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Taking HIPAA to School: Why the Privacy Rule Has Eviscerated FERPA's Privacy Protections, 47 J. Marshall L. Rev. 1047 (2014)

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TAKING HIPAA TO SCHOOL: WHY THE PRIVACY RULE HAS EVISCERATED FERPA’S PRIVACY PROTECTIONS

GREGORY RIGGS

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I. INTRODUCTION

School social workers face “special challenges in their handling of confidential information.”¹ For example, consider a situation in which a school social worker learns that a sixteen-year-old student² is pregnant. How should the social worker

* Dedicated to Kate Hawley, for inspiring this discussion, and believing in me always.

1. Frederic G. Reamer, *Update on Confidentiality Issues in Practice With Children: Ethics Risk Management*, 27 CHILD. & SCH. 117, 117 (2005).

2. The term “student” is used throughout this Comment to describe school social work services recipients. Although many other terms also would be accurate (e.g. “client” or “patient”), the “student” designation is used to make clear that this discussion focuses solely on those therapy records created by

respond to this information? A dilemma arises because recording the pregnancy might make it accessible to the student's parents, but not recording the incident will almost certainly lower the quality of care provided due to incomplete access to essential information during the therapy process. If the school social worker suspects physical or substance abuse surrounding the circumstances of the pregnancy, mandated reporting laws have the potential to further complicate the situation.³ Should the student's parents, school officials, or possibly even law enforcement authorities be notified? Is it legal to do so?

Part II of this Comment outlines school social workers' record-keeping requirements, focusing on access and disclosure procedures designed to maintain an appropriate level of confidentiality for all therapy records. What makes the educational setting complex is that not only must school social workers comply with general confidentiality laws regarding social work records,⁴ they also must adhere to relevant educational laws.⁵

Part III argues that because school social workers must comply with this dual set of laws, inefficiency, confusion, and fear result, thereby encouraging school social workers to record only the bare minimum necessary to function in their therapeutic roles.⁶ These unintended consequences not only negatively impact

school social workers. In this regard, several other terms warrant a brief discussion of their technical meaning in the context of this paper. The term "therapy session" is used generally to refer to the provision of mental health care through individual counseling, and "therapy records" as the memorialization of those sessions.

3. *See, e.g.*, 42 U.S.C. § 13031(a), (b)(3) (2012) (requiring social workers who "learn[] of facts that give reason to suspect a child has suffered an incident of child abuse" to report it to the appropriate designated federal agency as soon as possible); *id.* § 13031(d) (identifying appropriate agencies for various specified circumstances); Abused & Neglected Child Reporting Act, 325 ILCS 5/4 (2012) (requiring Illinois social workers "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or neglected child [to] immediately report or cause a report to be made to the Department [of Child and Family Services]").

4. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 26, 29, & 42 U.S.C. (2012)) (governing documents and records created by mental health care providers).

5. *See, e.g.*, Family Educational Rights and Privacy Act of 1974 (FERPA), Pub. L. No. 93-380, 88 Stat. 484 (codified as amended at 20 U.S.C. § 1232g (2012)) (regulating documents created in an educational institution).

6. In 1991 the National Association of Social Workers issued a statement intended to clarify the issue of confidentiality in school social work practice: "This multiplicity of clients contributes to the complexity of decision-making about confidentiality for school social workers. . . . School social workers should also be familiar with federal, state, and local laws and school district policies that clarify responsibilities related to confidentiality in specific situations." Mary McWhinney, Deborah Haskins-Herkenham, & Isadora Hare, NATIONAL ASSOCIATION OF SOCIAL WORKERS COMMISSION ON EDUCATION POSITION STATEMENT: THE SCHOOL SOCIAL WORKER AND CONFIDENTIALITY, 2,

the quality of services provided, but also frustrate the congressional intent behind both statutes. Part IV proposes two amendments designed to remedy this problem by providing more discretion for school social workers to determine when to grant access to confidential therapy records.

II. BACKGROUND

The Family Educational Rights and Privacy Act of 1974 (FERPA)⁷ is the primary federal law governing school records,⁸ including therapy records created by school social workers.⁹ However, the Health Insurance Portability and Accountability Act of 1996 (HIPAA)¹⁰ also governs documentation requirements regarding therapy sessions generally.¹¹ Although the educational community has largely ignored HIPAA, concluding that it is inapplicable to schools,¹² this view may be changing.¹³ This Comment discusses the extent to which HIPAA actually does govern school social workers' therapy records, and how its record-keeping requirements, when accurately read in conjunction with FERPA, frustrate the intent of both statutes.

This Part is divided into four sections. The first discusses the importance of maintaining the confidentiality of therapy records and also addresses issues particularly relevant to treating minors. The second describes the access rights and disclosure guidelines for "education records," which consist of nearly everything created and shared within the school.¹⁴ The third section discusses the

1991, available at www.socialworkers.org/practice/school/confidentiality.pdf.

7. 20 U.S.C. § 1232g (2012).

8. See, e.g., Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 619 (1997) (describing FERPA as "the federal law that most comprehensively governs student records"); Jennifer C. Wasson, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?*, 81 N.C. L. REV. 1348, 1353 (2003) (noting that FERPA is "the principal law on student privacy").

9. The term "therapy records" is used generically in this Comment to describe all records created during social work therapy sessions, regardless of whether they fall within FERPA's control over school social work records, or HIPAA's control over general social work records.

10. See generally Pub. L. No. 104-191, 110 Stat. 1936 (1996) (outlining HIPAA and codified as amended in scattered sections of 26, 29, and 42 U.S.C.).

11. See 45 C.F.R. § 160.103 (2012) (providing that HIPAA governs therapy records created during provision of mental health services).

12. PAULA ALLEN-MEARES, *SOCIAL WORK SERVICES IN SCHOOLS* 102 (6th ed. 2010).

13. See *id.* (suggesting that "[m]ore and more schools are becoming aware that HIPAA may have an impact on school records, although the extent of the impact is as yet unknown"); Daggett, *supra* note 8, at 619 (arguing that although initially "student records may not appear to be a particularly complicated issue, . . . in fact this topic involves complex legal terrain, as not only [FERPA], but a number of other laws regulate student records").

14. See 20 U.S.C. § 1232g(a)(4)(A) (defining "education records" as those

extent to which HIPAA applies to therapy records generally. This section also explains why most documents created by school social workers are beyond HIPAA's reach. The last section then explains the procedure school social workers can use to exempt personal notes and observations from "education records," and discusses why this procedure creates documents simultaneously governed by both FERPA and HIPAA.

A. Social Workers' Ethical Requirement to Maintain Confidentiality of Documents Produced During Therapy with Minors

Social workers are ethically bound to create accurate records of all therapy sessions.¹⁵ However, competing legal concerns require social workers to be extremely cautious before disclosing potentially confidential information contained in those records.¹⁶ This is especially true of school social workers, where treatment is primarily conducted with minors.¹⁷ Although a minor's constitutional right to privacy is not age-dependent,¹⁸ age is an important factor in how children are afforded legal rights,¹⁹ and

records that are: "(1) directly related to a student; and (2) [] maintained by an educational agency or institution or by a party acting for the agency or institution"); 34 C.F.R. § 99.3 (2012) (providing the same definition).

15. See Nat'l Ass'n of Soc. Workers, STANDARDS FOR SCHOOL SOCIAL WORK SERVICES, 10, 2012 (stating that "[s]chool social workers shall maintain accurate data and records that are relevant to planning, implementation, and evaluation of school social work services").

16. See Madelyn L. Isaacs & Carolyn Stone, *Confidentiality with Minors: Mental Health Counselors' Attitudes Toward Breaching or Preserving Confidentiality*, 23 J. MENTAL HEALTH COUNSELING 342, 342 (2001) (describing confidentiality as "a primary responsibility of mental health counselors" when making treatment decisions); LELAND C. SWENSON, PSYCHOLOGY AND LAW FOR THE HELPING PROFESSIONS 70 (2d ed. 1997) (noting that "[v]iolating the [student's] expectations of privacy violates professional ethical rules, the [student's] constitutionally based civil rights, and most state laws that govern professional conduct").

17. See Reamer, *supra* note 1, at 117 (providing examples of difficult confidentiality issues, including when students in schools "disclose information to social workers about their sexual activity and victimization, pregnancy, substance abuse, eating disorders, delinquent activity, or suicidal fantasies").

18. Lyman W. Boomer, Tim S. Hartshorne & C. Stuart Robertshaw, *Confidentiality and Student Records: A Hypothetical Case*, 39 PREVENTING SCH. FAILURE 15, 15 (1995).

19. See, e.g., Melissa Jonson-Reid, *Understanding Confidentiality in School-Based Interagency Projects*, 22 SOC. WORK EDUC. 33, 36 (2000) (explaining the extent to which minors do not enjoy full legal rights, using as an example the fact that parental permission is often required for the provision of non-crisis counseling services). *But see, e.g.*, WASH. REV. CODE § 71.34.530 (2013) (allowing children over thirteen years old to receive outpatient mental health treatment without parental consent).

must be considered in the decisions of mental health professionals.²⁰

One of the key differences between treating adults and children is that many courts and states assume that minors are not “legally competent to give meaningful health treatment consent.”²¹ This assumption is reflected in both FERPA and HIPAA, where parental consent for students under age eighteen is generally required before social work therapy records may be released.²² However, cognitive developmental theory suggests that this distinction is not an accurate reflection of minors’ actual ability to understand the options available to them.²³ Regardless of a social worker’s personal assessment of a given child’s competency, social workers must above all respect the child’s dignity throughout the therapy process²⁴ while also complying with applicable confidentiality laws and ethical requirements.²⁵

B. Understanding FERPA: A Primer in School-Based Record-Keeping Requirements

Congress enacted FERPA²⁶ under its Spending Clause authority as part of the Education Amendments of 1974.²⁷ Largely

20. See Alex S. Hall & Meei-Ju Lin, *Theory and Practice of Children’s Rights: Implications for Mental Health Counselors*, 17 J. MENTAL HEALTH COUNSELING 63, 65 (1995) (noting that “[m]inors are currently entitled to fewer rights than adults by both courts and states”); ROBERT CONSTABLE ET AL., *SCHOOL SOCIAL WORK: PRACTICE, POLICY, RESEARCH* 107 (7th ed. 2009) (noting that, “in some situations, student behaviors are problematic for the school social worker merely because the student is a minor”).

