-2021, serious suicidal ideation rose 3% and suicide attempts continue to rise with relative consistency.²⁶ Frankly, any data analysis would prove heartbreaking. College suicide numbers are far too high.

This problem with those numbers does not require thorough explanation. Death of a child is any parent's worst nightmare, particularly death by suicide. College and university

²⁰ Abrams, *supra* note 17.

²¹ *Id.*

²² Grubic, Badovinac, and Johri, *supra* note 18.

²³ 2021 Annual Report, *supra* note 16.

²⁴ Swapnil Mehta & Matthew Edwards, *Suffering in Silence: Mental Health Stigma and Physicians' Licensing Fears*. <https://doi.org/10.1176/appi.ajp-rj.2018.131101>; Robert Bell et al., *Suffering in Silence: Reasons for Not Disclosing Depression in Primary Care*, 9 ANNALS OF FAMILY MEDICINE 439 (2011).

²⁶ 2021 Annual Report, *supra* note 16.

administrators, likewise, struggle terribly with the death of one of their students.²⁷ Most importantly, death by suicide ends the hopeful future of a, typically young, college student. Serious, practical, and effective changes must continue to be implemented to fix this issue – and they ought to happen quickly.

b. Widespread Misunderstanding of FERPA in Higher Education

The Family Educational Rights and Privacy Act (FERPA)²⁸ has been considered a confusing piece of legislation for higher education administrators to utilize in practice, ever since it was first introduced in 1974 to provide students with enumerated rights to privacy of their educational records.²⁹ FERPA, commonly referred to as the Buckley Amendment after former New York Senator, James Buckley,³⁰ applies to any educational institution in the United States which receives federal funding and threatens that the funding to those institutions will be withheld for anyone who violates it.³¹ Therefore, an overwhelming majority of schools must adhere to it.

The essence of FERPA is that school administrators must receive express consent to release any information from a student’s educational record.³² Under FERPA, parents of a large majority of elementary- and high school-aged children receive certain rights to their children’s educational records.³³ According to the United States Department of Education, educational records “include but are not limited to grades, transcripts, class lists, student course schedules, health records (at

²⁷ Dierdre Flynn, *Student Death and the University Response*, 7 UNIVERSITY AND COLLEGE COUNSELING (2019), <https://www.bacp.co.uk/bacp-journals/university-and-college-counselling/november-2019/student-death-and-the-university-response/>.

²⁸ *Id.*

²⁹ Amelia Vance & Casey Waughn, *Student Privacy’s History of Unintended Consequences*, 44 SETON HALL LEGISLATIVE JOURNAL 515 (2019).

³⁰ Lee Hoffman, *Protecting the Privacy of Student Education Records*, NATIONAL CENTER FOR EDUCATION STATISTICS (1996), <https://nces.ed.gov/pubs/web/96859.asp>.

³¹ 34 CFR § 99.1(a) (2023).

³² 20 U.S.C. 1232g(a)(4).

³³ What is an education record?, DEPARTMENT OF EDUCATION, <https://studentprivacy.ed.gov/faq/what-education-record>.

the K-12 level), student financial information (at the postsecondary level), and student discipline files.”³⁴ For FERPA purposes, student mental health and counseling records that are held by a school are also considered to be educational records.³⁵ Administrators may, however, disclose certain information – called “directory” information – without consent.³⁶ Directory information typically includes, but is not limited to, a student’s name, phone number, email, address, date of birth, dates of attendance, and athletics-related information.³⁷ Schools may share details regarding directory information with their students; they are granted discretion to decide how to notify its community of what is considered to be directory information.³⁸

Once a person reaches the age of 18 or attends a school beyond the high school level which is bound by FERPA, however, educational rights fully transfer to the student.³⁹ Students who own the rights to their educational rights are called “eligible students”⁴⁰. College and university administrators, thus, are bound specifically by the privacy granted to “eligible students” under FERPA. Hereinafter, when analyzing FERPA and proposing an amendment to it, this paper will focus on eligible students, unless otherwise stated.

While a lack of precedent exists surrounding FERPA and no institution has ever lost federal funding by violating it, two Supreme Court cases in 2002 offered a bit of clarity in terms of the bounds of this legislation.⁴¹ *Owasso Independent School District No. I-011 v. Falvo* considered whether peer grading constituted an educational record.⁴² The Court concluded that, since

³⁴ *Id.*

³⁵ *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, supra note 9.*

³⁶ 34 CFR § 99.31

³⁷ *Id.*

³⁸ 34 CFR § 99

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Martha McCarthy, *The Supreme Court Addresses Student Records: Peer Grading Passes the Test*, 81 EDUCATIONAL HORIZONS 13 (2002).

