

PRIVACY AND CONFIDENTIALITY: BALANCING STUDENT RIGHTS AND CAMPUS SAFETY

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*“There is only one thing in the world worse than being talked about,
and that is not being talked about.”*

OSCAR WILDE¹

INTRODUCTION

College and university administrators worry about the welfare of students and their safety on campus. They have always been aware of potential risks to students from criminal activity in the surrounding community, but they are increasingly apprehensive about the risks that students pose to themselves and to other students on campus. Campus administrators, student health professionals, psychologists, and conduct officials regularly see students who abuse alcohol and other drugs at dangerous levels.² They recognize that students arriving on campus are more likely to have serious mental health issues, many of which are more severe than have been seen in the past.³ As a result, many campus administrators worry about school shootings and student suicides. In the past, concerns about student privacy may have discouraged some campus administrators from talking to each other and to the students' families about these students; however, concerns about public

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1. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY AND SELECTED STORIES* 20 (New American Library 1983) (1891).

2. Daniel Ari Kapner, *Infofacts Resources: Alcohol and Other Drugs on Campus—The Scope of the Problem*, THE HIGHER EDUCATION CENTER FOR ALCOHOL AND OTHER DRUG ABUSE AND VIOLENCE PREVENTION, June 2003, <http://www.higheredcenter.org/pubs/factsheets/scope.pdf>.

3. ROBERT P. GALLAGHER, INT’L ASS’N OF COUNSELING SERVS., NAT’L SURVEY FOR COUNSELING CTR. DIRS. 4-5 (2007), available at http://www.iacsinc.org/NsccdSurveyFinal_v2.pdf.

safety and litigation may be working to convince the higher education community that the only thing worse than talking about these students is not talking about them.

Concerns about balancing student privacy and confidentiality rights against the safety interests of the campus and larger community are included among the many related concerns about students who appear to be at risk for harming themselves or others. These issues may arise in diverse contexts, such as when a student submits a troubling essay to a teaching assistant or faculty member, when a participant in a study abroad program behaves erratically while traveling out of the country, when a student in a residence hall expresses concern over a roommate's eating disorder, or when a conduct official suspects that a student's violation of the student conduct code may be related to a bigger and potentially more threatening problem. In these examples, as in numerous others, the individual with the concern about the student may not know whom to tell. Some of these individuals may even worry that by getting involved they may be inappropriately subjecting the institution to additional liability. In the worst cases, an individual may believe that the law limits his or her ability to consult with others on campus about the best course of action regarding a student's welfare. Even after appropriate campus consultations have been made, the question may again be raised as to the ability of campus officials to disclose their concerns to a student's family, the police, or community mental health resources.

This article reviews the interplay between campus safety and student privacy and confidentiality.⁴ Part I discusses the provisions of the Family Educational Rights and Privacy Act ("FERPA")⁵ as they relate to making disclosures about a student for the safety of the student or others. Part II discusses the relationship between FERPA and the Health Insurance Portability and Accountability Act ("HIPAA")⁶ and contrasts the requirements of FERPA with those of medical confidentiality laws and ethical obligations of psychologists, physicians, and other health care providers for the limited purpose of distinguishing these obligations from the requirements of FERPA. Part III discusses issues that arise in campus communications and in notifying families of troubling student behavior. Part IV reviews examples of the consultative models that many campuses have employed to address distressed and distressing students and describes strategies to facilitate appropriate communications within these models without violating student privacy rights or laws relating to confidentiality.

4. For an excellent discussion of the history of FERPA and a review of FERPA in the context of other factors that influence and govern student privacy, see Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003).

5. 20 U.S.C. § 1232g (2000 & Supp. IV 2004).

6. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 & 42 U.S.C.).

I. FERPA AND STUDENT PRIVACY RIGHTS

Passed by Congress in 1974, the Family Educational Rights and Privacy Act requires colleges and universities⁷ to allow students⁸ to inspect and review their own education records.⁹ FERPA limits the disclosure of certain information contained in a student's education record to third parties—including parents—without the student's consent.¹⁰ It also gives students the right to request a hearing to contest alleged inaccuracies in their records.¹¹ FERPA requires institutions to give students annual notice of their rights under the law.¹² The law applies to all colleges and universities that receive federal funding,¹³ and the statutory remedy for a policy or practice that fails to comply is the withdrawal of that funding.¹⁴ Although students and their families have filed complaints with the Department of Education Family Policy Compliance Office for alleged violations of FERPA, to date no higher education institution has lost federal funding as a result of alleged violations of FERPA.