21. Hall & Lin, *supra* note 20, at 65.

22. See *infra* notes 35-38 (discussing FERPA’s pre-disclosure parental consent requirement); see also *infra* notes 61-63 (discussing HIPAA’s pre-disclosure parental consent requirement).

23. See William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 899 (1989) (arguing that existing literature suggests children are competent to give meaningful health treatment consent); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589, 1594 (1982) (describing empirical study finding that the ability of a group of 14-year-old children to make informed treatment decisions could not be differentiated from that of a group of adults); Ellen G. Garrison, *Children’s Competence to Participate in Divorce Custody Decision Making*, 20 J. CLINICAL PSYCHOL. 78, 84-85 (1991) (describing empirical findings that support the “general competence of children”).

24. Hall & Lin, *supra* note 20, at 66.

25. See Frederic G. Reamer, *THE SOCIAL WORK ETHICS CASEBOOK: CASES AND COMMENTARY* 48 (3d ed. 2009) (describing privacy and confidentiality as “bedrock principles in social work practice”).

26. 20 U.S.C. § 1232g.

27. Education Amendments of 1974, Pub. L. No. 93-380, § 101, 88 Stat. 484, 484 (1974) (“An act to Extend and Amend the Elementary and Secondary Education Act of 1965, and for other purposes.”).

an afterthought, it was introduced as a floor amendment without any meaningful debate over its provisions,²⁸ and contains no explicit statement of purpose.²⁹ The only real insight into its purposes are remarks made by the bill's sponsor, Senator James Buckley, who stated that FERPA was intended both to ensure parental access to their children's educational records, and also to "protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent."³⁰ Unfortunately, FERPA was created when "the model for academic recordkeeping was very much a paper model,"³¹ and may no longer be adequate in a digital age.³²

FERPA gives parents certain rights with respect to their children's school records. For example, parents³³ have the right to inspect and review their children's records maintained by the school.³⁴ Generally, schools may not release any information from a student's record without parental permission.³⁵ However,

28. 120 CONG. REC. 39,858, 39,862 (1974); *Legislative History of Major FERPA Provisions*, U.S. DEP'T OF EDUC., 1 (2002), available at www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf.

29. 20 U.S.C. § 1232g.

30. 120 CONG. REC. at 39,862; see also *Belanger v. Nashua, N.H., Sch. Dist.*, 856 F. Supp. 40, 46 (D.N.H. 1994) (noting these dual purposes); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (explaining that "Congress enacted FERPA under its spending clause power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records"). Senator Buckley also stated that the statute was intended to redress "the growing evidence of the abuse of student records across the nation." 121 CONG. REC. S7974 (daily ed. May 13, 1975).

31. Dan Carnevale, *Network Practices Can Endanger Students' Privacy, Report Warns*, CHRON. HIGHER EDUC., Nov. 23, 2001, at A30; see also Marcia Coyle, *Court Faces First School Records Case: Privacy Case Could Have Wide Impact*, NAT'L L.J., Nov. 19-26, 2001, at A1 (quoting Julie Lewis, staff attorney to the National School Boards Association, as stating that "[FERPA] seems a straightforward statute, but it has become cumbersome with implementation, particularly with the evolution of technology").

32. See Wasson, *supra* note 8, at 1354 (arguing that "[FERPA] is no longer adequate to guide schools through the complicated educational privacy issues of the new century"); Robert F. Curran, *Student Privacy in the Electronic Era: Legal Perspectives*, CAUSE/EFFECT, Winter 1989, at 14, 18 (stating that "[FERPA] needs an electronic overhaul to bring it into compliance with modern electronic systems").

33. On a student's eighteenth birthday or upon attendance at an institution of postsecondary education, whichever occurs first, the consent required of and rights generally accorded to the parents of a student are transferred to the student. 20 U.S.C. § 1232g(d).

34. See *id.* § 1232g(a)(1)(A)-(B) (prohibiting federal funding for educational institutions that deny parents the right to review their children's records); *id.* § 1232g(a)(2) (stating that parents must be "provided an opportunity for a hearing . . . in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students . . .").

35. *Id.* § 1232g(b)(1); 34 C.F.R. § 99.3; see also *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428 (2002) (noting that "[o]ne condition specified in [FERPA] is that sensitive information about students may not be released

FERPA allows schools to disclose such information, without consent, to certain parties and under certain specified conditions.³⁶ The most important of these exceptions is that school officials, including teachers, having a “legitimate educational interest”³⁷ can access students’ records without prior parental consent³⁸ – a determination Congress left to the discretion of each individual school.³⁹ Finally, whenever access is granted, school social workers must be careful to disclose the least amount of information necessary to address the issue at hand.⁴⁰ However, to be entitled to these safeguards, student information must be classified as an “education record.”⁴¹

FERPA currently⁴² defines “education records” as those records that are: “(1) Directly related to a student; and (2)

without parental consent”).

36. Student records may be released without parental consent if the requestor fits into one of nine specified categories: (1) school officials, including teachers, with “legitimate educational interests” in the student records; (2) officials of other school systems when the student transfers; (3) representatives of the Comptroller General, the Secretary of Education, federal auditors, and the Attorney General; (4) officials in connection with a student’s application of receipt of financial aid; (5) state or local officials given access under a state statute if the disclosure concerns the juvenile justice system and the nondisclosure to third parties is certified in writing; (6) organizations conducting studies for the purpose of developing predictive tests or improving education; (7) accrediting organizations; (8) appropriate persons in connection with an emergency to protect the health or safety of the student or others; and (9) officials in connection with a subpoena. 20 U.S.C. § 1232g(b)(1)(A)-(I); 34 C.F.R. § 99.31.

37. See Department of Education, FERPA Final Rule, 61 Fed. Reg. 59,292, 59,297 (Nov. 21, 1996) (defining “legitimate educational interest” as being present if a school official needs to review a student’s record “in order to fulfill his or her professional responsibility”).

38. 20 U.S.C. § 1232g(b)(1)(A); see also, 34 C.F.R. § 99.31(a)(1)(i)(A) (stating that “[a]n educational agency or institution may disclose personally identifiable information from an education record of a student without [parental consent] if the disclosure . . . is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests”).

39. See 34 C.F.R. § 99.31(a) (stating that it is the school’s responsibility to set out a written standard for determining when there is a legitimate educational reason for inspecting student records). The school must also take steps to ensure that the requestor will not disclose a student’s education records to third parties. See 20 U.S.C. § 1232g(b)(4)(B) (conditioning a third party’s access to student records on a promise not to disclose the records to others, and prohibiting schools from releasing any other education records for five years to a requestor who violates this promise).

40. See 34 C.F.R. § 99.31(a)(1)(ii) (requiring schools to “use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests”).

41. See 20 U.S.C. § 1232g (providing various protections only for “education records”).

42. FERPA initially did not define education records, but rather included a non-exhaustive laundry list of records that fell within its purview, including “identifying data, academic work completed, level of achievement (grades,

Maintained by an educational agency or institution or by a party acting for the agency or institution.”⁴³ Although confusion exists regarding precisely what this definition covers,⁴⁴ it is clear that Congress intended for it to be sufficiently broad enough to cover any record concerning a particular student.⁴⁵ This would necessarily include school social workers’ therapy records⁴⁶ – even

standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.” § 512(a), 88 Stat. at 572.

43. 20 U.S.C. § 1232g(a)(4)(B); 34 C.F.R. § 99.3. Excluded from this definition are law enforcement records, employee records, and certain medical treatment records of students over the age of 18 who are attending a postsecondary institution, 20 U.S.C. § 1232g(a)(4)(B)(ii)-(iv), as well as “directory information,” which includes a student’s name, address, phone number, date and place of birth, educational focus (major), participation in school activities and sports, height and weight of those on athletic teams, dates of attendance, degrees and awards, and the most recent school attended. *Id.* § 1232g(a)(5)(A); 34 C.F.R. § 99.3. In addition, courts have held that commonly known information is not considered part of a student’s education record. *See, e.g., Daniel S. v. Bd. of Educ. Of York Cmty. High Sch.*, 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (holding that FERPA does not protect information which might appear in school records but would also be “known by members of the school community through conversation and personal contact”); *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (explaining that “Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records”).

44. *See, e.g., Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (lamenting that “[t]his kind of language [in the definition of education records] leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information”).

45. Congress removed the original “laundry list” to ensure the definition was sufficiently broad to further the goal of allowing “parents and students [to] have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student.” 120 CONG. REC. at 39,858. This interpretation has been approved of by multiple courts. *See, e.g., Belanger*, 856 F. Supp. at 48 (stating that “[t]he plain meaning of [FERPA’s] statutory language reveals that Congress intended for the [education records] definition to be broad in scope”); *United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) (noting that “Congress made no content-based judgments with regard to its ‘education records’ definition”).