⁴² *Owasso Independent School Dist. v. Falvo*, 534 U.S. 426 (2002)

individual students are not “acting for” educational institutions and peer-graded items are not “maintained” within the meaning of FERPA, peer grading and discussing the grades is permitted under FERPA.⁴³ Notably, the Court failed to broaden its ruling to include whether teacher’s gradebooks are considered educational records.⁴⁴ The next 2002 case, *Gonzaga University v. Doe*, would have increased the significance of FERPA when the Court considered whether private damages could be awarded based on a FERPA violation.⁴⁵ However, the Court ruled that private rights do not exist pursuant to FERPA, stating that Congress must create private rights in “clear and unambiguous terms.”⁴⁶ Further, the Court ruled that “FERPA’s nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions.”⁴⁷ Thus, those two 2002 cases clarified that student grading is not a violation of FERPA and the only damage resulting from FERPA is loss of federal funding.

FERPA establishes sixteen exceptions under which prior consent is not required to disclose information.⁴⁸ The exceptions apply to all students, whether or not they yet own their own educational records.⁴⁹ A few of the exceptions are disclosure to other school officials who have legitimate educational interests; disclosure to accrediting organizations; disclosure for purposes of financial aid eligibility or amount; and disclosure to parents of students who violate any Federal, State, or local law or any policy of the institution governing the use of alcohol or a controlled

⁴³ *Id.* at 433.

⁴⁴ *Id.* at 436.

⁴⁵ *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

⁴⁶ *Id.* at 290.

⁴⁷ *Id.*

⁴⁸ 34 CFR § 99.31 (2023).

⁴⁹ *Id.*

substance if the student is under the age of 21 at the time of disclosure.⁵⁰ This paper focuses on one of them: the health and safety emergency exception.⁵¹

The health and safety emergency exception of FERPA,⁵² states that “an educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” An educational institution, it adds, ought to consider the “totality of the circumstances,” based on the threat to the health or safety of a student or other individuals, when considering whether to disclose information during a time of emergency. The exception also notes that, granted “rational basis” exists for determination of disclosure, the Department of Education will not “substitute its judgment” in making a determination regarding a potential violation of FERPA.⁵³

Seemingly, the statute is deferential to educational administrators. A strong argument exists that if a college or university were sued for violating FERPA after sharing information with parents regarding a student’s suicidal ideation or suicide attempt, the school would likely not be found liable. Essentially, under this “rational basis” test, a college administrator may conclude that a suicidal threat constitutes a health emergency of the sort contemplated by the exception. However, educational administrators are typically not trained in the law. Additionally, administrators who find themselves in those positions are under pressure and require quick decisions. The broad discretion should be beneficial to supporting students; unfortunately, however, many

⁵⁰ *Id.*

⁵¹ 34 CFR § 99.31(a)(10) (2023).

⁵² 34 CFR § 99.36 (2023).

⁵³ 34 CFR § 99.31(a)(10) (2023).

administrators interpret their discretion too narrowly out of fear of being sued or a strict understanding of FERPA.⁵⁴

Perhaps the most well-known recent example of an issue arising from the misunderstanding of FERPA's health and safety emergency is the 2007 tragic shootings at Virginia Tech University. After the shootings, President George W. Bush convened the United States Secretary for the Department of Health and Human Services, Secretary for the Department of Education, and Attorney General to discuss broad issues raised by the tragedy and provide recommendations in the hopes that a similar tragedy would never again occur.⁵⁵ The first and most important finding in that report is "Critical Information Sharing Faces Substantial Obstacles."⁵⁶ That discussion included "information silos" between critical university administrators due to their misunderstanding of federal privacy laws, particularly FERPA. "Throughout our meetings and in every breakout session, we heard differing interpretations and confusion about legal restrictions on the ability to share information about a person who may be a threat to self or to others," they wrote, referring to FERPA's health and safety emergency exception.⁵⁷ They also stated that participants [in the meetings] reported circumstances in which they incorrectly believed that they were subject to liability or foreclosed from sharing information under federal law."⁵⁸ Notably, the *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* referenced earlier in this paper was a direct recommendation of this report. Other

⁵⁴ Rene Couture, *FERPA Fear or FERPA Flex: Student Affairs Practitioners' Understanding of Federal Privacy Laws on Campus*, STUDENT AFFAIRS IN HIGHER EDUCATION AND THE SCHOOL OF EDUCATION, <https://sahe.colostate.edu/ferpa-fear/>.