A. Records Covered by FERPA

FERPA applies to “education records,” which it defines as those records maintained by an institution that contain information directly related to a student.¹⁵ Education records include almost all records maintained by the institution about a student and go well beyond just the academic record, class schedule, or transcript.¹⁶ The broad definition of “education records” also includes many records that are not educational or academic in nature, such as disciplinary records, financial records, disability accommodation records, photographs, e-mails, and electronic database records.¹⁷ Records are personally identifiable to a student if they include the student's name or other identifiable information or if the student is readily identifiable from the descriptive information contained in the record.¹⁸

In evaluating a potential disclosure or other issue relating to information about a

7. 20 U.S.C. § 1232g; 34 C.F.R. § 99.1 (2006) (stating that FERPA applies to every educational institution to which funds are made available under any program administered by the Secretary of the Department of Education).

8. 20 U.S.C. § 1232g(d) (“[W]henver a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.”).

9. *Id.* § 1232g(a)(1)(A).

10. *Id.* § 1232g(b).

11. *Id.* § 1232g(a)(2).

12. *Id.* § 1232g(e); 34 C.F.R. § 99.7 (2006).

13. 20 U.S.C. § 1232g.

14. *Id.* § 1232g(a)–(b).

15. *Id.* § 1232g(a)(4)(A).

16. *See id.*

17. *See id.*; *but see id.* § 1232g(a)(4)(B) (excluding certain records from the definition of “education records”).

18. 34 C.F.R. § 99.3 (2006).

student in identifying any possible FERPA implications, the preliminary question will be whether the information is in the form of a record. Direct personal experience or observation by a college or university employee is not a “record” as that term is used in FERPA,¹⁹ although it may at some point be documented in a record. Consequently, disclosure of a direct observation, as when an employee reports a difficult personal interaction with a student, is not a FERPA issue. Other considerations may come into play in deciding the extent to which the experience should be disclosed to others, but FERPA will not be relevant. Only if the experience is documented in an institutional record will FERPA be relevant to reviewing the potential disclosure of that record.

This distinction between a personal experience and an education record is often overlooked because over time campuses have come to misunderstand FERPA as a student privacy law, rather than as a student *record* privacy law. To the extent that this misunderstanding has contributed to any reluctance by faculty or staff members to disclose information about difficult or threatening interactions with students for fear of violating FERPA, colleges and universities need to clarify the law with respect to both personal experiences and student records. For personal experiences, such disclosures may be made to appropriate persons with the expertise to provide counsel on the issues of concern without implicating FERPA. If the disclosure involves student record information, FERPA applies but allows disclosures intended to address health or safety emergencies.²⁰

Some records on campus are expressly excluded from FERPA.²¹ Examples of records that are excluded from FERPA and are relevant to this discussion of campus safety include law enforcement records, treatment records, and sole possession records.²² While these records may contain information about a student, they either are governed by other laws and considerations as to their disclosure, as with law enforcement records and treatment records, or are excluded because they are by definition not disclosed, as with sole possession records.

1. Law Enforcement Records

Records created by a law enforcement unit for a law enforcement purpose are not “education records” and while in the hands of the law enforcement unit are not covered by FERPA for purposes of controlling their access or disclosure.²³ If those records are shared with a campus unit or official, perhaps in connection with a conduct investigation, then the copy of the record in the college or university’s possession—apart from law enforcement—is subject to FERPA.²⁴ FERPA records that a college or university shares with law enforcement (e.g., as school officials with a legitimate educational interest or pursuant to the health or safety exception) remain subject to FERPA and cannot be re-disclosed by the law enforcement unit

19. 20 U.S.C. § 1232g(a)(4).

20. 34 C.F.R. § 99.36(a) (2006).

21. 20 U.S.C. § 1232g(a)(4)(B).

22. *Id.*

23. *Id.* § 1232g(a)(4)(B)(ii).