46. *See* § 512(a), 88 Stat. at 571 (originally defining “education records” as “any and all official records, files, and data directly related to [a parent’s] children . . . and specifically including . . . scores on standardized intelligence, aptitude, and psychological tests, . . . health data, . . . teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns”). Because the original education records definition specifically included psychological tests, and Congress amended that definition to be even broader, the implication is that school workers’ student therapy records undoubtedly qualify as education records. *See* 120 CONG. REC. at 39,858 (eliminating the laundry list in order to cover all types of educational institution information, except for expressly specified exceptions).

those maintained at a school social worker's home or other private place.⁴⁷

A determination that a record is not an "education record" has significant consequences, because then it will be provided vastly different confidentiality protections.⁴⁸ Further complicating classification efforts is Congress' overhaul of the health care system through enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).⁴⁹

C. Regulating Health Treatment Information in a Digital Age: HIPAA's Privacy Rule

Congress enacted HIPAA in response to concerns about the rising cost of health care.⁵⁰ In particular, Title II of HIPAA included "Administrative Simplification"⁵¹ provisions establishing a uniform information network across health care institutions.⁵² Realizing that the security risks created by such a network would require a "uniform national policy of medical information

47. See, e.g., 121 CONG. REC. 13,990, 13,992 (1975) (lacking any indication that Congress intended FERPA to cover only school records maintained in a central location); 120 CONG. REC. at 39,858-59, 39,861-66 (lacking a central location requirement for education records definition). *But see Falvo*, 534 U.S. at 433 (explaining that "the word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled").

48. For example, FERPA allows the unqualified release of education records after all personally identifiable information has been redacted. See, e.g., *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012) (allowing release of records with personally identifiable information redacted); *Kryston v. Bd. of Educ.*, 77 A.D.2d 896, 897 (N.Y. App. Div. 1980) (allowing release of redacted student test scores to father for comparison with his child's test score because the other scores were not identified by student names); *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 538 N.E.2d 557, 560 (Ill. 1989) (allowing release of standardized achievement scores after all identifying information has been masked).

49. See generally Pub. L. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 26, 29, and 42 U.S.C.).

50. See H.R. REP. NO. 104-496, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1865 (stating that HIPAA was intended to "to combat waste, fraud, and abuse in health insurance and health care delivery, . . . [and] to simplify the administration of health insurance . . ."); *id.* at 69-70, *reprinted in* 1996 U.S.C.C.A.N. at 1869 (stating that HIPAA was passed "[i]n order to address the problem of health care cost inflation and make insurance more affordable").

51. See § 261, 110 Stat. at 1936 (stating that the purpose of Administrative Simplification subtitle is to "encourage[] the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information").

52. See H.R. REP. NO. 104-496, at 70, *reprinted in* 1996 U.S.C.C.A.N. at 1869 (noting that without uniformity modernization of information technology would be more difficult and cost savings opportunities would be lost).

privacy,”⁵³ Congress directed the Department of Health and Human Services (HHS) to promulgate regulations protecting patients’ rights to privacy.⁵⁴ In April, 2001, the HHS established the Standards for Privacy of Individually Identifiable Health Information, collectively known as the “Privacy Rule.”⁵⁵ These “systematic national privacy protections of health information”⁵⁶ govern school social workers’ therapy records.⁵⁷

In many ways, HIPAA’s confidentiality protections for health information are analogous to FERPA’s protections for therapy records. For example, HIPAA grants parents⁵⁸ a right to access, inspect, copy,⁵⁹ and request amendments to their children’s therapy records.⁶⁰ Subject to several exceptions,⁶¹ all other parties are denied access to such records without prior written parental authorization⁶² or, alternatively, the opportunity to agree or object

53. Marie C. Pollio, *The Inadequacy of HIPAA’s Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. ANN. SURV. AM. L. 579, 580 (2004).

54. H.R. REP. NO. 104-736, at 265 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1990, 2078 (“The Secretary would be required to establish standards regarding the privacy of individually identifiable health information that is in the health information network.”); *see also* H.R. REP. NO. 104-496, at 70, *reprinted in* 1996 U.S.C.C.A.N. at 1900 (directing the Secretary of the Department of Health and Human Services “adopt standards relating to the privacy of individually identifiable health information concerning the rights of individuals who are the subject of such information, the procedures for exercising such rights, and the authorized use and disclosures of such information”); Health Insurance Portability and Accountability Act of 1996 § 262, 42 U.S.C. § 1320d-2(a)(1)(B) (instructing that the Secretary’s standards must be “consistent with the goals of improving the operation of the healthcare system and reducing administrative costs”).

55. Health Insurance Reform: Security Standards, 68 Fed. Reg. 8,334, (Feb. 20, 2003) (codified as amended at 45 C.F.R. pts. 160, 162, & 164).

56. Lawrence O. Gostin, et al., *Balancing Communal Goods and Personal Privacy Under a National Health Information Privacy Rule*, 46 ST. LOUIS U. L.J. 5, 5 (2002).

57. *See* 45 C.F.R. § 160.103 (providing that the Privacy Rule covers all therapy records created or received relating to the provision of mental health services).

58. On a student’s eighteenth birthday or upon attendance at an institution of postsecondary education, whichever occurs first, the consent required of and rights generally accorded to the parents of a student are transferred to the student. *Id.* § 164.502(g).

59. *Id.* § 164.524.

60. *Id.* § 164.526.

61. *See id.* § 164.502(a)(1)(ii) (allowing disclosure for treatment and healthcare operations); *United States v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007) (detailing exceptions to the general rule requiring patient authorization before disclosing protected health information, including “for a law enforcement purpose to a law enforcement official,” and when the information is subject to a “court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer”).

62. 45 C.F.R. § 164.508; *see also* *Giangiulio v. Ingalls Mem’l Hosp.*, 850 N.E.2d 249, 264 (Ill. App. Ct. 2006) (explaining that “protected health information may not be disclosed without valid authorization[,] and use or

to a grant of third party access.⁶³ However, in order to obtain these protections, the records must constitute “protected health information,”⁶⁴ which HIPAA defines as “individually identifiable health information”⁶⁵ transmitted or maintained in any medium.⁶⁶ When access is permitted, the social worker again must disclose only the least amount of necessary information.⁶⁷

D. Keeping Separate Records as a Means for School Social Workers to Protect Confidential Information

There is certain information that school social workers should not include in social work therapy records.⁶⁸ Because these records are available to a wide audience, and may not be easily corrected, amended, or erased after being entered into computerized systems or databases, “hunches, speculations, gut reactions, and unsupported hypotheses, as well as other information that is inconclusive and might be misconstrued” should be omitted.⁶⁹ The proper repository for this type of information is in a separate record, generically termed “personal notes.”⁷⁰

disclosure must be made in a manner consistent with the authorization granted”).

63. 45 C.F.R. § 164.510; *Holman v. Rasak*, 785 N.W.2d 98, 104 (Mich. 2010).

64. *See* 45 C.F.R. § 164.502(a) (stating that a health care provider “may not use or disclose protected health information, except as permitted or required by” specified regulations).

65. *Id.* § 160.103; *see also* 42 U.S.C. § 1320d(6) (defining “individually identifiable health information” as information “created or received by a health care provider” that “relates to the past, present, or future physical or mental health or condition of an individual,” and that “identifies the individual,” or regarding which “there is a reasonable basis to believe that the information can be used to identify the individual”).

66. 45 C.F.R. § 160.103.

67. *Id.* § 164.502(b); *see also id.* § 164.502(a)(1)(iii) (requiring a covered entity to use “reasonable safeguards and minimum necessary procedures” when disclosing personally identifiable health information).

68. For example, school social workers should omit information that is interesting but not directly pertinent to the purpose of service, as well as judgmental language and derogatory characterizations of the student or others. Jill D. Kagle & Sandra Kopels, *SOCIAL WORK RECORDS* 91 (3d ed. 2008).

69. *Id.*

70. *Id.* Practitioners use different terms to refer to documents kept separate from the official record. They may call these documents “personal notes,” “clinical notes,” “unofficial records,” or “informal records.” *Id.* at 268. “Regardless of the terms used, the purpose is to somehow differentiate between two sets of records, one that can be shared with clients and others having a right to see the information, and the other that is kept solely for the social worker’s own use.” *Id.*

FERPA allows school social workers to keep such personal notes, which it labels “sole possession notes.”⁷¹ These include information “used only as a personal memory aid” by a school social worker who observes a student, as long as the school social worker does not share them with anyone other than a temporary substitute.⁷² Congress clearly intended to provide these personal notes absolute confidentiality protections,⁷³ subject only to the school social worker’s discretion as to whether and to whom they should be revealed.⁷⁴ This “sole possession note” exemption procedure has significant ramifications because it exempts documents that would otherwise fall under FERPA’s broad definition of “education records.”⁷⁵ Because “education records” consist of information contained in any medium,⁷⁶ this exemption procedure has the potential to give school social workers a powerful tool to maintain a higher degree of student confidentiality than FERPA would otherwise permit.⁷⁷

71. See 20 U.S.C. § 1232g(a)(4)(B)(i) (exempting from the definition of “education records” any “records of instructional, supervisory, and administrative personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a temporary substitute; . . .”).

72. See 34 C.F.R. § 99.3 (excluding from education records those documents “that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record”).