⁵⁵ Michael Leavitt, Margaret Spellings & Alberto Gonzales, *Report to the President on Issues Raised by the Virginia Tech Tragedy*, (2007), 3, https://www.justice.gov/archive/opa/pr/2007/June/vt_report_061307.pdf.

⁵⁶ *Id.* at 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

recommendations were offered in the report to clear up privacy-sharing concerns so that “family members, educational administrators, mental health providers, and other appropriate persons understand when and how they are legally entitled to share and receive information about mental illness... particularly where college [students] are involved.”⁵⁹ Fifteen years later, confusion should not persist.

Myriad examples could be offered to evidence the misunderstanding of FERPA, particularly its health and safety emergency exception, in the context of higher education,⁶⁰ as the federal executive branch of the United States government’s acknowledgement of the issue was culmination of many years of confusion amongst higher education leaders. A deeper dive into specific instances, though, seems futile. Unfortunately, the recommendations presented in that report did not produce enough change to adequately clarify FERPA for college and university administrators. Perhaps more challenging for individuals and groups attempting to develop policies for their institutions, no caselaw exists to help carve out a better interpretation of the language in FERPA’s health and safety emergency exception.

A question may arise regarding the Health Insurance Portability and Accountability Act (HIPAA). HIPAA, signed into law in 1996, protects individuals’ medical records and gives individuals rights over their medical records.⁶¹ Notably, HIPAA does not apply to cases of student suicide attempt or suicidal ideation at colleges and universities, as per the “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” issued by the

⁵⁹ 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, *supra* note 9.

⁶⁰ Vance and Waughn, *supra* note 29.

⁶¹ Wrongful disclosure of individually identifiable health information, U.S. Code 42 § 1320d-6 (2010)

Department of Education and Department of Health and Human Services.⁶² HIPAA only applies to institutions of higher education in terms of private records regarding the treatment of non-students in a university's healthcare facility. Any information regarding students held by their own university – including records from mental health centers or campus health clinics – is considered part of the student's educational record.⁶³ Thus, HIPAA is not relevant to any analysis in this paper, since it is exempted from student health records which are maintained as educational records by colleges and universities.

Altogether, the rise of suicide ideation and suicide attempts on college campuses and the misunderstanding of FERPA's health and safety emergency exception intersect to cause a dangerous problem. This problem must be addressed with intention and urgency.

III. CURRENT STATE OF THE LAW

A relevant review of the current state of caselaw includes a summary of the progression of college and university suicide liability law. Generally, courts have gradually chipped away at universities' initial absence of liability in terms of student suicide.⁶⁴ Suicide liability for institutions of higher education is a modern notion which will continue developing as courts are faced with difficult facts surrounding college student suicide and suicide attempt. Aligned with suicide liability law generally, colleges and universities were not considered responsible for student suicide in any extent until just within the past few decades. While a vast majority of cases

⁶² 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, *supra* note 9.

⁶³ *Id.*

⁶⁴ Heather Moore, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 423, 40 INDIANA LAW REVIEW 423 (2007).

continue to find no liability, a very small set of caselaw certainly worries higher education administrators about what is to come.

The landmark university suicide liability case is *Jain v. State of Iowa*.⁶⁵ This case, decided by the Iowa Supreme Court in 2000, ruled that the University of Iowa did not owe a duty to tell Sanjay Jain’s parents of his suicidal ideation or a duty to protect Jain from death by suicide.⁶⁶ Jain had attempted suicide and struggled with alcohol, drugs, and relationships – his Resident Assistant, Residence Hall Coordinator, and Assistant Director for Residence Life were all aware of those facts.⁶⁷ After Jain’s first suicide attempt, his Residence Hall Coordinator requested permission to contact Jain’s parents to include them in the conversation regarding his suicidal ideation – Jain did not consent.⁶⁸ Just a couple weeks later, Jain died by suicide by self-inflicted carbon monoxide in his residence hall room. An “unwritten University policy” was to contact a student’s parents with “evidence of a suicide attempt,” according to the court’s opinion.⁶⁹ The decision to share that information was solely at the discretion of the dean of students; however, he was never made aware of Jain’s suicidal ideation – without Jain’s consent, then, Jain’s parents never received any information from the University and were left blindsided by his death.