24. 34 C.F.R. § 99.8 (2006).

except as permitted by FERPA.²⁵ These records may be subject to other laws, however, such as state open records laws.²⁶

2. Treatment Records

FERPA also excludes certain treatment records from the definition of “education records.” FERPA coverage does not extend to records of a college or university student that are

made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity . . . and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.²⁷

As discussed further below, these records are protected by state and federal medical record confidentiality and privacy laws; their exemption from FERPA does not mean that they may be freely disclosed.

3. Sole Possession Records

FERPA excludes “sole possession records” from the definition of “education records.” Sole possession records are “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.”²⁸ The key concept here is that the records are not intended to be disclosed and are not accessible to others. For example, if a faculty member’s personal notes about a student are placed in a department file, they become accessible to others and are no longer within the “sole possession” exception.

B. FERPA Access Rights

FERPA gives college and university students the right to inspect and review their education records.²⁹ In most cases this right to “inspect and review” does not include the right to receive a copy of the record, although a school may choose to provide a copy to the student for convenience.³⁰ A college or university may, but is not required to, permit anyone with written consent from the student to inspect and review the student’s education records. The right to inspect or review does not

25. *Id.*

26. *E.g.*, WIS. STAT. § 19.31 (2000).

27. 20 U.S.C. § 1232g(a)(4)(B)(iv).

28. *Id.* § 1232g(a)(4)(B)(i).

29. *Id.* § 1232g(a)(1).

30. A school may be required to provide copies if failure to do so may effectively prevent access, as when a student does not live within commuting distance of the school. *See* 34 C.F.R. § 99.10 (2006).

extend to the student's agents, and an academic institution is not required to honor a student's request to permit access by an agent such as a parent or attorney.³¹ Under FERPA, a college or university is required to provide an opportunity to inspect and review the education record only to the student.³² If a given record contains information about more than one student, the requesting student has the right to see only the portions dealing with himself or herself,³³ so information relating to other students should be redacted or otherwise not disclosed.

For students in elementary and secondary school, parents have the right to access the student's records without the consent of the student, but the paradigm changes at the post-secondary level.³⁴ Once the student is in attendance at a college or university, the student holds the rights provided by FERPA, regardless of the student's age.³⁵ This is sometimes a surprising shift for parents who may have been accustomed to having access to their child's records in earlier grades. As students are entering colleges and universities at younger ages, this is becoming increasingly challenging. This is an area worthy of education for parents who may be more closely involved with their children than ever before and who may not be aware of this change in legal rights as their child moves from high school to postsecondary education.

C. FERPA Disclosure

FERPA generally provides that education records or the information contained in an education record may be disclosed only if one of three conditions is met: 1) the student consents to the disclosure, 2) the information falls within the definition of "directory information," or 3) the disclosure falls within one of the express exceptions provided by FERPA. The limitations on an institution's ability to disclose information from a student's record without the student's consent apply even to information in the record that is otherwise publicly available³⁶ or that the student has himself or herself already disclosed.³⁷ This may seem counterintuitive,

31. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to C. L. "Butch" Otter, Member, House of Representatives (July 29, 2002), *available at* <http://www.ed.gov/policy/speced/guid/idea/letters/20023/otter0729023q 2002.pdf>.

32. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Parent (Aug. 20, 2004), *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/hastings82004.doc>.

33. 34 C.F.R. § 99.12(a) (2006).

34. 20 U.S.C. § 1232g(d).

35. *Id.* ("[W]henever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.").

36. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to W. Joseph Hatley, Attorney, Lathrop & Gage (Mar. 8, 2005), *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/ks030805.doc>.

37. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Dr. Hunter Rawlings III, President, Cornell Univ., *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/cornell.doc> (last visited Mar. 6, 2008); Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep't of Educ., to Jerome D.

especially with regard to a student who may have disclosed significant information about himself or herself through a social network such as MySpace or Facebook.

However, this important right to limit the disclosure of information to third parties comes with several significant limitations. The exceptions discussed below are not an exhaustive list but are those exceptions most relevant to disclosures made in the context of campus or individual safety.