73. See *supra* note 30 and accompanying text (explaining that Congress created FERPA for the purpose of protecting students’ privacy); Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,856 (July 6, 2000) (codified as amended at 34 C.F.R. pt. 99) (clarifying that “[t]he main purpose of [the sole possession notes] exception to the definition of ‘education records’ is to allow school officials to keep personal notes private”).

74. Family Educational Rights and Privacy, 65 Fed. Reg. at 41,856 (“For example, a teacher or counselor who observes a student and takes a note to remind himself or herself of the student’s behavior has created a sole possession record, so long as he or she does not share the note with anyone else.”).

75. See *Miami Univ.*, 294 F.3d at 812 (noting that “Congress made no content-based judgments with regard to its ‘education records’ definition”); *ESPN*, 970 N.E.2d at 946 (holding that “the plain language of [FERPA] does not restrict the term ‘education records’ to ‘academic performance, financial aid, or scholastic performance’”). *But see* *John K v. Bd. of Educ.*, 504 N.E.2d 797, 802-803 (Ill. App. Ct. 1987) (rejecting lower court’s finding that the results of a student’s psychological evaluation were “notes for the exclusive use of the school psychologist,” finding instead that the results were made not solely for the benefit of the psychologist because they would also benefit the student).

76. See *supra* notes 42-47 and accompanying text (defining “education records”).

77. See, e.g., *MR v. Lincolnwood Bd. Of Educ. Dist.* 74, 843 F. Supp. 1236, 1239 (N.D. Ill. 1994), *reh’g denied*, No. 93 C 0418, 1994 WL 30968 (Feb. 1, 1994), *aff’d*, 56 F.3d 67 (7th Cir. 1995) (unpublished decision) (implicitly finding that videotape of special education student made by school without parent’s consent was an “education record”); *Warner v. St. Bernard Parish*

Congress also clearly intended that HIPAA not interfere with FERPA's treatment of therapy records, as evidenced by the fact that HIPAA explicitly states that "education records" do not fall within the definition of "protected health information" that the Privacy Rule controls.⁷⁸ However, because "sole possession notes" are not "education records" under FERPA,⁷⁹ HIPAA actually controls "sole possession notes."⁸⁰ Although this may seem fairly straightforward and innocuous at first glance, it actually creates significant problems,⁸¹ and frustrates Congress' purpose in establishing a "sole possession note" exemption.⁸²

III. ANALYSIS

Current law undermines students' privacy rights, their access to healthcare, and indeed even their physical safety, by sometimes requiring disclosure of school social work therapy records. This untenable situation has led to the perversion of personal notes, which were intended to function as a memory aid for the school social worker, but have turned into a repository for information the improper release of which may harm students.

School social workers' primary responsibility is to promote the well-being of students as it relates to their learning abilities and educational development.⁸³ This responsibility brings with it an ethical obligation to memorialize therapy sessions with

Sch. Bd., 99 F. Supp. 2d 748, 752 (E.D. La. 2000) (classifying a mother's letter in a student's file as an education record); *President & Trs. of Bates Coll. v. Congregation Beth Abraham*, No. CV-01-21, 2001 WL 1671588, at *4 (Me. Super. Ct. Feb. 13, 2001) (concluding that email messages sent to a professor were "education records").

78. 45 C.F.R. § 160.103 ("Protected health information [regulated by HIPAA's Privacy Rule] excludes individually identifiable health information in [e]ducation records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. § 1232g.").

79. See Nathan L. Essex, *SCHOOL LAW AND THE PUBLIC SCHOOLS; A PRACTICAL GUIDE FOR EDUCATIONAL LEADERS* 193 (5th ed. 2012) (explaining that "[r]ecords that remain in the sole possession of counselors are not subject to FERPA," and that "[e]ducational records under FERPA do not include personal files").

80. *Infra* Part III.A.3.

81. See *infra* Part III.B.1 (discussing ethical conflicts); see also *infra* Part III.B.2 (discussing legal conflicts).

82. See *infra* Part III.D. (arguing that HIPAA's control over FERPA's sole possession notes negates the entire reason for having an exemption for personal notes).

83. CODE OF ETHICS STANDARD 1.01 (Nat'l Ass'n of Soc. Workers 2008) ("[S]ocial workers' responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised. Examples include when a social worker is required by law to report that a client has abused a child or has threatened harm to self or others.").

accurate records,⁸⁴ which facilitate the continued treatment and understanding of each student.⁸⁵ How the school social worker maintains and protects those records is significant, because privacy and confidentiality are “bedrock principles in social work practice.”⁸⁶

To accomplish this objective school social workers must be conscious of whether their therapy records are governed by FERPA, or HIPAA, or both,⁸⁷ due to the potentially conflicting requirements of each law.⁸⁸ If FERPA covers student information, it may be classified as either an “education record”⁸⁹ and given certain qualified protections against disclosure,⁹⁰ or as a “sole possession note”⁹¹ and be provided much different protections.⁹² Because of significant ambiguity regarding what information falls under each of FERPA’s definitions,⁹³ classifying school social work records is far from straightforward.⁹⁴ Attempts to define whether

84. See STANDARDS FOR SCH. SOC. WORK SERVS., *supra* note 15, at 10 (requiring school social workers to “maintain accurate data and records that are relevant to planning, implementation, and evaluation of school social work services”).

85. See CODE OF ETHICS STANDARD 3.04(b) (Nat’l Ass’n of Soc. Workers 2008) (stating purpose of records is “to facilitate the delivery of services and to ensure continuity of services provided to clients in the future”).

86. Reamer, *supra* note 25, at 48.

87. Constable et al., *supra* note 20, at 109 (“School social workers must be familiar with all laws that cover the release of different kinds of information and who the individuals responsible for providing consent are.”).

88. See Dixie S. Huefner & Lynn M. Dagget, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 ED. L. REP. 469, 491 (2001) (concluding that “FERPA continues to contain numerous internal and external ambiguities and conflicts, and . . . presents significant and often unclear burdens to schools”).

89. See *supra* notes 42-47 and accompanying text (defining “education records”).

90. See *supra* notes 34-40 and accompanying text (explaining the extent to which “education records” are protected from unauthorized disclosure).

91. See 20 U.S.C. § 1232g(a)(4)(B)(i) (exempting from definition of “education records” any “records of instructional, supervisory, and administrative personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute; . . .”); 34 C.F.R. § 99.3 (excluding from education records those documents “that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible to any other person except a temporary substitute for the maker of the record”).

92. See Family Educational Rights and Privacy, 65 Fed. Reg. at 41,856 (explaining that “[t]he main purpose of [the sole possession notes] exception . . . is to allow school officials to keep personal notes private”).

93. See Huefner & Dagget, *supra* note 88, at 470 (describing FERPA as “a relatively straightforward statute [that] has become a cumbersome set of requirements with ambiguous parameters”).

94. See Phyllis Brown, *Education Law: First Amendment, Due Process and Discrimination Litigation Database*, 2 EDUC. L. § 6:16 (2012) (lamenting that “[a]lthough FERPA defines what is excluded from education[] records, it provides little guidance on what constitutes an education[] record”); Huefner &

information obtained in the educational setting constitutes “education records” have resulted in confusion⁹⁵ and have led to actions by school officials that frustrate FERPA’s purpose.⁹⁶

Because HIPAA exempts “education records” from its control, many assume that each statute’s jurisdiction is mutually exclusive.⁹⁷ However, those records not disclosed to anyone other than the social worker maker are not “education records,”⁹⁸ meaning they do not fall within HIPAA’s exemption. Accordingly, HIPAA actually governs those documents labeled “sole possession notes.” The implication is that school social workers utilizing FERPA’s “sole possession note” procedure to exempt therapy records from “education records” must also adhere to HIPAA’s Privacy Rule.⁹⁹

This Part consists of four sections. The first establishes why, in certain circumstances, school social workers are forced to simultaneously comply with both FERPA and HIPAA when attempting to maintain student confidentiality. The second section details the disjointed, inefficient, and sometimes even ineffective treatment spawned by these dual standards. The third section explains that the lack of public outcry stems from FERPA’s lack of meaningful remedies for privacy violations. Finally, the last section argues that when HIPAA grants access to otherwise confidential school social work records, FERPA’s purpose is frustrated.

A. HIPAA Inadequately Governs Those Documents to Which FERPA Intended to Give the Most Protection

Circumstances exist in which school social workers might desire to keep selected information out of a student’s “education record.” FERPA accommodates these situations through its “sole

Dagget, *supra* note 88, at 488 (noting that “a number of federal and state laws overlap with and in some cases potentially conflict with FERPA”).

95. See, e.g., *Falvo*, 534 U.S. at 436 (finding that student grades were not “education records” prior to recordation in a teacher’s grade book); *Miami Univ.*, 294 F.3d at 812 (finding that student disciplinary records maintained by an educational institution were “education records”); *Jensen v. Reeves*, 3 Fed. App’x. 905, 910 (10th Cir. 2001) (finding that disclosure of student disciplinary action did not constitute a disclosure of “education records”); *Belanger*, 856 F. Supp. at 48 (finding that “education records” include student information maintained at the school’s attorney’s office).

96. See Wasson, *supra* note 8, at 1359 (noting that schools must determine “whether the value of access [to information] is more important than the risk of a privacy violation”).

97. See, e.g., Pietrina Scaraglino, *Complying With HIPAA: A Guide For the University and Its Counsel*, 29 J.C. & U.L. 525, 537 (2003) (asserting that “[n]o records are covered by both the Privacy Regulations and FERPA”).