While the dispositive issue in the *Jain* case was tort liability, the court briefly mentioned “serious doubts” about Jain’s father’s FERPA health and safety emergency exception argument. The claim was that the University’s misapplication of FERPA – namely, that the health and safety emergency exception should have required administrators to contact Jain’s parents – was “to his son’s detriment” and, therefore, it should be held for “any reasonably foreseeable injuries resulting

⁶⁵ *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000).

⁶⁶ *Id.* at 295.

⁶⁷ *Id.* at 295-96.

⁶⁸ *Id.* at 296.

⁶⁹ *Id.*

therefrom.”⁷⁰ While offering doubt to the argument, calling the health and safety emergency exception a “discretionary exception to [FERPA’s] requirements,”⁷¹ the court did not formally consider it in the holding. Ultimately, the court held that the University did not have a special relationship with Jain that would have required its administrators to be more proactive in preventing his death.⁷² The opinion did offer weight to the argument that the University voluntarily adopted a policy to notify parents in cases of suicide attempt and failed to follow its own policy.⁷³ While stating that “plaintiff’s contention carries considerable appeal,” the court found the liability suggested in the suit to stretch too far.⁷⁴ Significantly, the University’s administrators lack of affirmative action did not put Jain in a position more likely to die by suicide – actually, they offered resources to help him, which he failed to utilize.⁷⁵

Two cases are concerning for university administrators: *Schieszler v. Ferrum College*⁷⁶ and *Shin v. Massachusetts Institute of Technology*.⁷⁷ The *Schieszler* case was about the death by suicide of Michael Frentzel, a freshman student at Ferrum College. Frentzel’s Resident Assistant, campus police, and the dean of students were aware for a few months of his suicidal ideation, to the point that they required him to sign a statement that he would not hurt himself.⁷⁸ They had been shown a note that Frentzel wrote stating that he was going to hang himself with a belt, and they had found him with bruises on his face that he admitted were self-inflicted.⁷⁹ In the motion to dismiss this case, the court determined that “plaintiff alleged sufficient facts to support her claim

⁷⁰ *Id.* at 298.

⁷¹ *Id.*

⁷² *Id.* at 300.

⁷³ *Id.* at 296.

⁷⁴ *Id.* at 299.

⁷⁵ *Jain v. State of Iowa*, *supra* note 65.

⁷⁶ *Schieszler v. Ferrum College*, 236 F.Supp.2d 602 (W.D. VA. 2002).

⁷⁷ *Shin v. Massachusetts Institute of Technology*, 19 Mass.L.Rptr. 570 (Super Ct. 2005).

⁷⁸ *Schieszler v. Ferrum College*, *supra* note 76.at 605.

⁷⁹ *Id.* at 605.

that a special relationship existed between Frentzel and Ferrum College giving rise to a duty to protect Frentzel from the foreseeable danger that he would harm himself.”⁸⁰ Although the court dismissed the student Resident Assistant from the case, the dean of students and the College were not dismissed from it and the case was sent to trial for a jury to consider whether the facts proved a special relationship.⁸¹ While the court noted that the special relationship did not exist by matter of law, it stated that the facts of this particular case created the relationship.⁸²

The *Shin* case is distinguished from *Schieszler* because Elizabeth Shin’s parents were informed, after her housemaster gained Shin’s consent, of her initial hospitalization while she was a freshman student at the Massachusetts Institute of Technology (“MIT”).⁸³ Shin’s father and Shin met with a full-time psychiatrist in MIT’s Mental Health Services Department (“Mental Health”) regarding potential treatment options. Shin refused to utilize any services offered outside of MIT but agreed to meet with the psychiatrist every two or three weeks.⁸⁴ Other warning signs arose over time. Another administrator at the Institute made the psychiatrist aware that Shin made a suicide comment to her ex-boyfriend, and that same administrator brought Shin to MIT Mental Health because Shin said that she had thoughts of suicide⁸⁵. Shin told multiple Mental Health administrators that she had engaged in physical self-harm.⁸⁶ Shin also told her professor that she “bought a bottle of sleeping pills with the intention to take them” and another administrator that she did not feel safe alone.⁸⁷ Further, Shin was admitted to the hospital once again (and, again, her parents were contacted with her consent), students reported Shin’s deteriorating mental health to

⁸⁰ *Id.* at 609.