1. Consent

In working with distressed students, consent³⁸ is sometimes overlooked as a means to provide information to a student's family about trouble the student may be having at school. A student initially may be reluctant to communicate with family for fear of disappointing or angering a parent but may be willing to do so if the institution provides some support. Sometimes having a knowledgeable campus employee in the meeting or on the phone when the information is shared may provide some perspective for parents, support for the student, and information about options for services on campus or for taking time away from studies. The law does not favor finding implied consent for disclosure, but in instances in which a student brings a parent to a meeting, such implied consent has been assumed. In other cases, however, consent is not a realistic option, and the institution will need to pursue other means for disclosure.

2. Directory Information

FERPA allows institutions to designate certain classes of information as "directory information." Directory information is information contained in an education record that is not generally considered harmful if disclosed, and it may be released to anyone, inside or outside the institution, without the student's consent.³⁹ Each institution may designate the types of information that may be treated as directory information. Directory information includes, but is not limited to, information such as the student's name, address (local, permanent, e-mail), telephone number(s), dates of attendance, major course of study, degrees and awards received, participation in recognized sports and activities, photograph, and date and place of birth.⁴⁰ If an institution makes directory information available, it must allow students the opportunity to block the release of their directory information.⁴¹ A student's decision to affirmatively block the release of directory information will not affect releases made under other FERPA provisions.

3. Legitimate Educational Interest

A fundamental limit on the student's right to control the disclosure of

Schad, Attorney, Hudgson Russ LLP (Dec. 23, 2004), available at <http://www.ed.gov/policy/gen/guid/fpco/doc/schadj122304.doc>.

38. 20 U.S.C. § 1232g(d).

39. *Id.* § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (2006).

40. 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (2006).

41. 20 U.S.C. § 1232g(a)(5)(B).

personally identifiable information is the ability of college and university personnel to share information with school officials who have a legitimate educational interest in the information.⁴² The statute does not offer a precise definition of what constitutes a “school official” or a “legitimate educational interest” but is explicit that it is the institution that makes these determinations.⁴³ These definitions may be broad and need not be strictly limited to a “need to know” basis. A legitimate educational interest is not strictly limited to academic or educational matters, and permitted disclosures are not limited to those that may address the student’s interest or that may be to the benefit of the student. The Family Policy Compliance Office has offered the following model definitions:

A school official is a person employed by the University in an administrative, supervisory, academic or research, or support staff position (including law enforcement unit personnel and health staff); a person or company with whom the University has contracted as its agent to provide a service instead of using University employees or officials (such as an attorney auditor, or collection agent); a person serving on the Board of Trustees; or a student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibilities for the University.⁴⁴

As a result of efforts to protect student privacy on campus, especially as it may relate to records that contain potentially stigmatizing information such as conduct records and disability accommodation records, tensions may arise on campus over access to information. The officials who administer student conduct and who provide services for students seeking accommodations for disabilities may be reluctant to share information from their files with others on campus, including faculty and administrators, and may feel that they are in the best position to decide which offices and personnel have a need to know such information. These officials may believe that following the terrorist attacks of September 11, 2001 and in the aftermath of recent campus tragedies some people on campus may be unduly fearful and may be overreacting by demanding to know which students have previous conduct records or have requested disability accommodations. In addition, they may have real concerns that the information may be used to discriminate against students or to treat students unfairly. While the institution may want to consider the important student development issues and the risks associated with having sensitive information widely distributed on campus, FERPA does not limit the sharing of this information with other school officials so long as the purpose for the disclosure is within the institution’s definition of

42. *Id.* § 1232g(b)(1).

43. *Id.*

44. U.S. Dep’t of Educ., Family Policy Compliance Office, Model Notification of Rights under FERPA for Postsecondary Institutions, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/ps-officials.html> (last visited Mar. 6, 2008).

legitimate educational interest. The decision is an institutional one and not the sole purview of the office that creates or holds the record, although that office may have important input to be weighed in making the institutional decision.