98. See *supra* note 91 (defining “sole possession notes”).

99. See *infra* notes 117-122 and accompanying text (explaining why HIPAA’s Privacy Rule applies to “sole possession notes”).

possession notes” exemption procedure where using masked or redacted records will not suffice. However, this procedure is inadequate because it triggers HIPAA’s regulations.

1. *Social Workers Might Not Want Certain Things to Qualify as Education Records*

Consider again the earlier example in which a school social worker learns of a pregnant student whom the school social worker suspects is being abused. The school social worker might need to consult with therapy team members,¹⁰⁰ including a supervisor, school nurse, or possibly principal – all persons who clearly would have a “legitimate educational interest” in helping the student.¹⁰¹ But the moment a school social worker discloses these “sole possession notes” they immediately become part of the student’s education record.¹⁰² Then, parents could not be denied access to the information regarding the student’s potential abuse.¹⁰³ This would be problematic in the event the parents are in fact the abusers. Disclosing this information would not only violate the school social worker’s duty to keep the information confidential,¹⁰⁴ but also any trust the student might have in the social worker.¹⁰⁵

The potential for this type of ethical dilemma has led school social workers and others within the school to share less information, even when common sense would dictate otherwise.¹⁰⁶

100. See M. Jonson-Reid et al., *School Social Work Characteristics, Services and Dispositions: Year One Results*, 1 CHILD. & SCH. 5, 17 (2004) (conducting survey that concluded that the most critical aspects of a school social worker’s position are consultation, teamwork, short-term support, and referral and linkage to community services).

101. See Department of Education, FERPA Final Rule, 61 Fed. Reg. at 59,297 (explaining that “legitimate educational interest” is present if a school official needs to review a student’s record “in order to fulfill his professional responsibility”).

102. See Constable et al., *supra* note 20, at 755 (explaining that even documents maintained on a computer become “education records” if shared orally with any other person). FERPA provides absolute confidentiality for therapy records unless and until a school social worker “reveal[s] [them] to any other person except a substitute.” 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3.

103. See 20 U.S.C. § 1232g(a)(1)(A)-(B) (conditioning federal funding on schools granting parents the right to access their children’s educational records).

104. See CODE OF ETHICS *supra* note 85, at § 1.07(a), (c) (describing school social workers’ ethical duty to respect students’ privacy and hold in confidence all information obtained throughout the therapy process).

105. See Constable et al., *supra* note 20, at 111-12 (discussing long-term consequences within both the school and community that may result from breaching a student’s trust).

106. See *Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (arguing that FERPA’s “education records” definition “is open to interpretations that

As a result, school social workers wishing to take advantage of the “sole possession note” procedure exemption must be careful not to disclose their notes to anyone for any purpose. This “sole possession note” procedure for maintaining student confidentiality has caused a great deal of confusion on the part of school social workers over how to accurately record treatment sessions.¹⁰⁷

2. *Insufficiency of Using De-Identified Information to Maintain Appropriate Levels of Confidentiality*

In theory, school social workers have the option of using masked or redacted records to maintain the confidentiality of student information shared with others in the school.¹⁰⁸ However, although FERPA allows for broad disclosure of redacted education records,¹⁰⁹ redaction is not a viable option. The reason is that the records would need to be redacted to such an extent that they would be rendered unintelligible.¹¹⁰ Otherwise, if anyone were to

invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances”).

107. *Cf.* Mary H.B. Gelfman & Nadine C. Schwab, *School Health Services and Educational Records: Conflicts in the Law*, 64 ED. L. REP. 317, 319 (1991) (discussing the record-keeping dilemma faced by school nurses when determining “what is appropriate to record on the student’s health record, and what cannot be recorded on that health record because of [student] confidentiality rights”).

108. 34 C.F.R. § 99.31(b)(1) (“An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without [parental consent] after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.”).

109. *ESPN*, 970 N.E.2d at 947 (“With the personally identifiable information concerning the names of the student-athlete, parents, parents’ addresses, and other person[s] involved redacted, FERPA would not protect the remainder of these records.”); *see also, e.g.*, *Obersteller v. Flour Bluff Indep. Sch. Dist.*, 874 F. Supp. 146, 149 (S.D. Tex. 1994) (holding that a letter to a newspaper editor written by school secretary did not violate FERPA where the student referred to was not named or otherwise identified); *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (concluding that records of university disciplinary charges against fraternities and sororities for hazing violations were not FERPA records because they did not identify individual students).

110. FERPA drops the parental consent required to release education records after a school “has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” 34 C.F.R. § 99.31(b)(7). Because school social workers provide services during the course of long-term treatment, it could quickly become apparent to whom redacted records apply. This would be particularly problematic in rural communities where the typical school social worker practices in a smaller

find out to whom the records applied,¹¹¹ they would no longer be anonymous, and again, the information would immediately become part of the education record.¹¹² This presents problems especially in small schools and rural communities because of the close-knit nature of these locales.¹¹³

The Privacy Rule similarly does not regulate social work records that have been de-identified by removing all “personally identifiable health information.”¹¹⁴ However, HIPAA exempts such documents from the Privacy Rule only when they are coded to a high degree of statistical certainty,¹¹⁵ or else are redacted so fully that the records would be rendered unusable.¹¹⁶ Because schools typically lack the resources to comply with HIPAA’s costly procedural requirements, the only realistic way to keep information out of a student’s permanent file is to use the “sole possession notes” exemption.

school.

111. See Daggett, *supra* note 8, at 624-25 (discussing situations where students’ FERPA rights may be violated even though the students are not named); Doe v. Knox Cnty. Bd. of Educ., 918 F. Supp. 181, 184 (E.D. Ky. 1996) (finding that the disclosure of information to media about unnamed student with hermaphroditism presented triable issue of fact on FERPA claim).

112. See 20 U.S.C. § 1232g(a)(4)(B)(i) (exempting “sole possession notes” from FERPA’s “education records” definition only until the social worker discloses them to a third party).

113. For example, in a small town with one blind student, telling the local paper about the costs of “a local blind student’s” special education program would likely violate that student’s FERPA rights. *Cf.* Carey v. Maine Admin. Sch. Dist. 17, 754 F. Supp. 906 (D. Me. 1990) (finding that school violated FERPA by providing media with confidential information about apparently unnamed special education student who brought automatic weapon to school).

114. 45 C.F.R. § 164.514(d)(2) (“Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information.”); Breach Notification for Unsecured Protected Health Information, 74 Fed. Reg. 42,740, 42,740-44 (Aug. 24, 2009) (codified at 45 C.F.R. pts. 160 & 164) (“If information is de-identified in accordance with 45 C.F.R. § 164.514(b), it is not protected health information . . .”).

115. 45 C.F.R. § 164.514(b)(1) (requiring school social workers to submit the allegedly de-identified information to “[a] person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable,” who “determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information,” and “[d]ocuments the methods and results of the analysis that justify such determination”). In other words, the Privacy Rule requires far more than merely redacting or masking a student’s name.

116. See *id.* at (b)(2) (considering health records de-identified if, among other identifiers of the individual or of relatives or household members, the names, geographic subdivisions smaller than a State, and all elements of date (except year) are removed).

3. HIPAA's Privacy Rule Governs "Sole Possession Notes"

School social workers' confusion surrounding confidential personal notes¹¹⁷ is compounded by the fact that "education records" covered by FERPA are not considered to be "protected health information" subject to the Privacy Rule.¹¹⁸ "Sole possession notes" are not considered "education records" either,¹¹⁹ and therefore, they are not governed solely by FERPA.¹²⁰ These notes contain information recorded by a health care provider during the course of therapy, meaning they are governed by HIPAA.¹²¹ However, because "sole possession notes" are kept separate from the rest of a student's record, they are defined by HIPAA as "psychotherapy notes."¹²²

Under HIPAA, "psychotherapy notes" include anything created by a school social worker that is separated from the rest of the student's record.¹²³ Although both statutes similarly provide for such personal notes, the protections and penalties for wrongful disclosure afforded under each are very different.¹²⁴ For example, although HIPAA does not allow patients to inspect their own "psychotherapy notes,"¹²⁵ it allows disclosure to specified parties by the school social worker upon the student's request.¹²⁶ In the

117. See, e.g., McWhinney, *supra* note 6, at 2 (commenting on the "complexity of decision-making about confidentiality for school social workers"); ALLEN-MEARES, *supra* note 12, at 102 (describing the uncertainty amongst school faculty regarding HIPAA's applicability to schools); Wasson, *supra* note 8, at 1354 (arguing that FERPA requires an overhaul to reflect modern technological advancements).

118. See 45 C.F.R. § 160.103 (excluding FERPA's "education records" from the Privacy Rule's control).

119. 20 U.S.C. § 1232g(a)(4)(B)(i).

120. CONSTABLE ET AL., *supra* note 20, at 109 ("It is necessary to understand that FERPA applies only to the education records of students . . . FERPA does not apply to the personal notes of school social workers . . .").

121. See 45 C.F.R. § 160.103 (providing that the Privacy Rule covers all information created or received relating to the provision of mental health services).

122. *Id.* § 164.501.

123. See *id.* (defining "psychotherapy notes" as "notes (recorded in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record[]").

124. REAMER, *supra* note 25, at 117 ("Social workers who serve children should be aware that under HIPAA regulations 'psychotherapy notes' have special privacy protections.").

125. See 45 C.F.R. § 164.524(a)(1)(i) (providing that "an individual has a right of access to inspect and obtain a copy of protected health information about the individual . . . , except for: Psychotherapy notes . . .").