⁸¹ *Id.* at 614-15.

⁸² *Schieszler v. Ferrum College*, *supra* note 76. at 608.

⁸³ *Shin v. Massachusetts Institute of Technology*, *supra* note 77.

⁸⁴ *Id.* at 1.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

administrators, and Shin told another student that she was going to kill herself with a knife.⁸⁸ One day, after she had been discussed by administrators at the “deans and psychs” meeting, she died by suicide.⁸⁹ The court granted MIT itself summary judgment on all counts; however, certain individuals were not granted the same.⁹⁰ The main psychiatrist was found to hold a physician-patient relationship with Shin and, based on negligence/wrongful death and conscious pain and suffering, the dean of students and housemaster’s summary judgments were also denied.⁹¹ Eventually, after the Shin family initiated a wrongful death claim for \$27.65 million, Shin’s family and MIT reached a confidential settlement, and the suit was dropped.⁹²

A high-profile wrongful death claim, involving the death by suicide of former Stanford University women’s soccer captain, Katie Meyer, is currently under consideration in California.⁹³ Her parents filed suit, claiming that Stanford administrators “caused Katie to suffer an acute stress reaction that impulsively led to her suicide.”⁹⁴ Meyer spilled coffee on a Stanford football player who had allegedly assaulted another Stanford women’s soccer player. Based on that incident, Meyer was sent notice by the Office of Community Standards that disciplinary action was imminent and requesting a conduct meeting with her.⁹⁵ At the time of her notice, counseling services were closed, although the letter did include a resource available 24/7 that she could contact for mental health support. That night, Meyer died by suicide.⁹⁶ Absent additional facts arising

⁸⁸ Shin v. Massachusetts Institute of Technology, *supra* note 77. at 2-5.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 8.

⁹¹ Shin v. Massachusetts Institute of Technology, *supra* note 77. at 11.

⁹² Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED (2006), <https://www.insidehighered.com/news/2006/04/04/settlement-mit-suicide-suit>.

⁹³ Jaclyn Hendricks, *Stanford goalie Katie Meyer faced disciplinary action over coffee incident before suicide: lawsuit*, NEW YORK POST, Nov. 24, 2022. <https://nypost.com/2022/11/24/katie-meyers-family-files-wrongful-death-suit-against-stanford/>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Hendricks, *supra* note 93.

which shows that the administrators possessed actual knowledge of suicidal ideation from Meyer, any indication that Stanford could be found liable in this case would seem to significantly extend university suicide liability. “Katie’s Save,” a foundation formed in her honor which fights for changes to university mental health response, is pushing for a Designated Advocate of a student’s choice who could be contacted in situations when the student may need extra guidance and support.⁹⁷

Overall, college and university suicide law will continue to progress as suicide law develops more broadly. Higher education administrators and policymakers are awaiting future cases that will solidify their liability in this space. While most caselaw protects institutions of higher education from responsibility, the *Schieszler* and *Shin* cases may represent a shift in how judges will view the relationship between students and their universities. The expectation that college administrators should be able to interpret the vague language of FERPA while balancing the reality that they could be held liable for a student’s suicide seems far too high. They deserve more certainty. In each of the cases involving Jain, Schieszler, and Shin, university administrators were aware of suicidal ideation – those administrators should have explicitly been able to share that information with the parents before it was too late.

IV. THE SOLUTION

The problem created by the mental health crisis and misunderstanding of FERPA can be corrected through two proposals: (1) adding new language to the FERPA health and safety emergency exception that explicitly authorizes college and university administrators to inform parents if their child has experienced suicidal ideation or suicide attempt and (2) students

⁹⁷ Katie’s Save, F19HT FOR KATIE’S SAVE, May 23, 2023, <https://www.katiessave.org/f19ht-katies-save>.

authorizing a certain contact person for this disclosure. Plainly stating that administrators can share this information will improve how universities respond to mental health crises and, more importantly, benefit students who are experiencing them. Furthermore, by creating a formal authorization process, administrators can be confident that the information is being shared to appropriate contacts.