126. See *id.* § 164.508(a)(2) (providing that "[n]otwithstanding any provision of this subpart . . . a covered entity must obtain an authorization for any use or disclosure of 'psychotherapy notes'") (internal quotation marks added); *Kalinowski v. Evans*, 337 F. Supp. 2d 136, 137 (D.D.C. 2005) (holding

event of an unauthorized disclosure of “psychotherapy notes,” the school social worker is potentially liable for both civil and criminal penalties.¹²⁷ Due to the potentially drastic punishment for wrongful disclosures,¹²⁸ school social workers’ concern about the interplay between FERPA and HIPAA is understandable.

B. The Implications of HIPAA Governing “Sole Possession Notes”

The differences between FERPA and HIPAA give rise to potential irreconcilable ethical and legal conflicts as school social workers provide therapeutic services to students. Below this Comment will identify several such dilemmas created by FERPA and HIPAA’s overlapping regulatory schemes.

1. The Differences in the Use and Disclosure Requirements Under FERPA and HIPAA Create Ethical Conflicts

FERPA provides that “sole possession notes” need not be disclosed to anyone other than a temporary substitute.¹²⁹ As previously explained, there are numerous circumstances in which a school social worker might choose to employ this procedure.¹³⁰ HIPAA provides a similar procedure for maintaining

that “[t]he ‘authorization’ for release of medical or treatment records, required by [HIPAA], refers to the authorization of the patient or person receiving the treatment from the health care professional, and not the professional’s authorization”).

127. See U.S. Department of Health and Human Services, Press Release, Fact Sheet: Protecting the Privacy of Patient’s Health Information (May 19, 2001), available at <http://aspe.hhs.gov/admnsimp/final/pvcfact2.htm> (clarifying that HIPAA provides for both civil and criminal penalties for knowing violations); ESSEX, *supra*, note 79, at 197 (suggesting possibility of tort liability for defamation resulting from unauthorized disclosure of “psychotherapy notes”).

128. *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004) (“FERPA is not a law which absolutely prohibits the disclosure of [therapy records]; rather it is a provision which imposes a financial penalty for the unauthorized disclosure of [therapy records].”). *But see* 20 U.S.C. § 1232g(a)(1), (b)(1) (protecting only “education records”). A school social worker who either refuses a parent or eligible student access to “sole possession notes,” or divulges information contained therein without proper parental consent, has not violated FERPA because “sole possession notes” do not qualify as “education records.” *See id.* § 1232g(a)(4)(B)(i) (exempting “sole possession notes” from the “education records” definition).

129. 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3; *see also* Daggett, *supra* note 8, at 626 (discussing implications of information contained in documents that are defined as “sole possession notes”).

130. *Supra* notes 102-105 and accompanying text.

confidentiality: “psychotherapy notes.”¹³¹ However, HIPAA’s protections are both confusing and less extensive.¹³²

HIPAA prevents “psychotherapy notes” from being disclosed without a patient’s consent.¹³³ However, in the school setting, where the patient is a minor, the minor’s parents are the only people allowed to provide this required consent.¹³⁴ If the parent is granted access to these records, the parent not only might let the wrong person see the records, but also might withhold them from the appropriate people having “legitimate educational interests” in accessing the information.¹³⁵

2. *The Differences Between FERPA and HIPAA Create Irreconcilable Legal Conflicts*

School social workers need to balance their ethical obligation to maintain confidentiality¹³⁶ with their legal duty to report suspected abuse and protect the student from ongoing and future harm.¹³⁷ Federal law¹³⁸ requires school social workers to

131. See 45 C.F.R. § 164.501 (defining HIPAA’s “psychotherapy notes”).

132. Congress’ enactment of the Privacy Rule spawned a plethora of articles written attempting to explain the new procedures mental health providers were required to implement. See, e.g., Kathryn L. Bakich, *Countdown to HIPAA Compliance: Understanding EDI, Privacy, and Security*, 15 BENEFITS L.J. 2 (2002); Hugh Barton, *Health Information and Patient Rights Under HIPAA*, 65 TEX. B.J. 824 (2002); Susan M. Gordon, *Privacy Standards for Health Information: The Misnomer of Administrative Simplification*, 5 DEL. L. REV. 23 (2002); Mary B. Johnston & Leighton Roper, *HIPAA Becomes Reality: Compliance with New Privacy, Security, and Electronic Transmission Standards*, 103 W. VA. L. REV. 541 (2001); Nancy A. Lawson et al., *The HIPAA Privacy Rule: An Overview of Compliance Initiatives and Requirements*, 70 DEF. COUNS. J. 127 (2003).

133. 45 C.F.R. § 164.508(a)(2); see also *Kalinowski*, 337 F. Supp. at 137 (explaining that it is the patient (or student in the context of school social work therapy sessions) rather than the school social worker who controls access to “psychotherapy notes”).

134. See 45 C.F.R. § 164.502(g) (granting parents the right to either consent or refuse access to third parties).

135. See *supra* notes 37-40 and accompanying text (explaining the permissibility of disclosures to those within the school having a “legitimate educational interest”).

136. See Swenson, *supra* note 16, at 70 (noting that “[v]iolating the [student’s] expectation of privacy violates professional ethical rules, . . .”); *supra* note 25, at 48 (describing privacy and confidentiality as “bedrock principles in social work practice”); CODE OF ETHICS *supra* note 85, at § 1.07(a), (c) (describing social workers’ ethical duty to maintain confidentiality throughout all stages of the therapy process).

137. See *supra* note 3 (noting that school social workers are mandated reporters under both federal and Illinois law).

138. The Child Abuse Prevention & Treatment Act of 1974 also required states to adopt appropriate legislation establishing methods to protect the confidentiality of “children and parents.” Pub. L. No. 93-247, § 4, 88 Stat. 4, 106 (1974) (codified as amended at 42 U.S.C. §§ 5101-07).

immediately report suspected child abuse,¹³⁹ and provides immunity from both civil and criminal liability when done in good faith.¹⁴⁰

These competing interests present problems for our hypothetical school social worker because any record of the pregnancy and suspected abuse would become part of the student's education record (at least if disclosed to a third person),¹⁴¹ and therefore, accessible to the student's parents¹⁴² and most faculty within the school.¹⁴³ On the other hand, failing to record the incident would violate the social worker's duty to report,¹⁴⁴ as well as jeopardize the student's safety and well-being.

FERPA also potentially conflicts with federal laws protecting the confidentiality of substance abuse records.¹⁴⁵ For example, to the extent states give minors the right to get treatment or counseling for substance abuse problems without parental consent, the federal substance abuse laws require that records of that assistance be kept confidential, even from parents, unless the minor consents.¹⁴⁶

Similarly, some states allow minors to obtain outpatient mental health treatment without parental consent.¹⁴⁷ This creates the same potential conflict, because parents are given a right of access to this student's education records,¹⁴⁸ which contain

139. 42 U.S.C. § 13031(a).

140. *Id.* § 13031(f).

141. *See supra* note 45 and accompanying text (explaining that FERPA's "education records" definition is sufficiently broad enough to cover any record concerning a particular student).

142. *See* 20 U.S.C. § 1232g(a)(1)(A)-(B) (requiring all schools receiving federal funding to grant parents the right to access their children's education records).

143. *See* 20 U.S.C. § 1232g(b)(1)(A) (relaxing the parental consent requirement for the release of "education records" when such release is to teachers or school officials with a "legitimate educational interest" in the records); Department of Education, FERPA Final Rule, 61 Fed. Reg. at 59,297 (explaining that "legitimate educational interest" is present when a school official or teacher needs to review an "education record" "in order to fulfill his [or her] professional responsibility"); 34 C.F.R. § 99.31(a) (leaving to each individual school's discretion the task of creating standards to use in determining when "legitimate educational interest" is present). Congress has set the hurdle to access students' "education records" so low that nearly everyone in a school can make the requisite showing.

144. *See supra* note 3 (noting that school social workers are mandated reporters under both federal and Illinois law).

145. *See* Huefner & Dagget, *supra* note 88, at 489 (describing situations in which FERPA potentially conflicts with other laws).

146. 42 U.S.C. § 290dd-2; 42 C.F.R. § 2.14.

147. *See, e.g.,* WASH. REV. CODE. § 71.34.030 (allowing minors age thirteen and over to receive outpatient mental health treatment without parental consent); CAL. HEALTH & SAFETY CODE § 124260(b) (2012) (allowing California minors over the age of 12 to consent to mental health treatment without parental consent).

148. 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3.

information regarding the mental health treatment.¹⁴⁹ Furthermore, information sharing within the school, even to those having a “legitimate educational interest,” still violates federal laws¹⁵⁰ and the social work professional code of ethics.¹⁵¹

C. *The Lack of Meaningful Remedies Has Prohibited Enforcement of FERPA Violations*

Individuals harmed by improper disclosure or denial of school records have no meaningful recourse.¹⁵² FERPA creates no private cause of action,¹⁵³ meaning that students and parents may not sue for damages under 42 U.S.C. § 1983 to enforce any of FERPA’s provisions.¹⁵⁴ Consequently, if an education record is improperly disclosed, a student’s only recourse is to notify the Family Policy Compliance Office (FPCO).¹⁵⁵ The FPCO then

149. See *supra* notes 45-46 and accompanying text (explaining that FERPA defines “education records” broadly to include any information about a student, including therapy session records).