The first proposal – which is practical, as it could be added to the end of the health and safety emergency within FERPA – relieves universities of any legal responsibility related to student privacy should they decide to share information with parents regarding their children’s suicidal ideation or suicide attempt:

Certain college and university administrators may, if they choose, provide parents⁹⁸ with information related to a student’s suicidal ideation or suicide attempt, even if the parents’ knowledge of the information is not necessary to protect the health or safety of the student or other individuals, provided that the administrators have actual knowledge of foreseeable harm to the student. Actual knowledge of suicidal ideation or suicide attempt create an “emergency” under the meaning of this exception. The individuals authorized to make discretionary decisions regarding this release of information should be limited to the dean of students, campus security employees, and campus mental health professionals. In making the decision, those administrators are encouraged to consider whether contact would benefit the student.

Because the language in that proposal is chosen intentionally, several components of it are noteworthy. Foremost, administrators are granted full discretion when deciding whether to share the information with parents; as a result, they cannot be held liable for sharing information with parents *or* for not sharing information with parents, which is important for a few different reasons. It seems likely that, generally, universities would build their policies with the assumption of

⁹⁸ “Parent” takes the meaning already defined in FERPA. “Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” *34 CFR § 99.3*.

informing parents in most cases. Some cases, though, are better handled without including parents: if parents are a cause of the student's suicidal ideation, for example, or if a student does not enjoy a stable relationship with their parents. When being provided with explicit discretion, university administrators will not feel burdened by potential legal ramifications of any decisions that they make under difficult circumstances involving suicidal ideation or suicide attempt. Rather, administrators, empowered as reliable decision makers based on their experience and expertise, will be focused exclusively on what matters: supporting the student.

Next, only certain administrators are granted authority to share this information with parents. Defining the scope of who is permitted to share the information is critical for providing clarity, one of the main objectives of this proposal. The dean of students, campus security employees, and campus mental health professionals were deliberately selected based on their expertise and experience. The dean of students typically guides policy and makes difficult decisions for care of the students at their institutions – as in the *Jain* case, most colleges and universities who opt to share information with parents under certain circumstances would designate the dean of students as the person who does it. However, it seems straining, pressure-inducing, and potentially even dangerous to only allow deans of students (or even, perhaps, anyone else who works in their offices) to share information regarding suicidal ideation and suicide attempt; therefore, this proposal presents a couple other options to ease the burden. Campus security employees, as regular first responders to emergencies on campuses, ought to be trained in responding to suicidal ideation and suicide attempts. Per this proposal, part of their response should be, if they deem it beneficial, to include parents in the conversation. Finally, campus mental health professionals are included in this proposal as permitted to share information with parents about their child's suicidal ideation or suicide attempt. They are, naturally, the most highly trained

individuals on campus regarding student mental health. Typically, then, they are most equipped to determine whether information should be shared with parents. Beyond their expertise, individuals designated to support students with mental health struggles are most likely to be told by students of suicidal ideation or suicide attempt. Mental health professionals will also be in the most difficult position in terms of deciding whether to share any information with parents; not requiring them to report, though, makes it an easier judgment, as they are taking it case-by-case. A final advantage of designating certain administrators to share this information is to create a more certain line of communication – for example, a Resident Assistant would know who to approach with a concern of potential suicidal ideation or suicide attempt.

Further, those administrators may only share the information with “actual knowledge of foreseeable harm.” This part of the proposal is open to interpretation; on the flip side, however, it allows for discretion for administrators who should be empowered to make decisions about when to share information with parents. “Actual knowledge” should mean that the administrator heard directly from the student, not a third party, that they have experienced suicidal ideation or suicide attempt. Beyond just hearing (or, perhaps, reading) the words coming from the student, the administrators should have reason to believe that there is “foreseeable harm” based on what the student confided in them. The threshold for when it is best practice to share information should be high – and most administrators and policies would treat it as such because, again, their focus will be on what is best for students.