150. See, e.g., 42 C.F.R. § 2.13 (limiting internal information sharing in substance abuse programs); *supra* note 146 and accompanying text (prohibiting disclosure of substance abuse treatment records, even to a student’s parents); *supra* note 3 (requiring school social workers to immediately report suspected abuse to the Department of Child and Family Services).

151. See STANDARDS FOR SCH. SOC. WORK SERVS., *supra* note 15, at 10 (discussing school social workers’ ethical obligation to maintain accurate therapy records); REAMER, *supra* note 1, at 117 (explaining how difficult confidentiality issues concerning the treatment of minors places school social workers in a precarious situation); CONSTABLE ET AL., *supra* note 20, at 107 (noting that treating minors raises uniquely difficult issues).

152. See, e.g., Wasson, *supra* note 8, at 1356 n.36 (discussing the presence of multiple problems with FERPA’s enforcement scheme).

153. See, e.g., Cort v. Ash, 422 U.S. 66, 84 (1975) (holding that under no circumstance is there a private cause of action under FERPA); Burke v. Brookline Sch. Dist., Civil No. 06-cv-317-JD, 2007 WL 268947, at *3 (D.N.H. Jan. 29, 2007), *aff’d*, 257 Fed. App’x 335 (1st Cir. 2007) (finding no private cause of action under FERPA); Woodruff v. Hamilton Tp. Pub. Schs., 305 Fed. App’x. 833, 837 (3d Cir. 2009) (finding no private cause of action under FERPA); Simpson *ex rel.* Simpson v. Uniondale Union Free Sch. Dist., 702 F. Supp. 2d 122, 125 (E.D.N.Y. 2010) (finding no individual right of enforcement under FERPA).

154. *Gonzaga Univ.*, 536 U.S. at 287 (“[T]here is no question that FERPA’s nondisclosure provisions fail to confer enforceable rights.”).

155. Family Educational Rights and Privacy, 65 Fed. Reg. at 41,854 (“A parent or eligible student may file a written complaint with the Family Policy Compliance Office (FPCO) regarding an alleged violation under [FERPA].”). The FPCO was created by the Secretary of Education “to act as the Review Board required under [FERPA and] to enforce [FERPA] with respect to all applicable programs.” 34 C.F.R. § 99.60(a) to (c). The Second Circuit in *Taylor v. Vermont Department of Education*, addressed the FERPA question left unanswered by *Gonzaga Univ.*, concluding that the lack of a private remedy for unauthorized disclosure applies equally to improper denial of access to records as it does to unauthorized disclosure. 313 F.3d 768, 786 (2d Cir. 2002).

follows its own procedures¹⁵⁶ to determine whether a violation has occurred, and if so, directs the school to remedy the violation.¹⁵⁷ However, this process actually does little to remedy violations,¹⁵⁸ because the FPCO is authorized only to seek voluntary compliance from the offending school.¹⁵⁹ Furthermore, it does not address individual harms, but only systematic violations.¹⁶⁰

D. HIPAA's Structure Negates the "Sole Possession Notes" Exemption

The Department of Education clarified in a 2000 amendment to FERPA that the purpose of having sole possession notes is to allow those within the school to keep personal observations private.¹⁶¹ But, these personal notes are not considered education records,¹⁶² and thus, are not exempted from HIPAA's control.¹⁶³ As such, the school social worker faces a dilemma: either disclose information to persons with legitimate educational interests,¹⁶⁴ and risk disclosure to any other person who is or may be granted access to the student's education record,¹⁶⁵ or keep separate personal notes with the hope that the student's parent never authorizes their disclosure.¹⁶⁶

156. The FPCO permits students and parents who suspect a violation of FERPA to file individual written complaints. 34 C.F.R. § 99.63. If a complaint is timely and contains the required information, the FPCO will initiate an investigation, *id.* § 99.64(a)-(b), notify the educational institution of the charge, *id.* § 99.65(a), and request a written response. *Id.*

157. If a violation is found, the FPCO distributes a notice of factual findings and a "statement of the specific steps that the agency or institution . . . must take to comply" with FERPA. *Id.* § 99.66(b), (c)(1).

158. See Huefner & Dagget, *supra* note 88, at 485 (noting that although the FCPO has issued hundreds of complaints, it has never attempted to withdraw federal funds because of FERPA violations); Robert W. Futhey, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 308-14 (2008) (arguing that "Congress should amend FERPA to allow individuals to bring an action against educational institutions that violate FERPA").

159. 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.66(c).

160. 20 U.S.C. § 1232g(a)(1).

161. Family Educational Rights and Privacy, 65 Fed. Reg. at 41,856 ("The main purpose of the [sole possession notes] exception to the definition of 'education records' is to allow school officials to keep personal notes private.").

162. See ESSEX, note 79, at 193 (explaining that "[r]ecords that remain in the sole possession of counselors are not subject to FERPA," and that "[e]ducational records under FERPA do not include personal files").

163. See *supra* Part III.A.3 (discussing why HIPAA controls therapy records created within a school that are not classified as education records).

164. See *supra* note 143 (explaining the "legitimate educational interest" exception to the parental consent requirement for education record disclosure).

165. See *supra* notes 33-41 and accompanying text (discussing who is permitted to access "education records").

166. See *supra* notes 68-70 and accompanying text (discussing why a school

HIPAA creates an untenable situation: if the parent grants a third party access to the psychotherapy notes, they are no longer maintained in the sole possession of the person who made them (the school social worker). If and when that happens, they immediately become education records.¹⁶⁷ But HIPAA exempts education records from its Privacy Rule,¹⁶⁸ meaning that the information can be disclosed to most faculty within the school.¹⁶⁹ In sum, there is no way for school social workers to maintain confidential therapy notes. This contradicts Congress' intent to protect students' and parent's privacy when it chose to include FERPA's sole possession note exemption.¹⁷⁰

IV. PROPOSAL

This Comment suggests two amendments which will finally accomplish the congressional intent in drafting both FERPA and HIPAA. First, HIPAA needs a simple amendment that broadens its exemption to include all school records subject to FERPA. Second, FERPA must be updated to reflect the confidentiality protections afforded to social workers practicing in analogous non-educational settings. The FERPA amendment provides more discretion for school social workers to determine when and to whom to grant access to confidential therapy session notes, but without also requiring the notes to become "education records" that are accessible to most faculty within the school.

A. An Amendment to HIPAA's Privacy Rule Providing a Broader School Record Exemption

The purpose of this amendment can be stated as follows:

To enlarge HIPAA's exemption for 'education records' to include all documents created within schools that receive federal funding conditioned on compliance with FERPA's privacy protections.

social worker would have legitimate reasons for keeping certain information out of a student's education record). This is because if the parent permitted any person to access the personal notes, they would immediately become part of the student's education records. *Id.*

167. Family Educational Rights and Privacy, 65 Fed. Reg. at 41,856 ("The main purpose of [the sole possession notes] exception to the definition of "education records" is to allow school officials to keep personal notes private.").

168. See 45 C.F.R. § 160.103 (exempting FERPA's "education records" from the Privacy Rule's control).

169. *Supra* note 143.

170. See 120 CONG. REC. at 39,862 (noting that Congress enacted FERPA to "protect [parents' and students'] rights to privacy by limiting the transferability of their records without first their consent"); *supra* Part II.D. (explaining that Congress sought to accomplish this purpose through the "sole possession note" exemption procedure).

The following provision can be inserted into 45 C.F.R. § 160.103 to accomplish this purpose:

(2) Protected health information excludes individually identifiable health information in:

(iv) Records described at 20 U.S.C. § 1232g(a)(4)(B)(i)¹⁷¹ and 34 C.F.R. § 99.3.¹⁷²

This proposed amendment to HIPAA's Privacy Rule will easily resolve the current confusion surrounding which law applies to school social workers' therapy records. It will make clear that personal notes kept by school social workers are in no way governed by HIPAA's Privacy Rule, by enlarging its current exemption for what FERPA calls "education records" from the "protected health information" it controls.¹⁷³ It furthers the congressional goal of exempting from HIPAA's control all school records.¹⁷⁴ HIPAA's Privacy Rule was written largely as an afterthought to an Act meant to increase the portability of health insurance as people change jobs, and it has been widely criticized as confusing, difficult to implement, and even a failure in achieving actual information privacy.¹⁷⁵ It was also drafted without much thought given to the implications for school social workers.¹⁷⁶

171. 20 U.S.C. § 1232g(a)(4)(B) provides the following: "The term 'education records' does not include – (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;"

172. 34 C.F.R. § 99.3 provides the following: "The term [education records] does not include: (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the records"

173. 45 C.F.R. § 160.103.

174. *Supra* note 78 and accompanying text.

175. Pollio, *supra* note 53, at 597-601; *See* Lawson et al., *supra* note 132, at 127 (describing HIPAA as a "maze of mandates and exceptions"); Johnston & Roper, *supra* note 132, at 542 (calling HIPAA "enormously broad"); Bakich, note 132, at 45 (asserting that HIPAA's Privacy Rule is "likely to produce the most significant change in health care operations since Medicare"); Michael N. Mercurio, *Uncomplicating Health Care Industry Via HIPAA's Administrative Simplification*, MD. B.J., Feb. 2003, at 36 (calling HIPAA the "most sweeping piece of legislation to affect the health care industry in decades").

176. The purpose of the 2002 modification to HIPAA's privacy rule was to "maintain strong protections for the privacy of individually identifiable health information while clarifying certain of the Privacy Rule's provisions," as well as "addressing the unintended negative effects of the Privacy Rule on health care quality or access to healthcare, and relieving unintended administrative burdens created by the Privacy Rule." Standards for the Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,182 (Aug. 14, 2002) (codified as amended at 45 C.F.R. pts. 160 & 164).