A similar proposal has been considered by Congress. Tim Murphy, a Pennsylvania member of the House of Representatives, introduced the Mental Health Security for American Families in Education Act of 2007 (SAFE).⁹⁹ The bill did not make it very far. After beginning at

⁹⁹ Mental Health Security for American Families in Education Act of 2007 (SAFE), H.R. 2913, 115th Cong. (2007).

the House Committee on Education and Labor, it was referred to the Subcommittee on Higher Education, Lifelong Learning, and Competitiveness. However, it died there. The bill had 24 cosponsors, including sixteen Republicans and eight Democrats.¹⁰⁰ No information can be found about why the bill died in its Subcommittee. Tim Murphy, notably, holds a PhD in psychology, received the American Psychological Association's Outstanding Leadership Award for his advocacy on behalf of psychologists and persons with mental health disorders, and was lauded for his role in Congress as an expert and advocate in the mental health space.¹⁰¹

Representative Murphy's bill cited as his findings surveys by the American College Health Association, National Institute of Mental Health, Suicide Prevention Resource Center, and Counseling Center Directors.¹⁰² His introduction stated that "the unintended consequence of FERPA, however, is that school personnel, administrators, and teachers who have little or no training in mental health and mental illness are burdened with defining and determining if a student is at risk. These educational personnel are reluctant to release information to parents for fear of legal action. These issues create barriers and delays for informing families even when schools are concerned that students may be a risk to themselves or others." The language in his bill is different than the proposal here because it requires a written certification of a "licensed mental health professional" that they believe a "significant risk" of harm is posed to the student or someone else and that sharing the information with parents "may protect the health or safety of the student or other persons."¹⁰³ Recognizing the value that requiring a written certification may add – namely, accountability for the administrator who chooses to share the information – it seems too

¹⁰⁰ *Id.*

¹⁰¹ PSYCHOLOGISTS RECOGNIZE REP. TIM MURPHY FOR LEADERSHIP ON MENTAL HEALTH ISSUES, (2005), <https://www.apa.org/news/press/releases/2005/03/slc-murphy>.

¹⁰² Mental Health Security for American Families in Education Act of 2007 (SAFE), H.R. 2913, 115th Cong. (2007).

¹⁰³ *Id.*

burdensome and, frankly, futile. The rest of the bill, however, seems similar to the proposal in this paper. Representative Murphy’s “licensed mental health professional,” based on his definition, could include the dean of students and campus security employees.

The second practical proposal is that students should authorize a contact person who may receive information in cases of suicidal ideation and suicide attempt. This type of contact person is not unprecedented, as the Higher Education Opportunity Act mandates that colleges and universities who provide on-campus housing require students to authorize a person as a contact for if they are missing for more than 24 hours.¹⁰⁴ By students authorizing a particular contact person, administrators can be confident that the information is being shared safely and appropriately and students can be better supported in their situation of suicidal ideation or suicide attempt. “Katie’s Save” put forth a similar proposal and called this contact a “Designated Advocate”.¹⁰⁵ Designating this contact person should be required, as allowing students to opt out of this authorization would negate the purpose of supporting them. Universities obtaining this authorized contact information does not require administrators to use it – if an administrator determines that this person should not be included in the conversation, then their discretion should prevail.

Sharing information with parents about their child’s suicidal ideation or suicide attempt has many benefits. Most practically, parents can provide emotional support. Parents are expected to serve as natural protectors for their children, and most of them proudly sacrifice a significant amount of energy and resources in fulfilling that role. Including parents in the conversation can make the situation feel more manageable and sensible for a student experiencing suicidal ideation or suicide attempt than if university administrators with whom the student may or may not possess

¹⁰⁴ Raul Ruiz, *Accessing Higher Education Opportunities Act*, (2021).

¹⁰⁵ Katie’s Save, *supra* note 97.

a personal relationship.¹⁰⁶ Parents knowing what their children are experiencing allows them to be supportive emotionally and, in many circumstances, physically.

Additionally, parents can provide historical insight to the response to a student's suicidal ideation or suicide attempt. They know their children's medical history, which should impact how administrators respond to these cases. An understanding of a student's medical history can give background such as past suicidal ideation, anxiety, depression, triggers, drug and alcohol use, and other important contexts. Any medication utilized by a student or relationship concerns could also heavily impact a student. To administrators, each case is unique; parents' knowledge of their children's mental health helps personalize it.

Finally, parents remain in their children's lives beyond their time as students. University careers are limited in time. Similar to how parents' understanding of historical context is helpful, their knowledge of any suicidal ideation and suicide attempt benefits the future of their children. They will be the individuals supporting the students moving forward. By allowing them to support during times of need while a student is in college, they are better able to support in similar situations that may potentially arise at another time, particularly since 50% of students are moving back home after graduating from college.¹⁰⁷ College administrators do not serve as long-term support; their assistance can only be maximized to a certain degree, so collaborating with parents while both support systems can be involved will be best for students' futures.