The amendment remedies what is clearly nothing more than a small oversight made while drafting a massive statute.¹⁷⁷ No longer must school social workers keep two sets of documents, which are each subject to widely varying confidentiality protections and record-keeping requirements. However, this is not the end of the remedy. FERPA also requires an amendment to address the shortcomings¹⁷⁸ in the way it handles “sole possession notes.”

B. An Amendment to FERPA Giving School Social Workers Broader Discretion and Control over Student Therapy Records

The purpose of this amendment can be stated as follows:

To enlarge FERPA’s ‘education records’ exemption to provide more discretion for school social workers, who are in the best position to decide when it is appropriate to disclose confidential information obtained during therapy sessions.

The following provision can be inserted into 20 U.S.C. § 1232g(a)(4)(B) to accomplish this purpose:

The term ‘education records’ does not include--

- (i) personal notes recorded (in any medium) by a school social worker who is documenting or analyzing observations and contents of conversations during a private counseling session or a group, joint, or family counseling session and that are kept separate from the rest of the student’s education record.

FERPA’s procedures regarding school social workers’ personal notes requires an amendment that reflects modern changes to the social work profession. Congress must no longer treat FERPA as merely “a tangential piece of much larger legislation.”¹⁷⁹ In addition to the ambiguous definition of education

177. See Pollio, *supra* note 53, at 620 (arguing that although HIPAA’s Privacy Rule has successfully struck a balance between privacy protection for individuals and ease of administration for the health care industry, it is nonetheless satisfactory “only if viewed as a starting point”).

178. See *supra* Part III.A. (arguing that HIPAA inadequately governs the very documents to which FERPA provides the most protections); *supra* Part III.B (explaining the differences in the use and disclosure requirements under FERPA and HIPAA, and arguing that these differences create competing results, due to the irreconcilable legal and ethical conflicts of each law); *supra* Part III.C (explaining the lack of meaningful remedies afforded under FERPA, and why this has prevented students, parents, and school social workers from attempting to rectify the current deficiencies in this area of education law); *supra* Part III.D (concluding that the Privacy Rule negates FERPA’s “sole possession note” protections).

179. Huefner & Dagget, *supra* note 88, at 491. Huefner and Daggett argue that “Congress has never focused exclusively or even primarily on student records issues.” *Id.* To support this conclusion the authors analyzed statutory

records¹⁸⁰ is the lack of an adequate explanation of FERPA's "sole possession note" exemption procedure.

With this amendment FERPA's confidentiality protections will no longer be lacking. The shortcomings of this hastily drafted piece of legislation offered on the floor of the US Senate,¹⁸¹ which did not receive scrutiny from legislative committees or hearings,¹⁸² will be addressed. Within four months after Congress enacted FERPA, Senator James Buckley introduced an amendment to give FERPA a major overhaul.¹⁸³ FERPA will now reflect the Buckley amendment's acknowledged purpose of clarifying FERPA's language in light of the many questions school administrators raised because of FERPA's original hasty drafting.¹⁸⁴ This almost immediate revision was likely needed due to the fact that Congress did not sufficiently analyze the ramifications of FERPA's "sole possession notes" procedure.¹⁸⁵ Contrary to the current situation under which school social workers' personal notes are governed by HIPAA's Privacy Rule,¹⁸⁶ FERPA's legislative history

and regulatory changes, new court decisions, and conflicts and overlaps between FERPA and other privacy laws. The authors end their discussion by calling for Congress to re-evaluate FERPA, because it "continues to contain numerous internal and external ambiguities and conflicts, and it presents significant and often unclear burdens to schools." *Id.* The authors' arguments are relevant even thirteen years later, especially since the enactment of HIPAA.

180. See *Gonzaga Univ.*, 536 U.S. at 291-92 (Breyer, J., concurring) (finding that Congress did not intend to allow a private cause of action pursuant to 42 U.S.C. § 1983 because of the ambiguous definition FERPA attributed to education records, and also noting that FERPA's definition of education records is so vague that educational institutions cannot know what specific types of information the educational institution could permissibly reveal).

181. See *supra* notes 27-32 and accompanying text (outlining the history surrounding the enactment of FERPA, including the fact that there was no legislative history, no meaningful debate over any of its provisions, and it was enacted in an era before the explosion of personal computers, electronic records, and instantaneous electronic document transmission).

182. 120 CONG. REC. at 39, 858; DEP'T OF EDUC., *LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS*, 1 (2002), available at www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf.

183. See § 513, 88 Stat. at 571-74 (illustrating FERPA's original text); 120 CONG. REC. at 39,864-66 (illustrating the amended text of FERPA).

184. 120 CONG. REC. at 39,858.

185. Compare 120 CONG. REC. at 39,858 (stating that Congress wrote FERPA in haste), with Family Education Rights and Privacy, 65 Fed. Reg. at 41856 (implying that Congress clearly intended to give "sole possession notes" absolute confidentiality protections), and 20 U.S.C. § 1232g(a)(4)(B)(i) (exempting from FERPA's "education records" definition and the corresponding access rights and wrongful disclosure protections those personal notes that are kept in the sole possession of a school social worker).

186. HIPAA exempts "education records" from its control. FERPA exempts from the "education records" definition those therapy records kept in the "sole possession" of the school social worker. Therefore, what FERPA calls "sole possession notes" are actually considered "psychotherapy notes" under HIPAA.

and subsequent judicial decisions interpreting its scope suggest that Congress intended to give absolute confidentiality protection to personal notes.

FERPA's amendment will also remedy the legislative oversight that has been further compounded by subsequent developments regarding the social work profession.¹⁸⁷ Although Congress clearly evinced intent to protect the privacy of school records,¹⁸⁸ Senator James Buckley also stated that he initiated FERPA in part because, in a free society, individual privacy is essential.¹⁸⁹ The amendment conforms to Senator Buckley's original intent in enacting FERPA. This is accomplished by providing school social workers more discretion in whether, and to whom, to disclose personal notes created from information obtained during the course of student therapy sessions.

Furthermore, developments in social work practice over the last forty years have significantly changed the way therapy session confidentiality is viewed. HIPAA, enacted nearly thirty years after FERPA, intended to take into account these developments by providing significant confidentiality protections to therapy records.¹⁹⁰ Social workers practicing in analogous non-educational settings are able to create personal notes that remain confidential. Regardless of who is granted access to these observations, whether temporary or permanent, such notes remain the exclusive property of the social worker.¹⁹¹ The only way in which these notes are lacking is their confidentiality protections are not in fact absolute. The recipient of social work services is the only person, other than the social worker, who can grant third

See supra Part III.D. (arguing that the current overlap between the two statutes creates a catch-22: either disclose information to parents and persons with legitimate educational interests, and risk disclosure to any other person who is or may be granted access to the student's education record, or keep separate personal notes with the hope that the student's parents never allow them to be disclosed).

187. *See supra* notes 84-85 and accompanying text (noting that social workers have an ethical obligation to accurately document therapy sessions); *supra* notes 21-23 and accompanying text (noting that recent studies suggest that minors may be capable of giving informed consent to mental health treatment); *supra* notes 145-149 and accompanying text (describing developments in both state and federal laws that allow minors to seek mental health services without parental consent, especially in the areas of substance abuse and pregnancy).

188. 121 CONG. REC. at 13,991.

189. *Id.*

190. *See supra* note 73 (arguing that Congress clearly intended to provide "sole possession notes" with absolute confidentiality protections until the school social worker consciously chooses to disclose them to third parties).

191. *See supra* notes 122-128 and accompanying text (defining HIPAA's "psychotherapy notes," and explaining the confidentiality protections disclosure requirements concerning the dissemination of these records).

parties access to the information contained therein.¹⁹² However, HIPAA does not allow recipients to access the notes themselves.¹⁹³

Instead of the current procedure, FERPA will now provide that personal notes remain confidential unless and until the school social worker consciously chooses to put them into a student's "education record." This proposed amendment tracks HIPAA's "psychotherapy notes" exemption,¹⁹⁴ with the added protection that not even students or their parents can require the social worker to disclose the notes.

V. CONCLUSION

Current law creates an undesirable situation because it forces school social workers to choose between creating accurate documents or maintaining confidentiality.¹⁹⁵ Confidentiality in treatment is a bedrock principle of the social work profession, and has come to be widely recognized over the course of the twenty-first century. However, FERPA's alleged "confidentiality protections" are nothing more than a mere illusion of privacy. What little benefit they did provide to students was eviscerated when HIPAA swallowed up FERPA's "sole possession notes" exemption procedure. Without amending FERPA and HIPAA, school social workers will continue to be denied the protections provided by technological advancements to their peers practicing in analogous non-educational settings.

192. *See* 45 C.F.R. § 164.524(a)(1)(i) (providing that "an individual has a right of access to inspect and obtain a copy of protected health information about the individual . . . , except for: Psychotherapy notes").

193. *See supra* notes 133-134 (explaining that the only persons who can authorize disclosure of "psychotherapy notes" are the student's parents, and not the school social worker).

194. *See* 45 C.F.R. § 164.501 (defining "psychotherapy notes" as "notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record").

195. *See supra* Part III.B (arguing that the irreconcilable ethical and legal conflicts created by the overlap between FERPA and HIPAA encourages school social workers to record only the bare minimum required to fulfill their therapeutic duties).