In sum, the solution to the college mental health crisis and misunderstanding of FERPA is to (1) explicitly allow – but not require – college administrators to share information with parents

¹⁰⁶ Marcia Morris, *What Every Parent Should Know About College Student Suicide*, PSYCHOLOGY TODAY (2016), <https://www.psychologytoday.com/us/blog/college-wellness/201605/what-every-parent-should-know-about-college-student-suicide>.

¹⁰⁷ Zack Friedman, *50% Of Millennials Are Moving Back Home With Their Parents After College*, FORBES (2019), <https://www.forbes.com/sites/zackfriedman/2019/06/06/millennials-move-back-home-college/?sh=d96c20f638ad>.

regarding their children's suicidal ideation and suicide attempt and (2) require colleges to obtain authorization from students regarding contact people for administrators to share information in cases of suicidal ideation and suicide attempt. These proposals are clear, intentional, student-centered, and will optimize how universities respond to these challenging circumstances.

V. CONCLUSION

Finally, it is important to review potential criticisms of the proposals and, most of all, call upon legislators to urgently implement them so that parents are informed of their children's suicidal ideation and suicide attempts before it's too late.

a. Potential Criticisms to the Proposals

Three criticisms to these proposals carry weight: allowing administrators to share information with parents regarding a student's suicidal ideation or suicide attempt may (1) deter students from seeking mental health support if they believe that their parents may be made aware of their struggles; (2) undercut the basic principle of FERPA that eligible students have the right to ownership over their own educational records; and (3) be unnecessary because, regardless of whether authorization is explicit or not, courts would likely rule against any plaintiffs claiming a violation of FERPA based on administrators sharing this information. While all three arguments are valid, none are robust enough to overcome the value of allowing administrators to share this critical information with parents.

First, the proposals will not considerably prevent students from seeking help. Undeniably, college and university administrators are only able to support students struggling with their mental health if they are aware of the struggles. Thus, admittedly, any system of support must be designed to make it comfortable for students to share information regarding suicidal ideation and suicide

attempts. Allowing administrators to share information regarding student suicidal ideation and suicide attempt, however, will not infringe upon that objective. Allowing parents to know this information is not detrimental from a psychological perspective, as evidenced by Representative Murphy, a psychologist and national mental health expert, introducing a similar bill allowing parents to be informed of this information. Moreover, practically, it seems unlikely that students consider privacy laws when deciding which information to share with college administrators. Particularly in situations mired by suicidal ideation, myriad other factors determine what information administrators learn. Overall, this argument does not outweigh the benefit of being able to include parents in the conversation regarding their children's suicidal ideation prior to a student potentially dying by it.

Similarly, the proposals do not undercut FERPA's purpose. To be clear, FERPA is a substantially important piece of legislation that is worthy of the value given to it by university administrators. It has exceptions, though, for a reason. While this proposal is not carving out a wholly new exception, it is offering an expansion to the existing health and safety emergency exception – the benefit of these proposals serves the health and safety emergency exception's safety-focused purpose. Sharing information regarding a student's suicidal ideation or suicide attempt with parents is, simply, more important than safeguarding the student's educational privacy. Based on rationale detailed earlier in this paper, parents ought to be made aware if their children are stuck in this delicate situation. Rather than prioritizing student privacy protection, allowing parents to be included in the conversation prioritizes student safety: FERPA, indeed, is about protection of students.

Finally, the language presented in the proposals is certainly not unnecessary. Remember, college and university administrators are not legal experts. Especially considering that cases of

suicidal ideation and suicide attempt are high-pressure, high-intensity situations, administrators should not feel held back by the law from helping students as best as possible. University policies should not need to be written by predicting how courts would rule if lawsuits were to arise; rather, administrators should be able to confidently develop policies that best support students. Fixing FERPA's misunderstanding requires clarity. The proposals are clear. Adding the proposed language to FERPA would lead to administrators reconsidering how they handle cases of suicidal ideation and suicide attempt and, ultimately, help more students.

Even after warning signs of mental health concerns were recognized by Hamilton College administrators, Graham Burton's parents were not contacted until after their child died by suicide. Or, as the New York Times wrote, "Until It Was Too Late." It is time that college and university administrators begin including parents in the conversation regarding their children's suicidal ideation and suicide attempt before it's too late.