4. Health or Safety Emergency

One of the most important FERPA exceptions in the area of campus safety permits the disclosure of information from student education records “to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”⁴⁵ Health concerns may include issues such as a student reporting to a resident hall assistant a recent diagnosis of a highly contagious disease such as measles or meningitis. The institution may share this information with others with whom the student has had close contact, without the student’s consent, to encourage them to seek appropriate testing or medical care.⁴⁶ Safety concerns may include concerns for a student’s welfare such as a serious eating disorder, dangerous high-risk behavior such as heavy or binge drinking, suicidal ideation or threats, or erratic and angry behaviors that others might reasonably perceive as threatening.⁴⁷

Although the FERPA health or safety exception does not require the same level of serious and imminent harm that would be required for disclosing confidential information from a medical or mental health record,⁴⁸ disclosures should only be made in good faith based upon the available facts and should be limited to individuals or entities in a position to address or respond to the concern appropriately. The Family Policy Compliance Office has issued guidance to clarify that educational institutions have significant discretion in determining whether a specific situation constitutes an “emergency” and has indicated that it will not question this determination unless it is “manifestly unreasonable or irrational.”⁴⁹

45. 34 C.F.R. § 99.36(a) (2006).

46. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep’t of Educ., to Martha Holloway, State Sch. Nurse Consultant, Ala. Dep’t of Educ. (Feb. 25, 2004), *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/alhippaa.doc> [hereinafter Holloway Letter]; Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep’t of Educ., to Melanie P. Baise, Assoc. Univ. Council, Univ. of N.M. (Nov. 29, 2004), *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/baiseunmslc.doc> [hereinafter Baise Letter].

47. Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, U.S. Dep’t of Educ., to Dr. J. Chris Toe, President, Strayer Univ. (Mar. 11, 2005), *available at* <http://www.ed.gov/policy/gen/guid/fpco/doc/strayer031105.doc>.

48. *E.g.*, CAL. CIV. CODE § 56.10 (West 2007); TEX. OCC. CODE ANN. § 159.004(2) (Vernon 2004) (allowing disclosure of confidential information by physicians to “medical or law enforcement personnel” if there is a risk of “(A) imminent physical injury to the patient, the physician, or another person; or (B) immediate mental or emotional injury to the patient.”).

49. Baise Letter, *supra* note 46. The Department of Education has proposed amendments to the FERPA regulations, 34 C.F.R. § 99.36, to clarify this section. *See* Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). The proposed amendments would remove language requiring strict construction of this section and expressly permit institutions to take into account the totality of the circumstances in making determinations. *Id.* at 15,589. If the institution finds an “articulable and significant threat to the safety or health of the student or other

For issues involving distressed or distressing students, the initial disclosure should be made to campus professionals who may then assist in determining whether further disclosure is appropriate. Colleges and universities may rely upon this exception to contact family members with concerns about the student. This will permit families to provide additional support, to partner with the student and the school to develop appropriate short and long term strategies, and to share information with the school, such as information regarding the student's past behavior or conduct at home, that may assist in determining the best services to recommend for the student and that may contribute important information to any threat assessment being considered.

5. Disclosures to Parents or Family

Discussions of troubling student behavior, suicidal ideation or threats, and perceived risks to others often include consideration of communicating campus concerns to parents or family. This is particularly true when the student is of traditional college or university age or younger. For older students, the issue may be communication with a spouse or other family member rather than a parent.

General FERPA exceptions, such as the health or safety exception, will permit communications with parents and family as well as with other appropriate persons or entities such as law enforcement and community mental health providers when a student is in distress or is behaving in a threatening manner. FERPA also provides two additional exceptions that apply specifically to parents. First, a college or university may, but is not required to, provide information to a parent or legal guardian regarding any violation of law or of an institutional policy governing the use or possession of alcohol or a controlled substance.⁵⁰ To rely on this exception, the institution must determine that the student committed a disciplinary violation with respect to such use or possession and the student is under the age of twenty-one at the time of the violation and the disclosure.⁵¹ Second, FERPA also permits disclosures of education record information to a student's parent if the student is the parent's dependent for federal tax purposes.⁵² To rely on this exception the institution must verify the student's status, which may be done by asking the student for confirmation or by asking the parent for a copy of the relevant portion of the most recent year's tax return.

The U.S. Department of Education has published a series of pamphlets describing the balance of student privacy and campus safety.⁵³ The pamphlets include information for elementary and secondary schools, for colleges and

individuals", the proposed rule would permit disclosure to any person whose knowledge of the threat is necessary to protecting the student or others. *Id.* "If, based on information available at the time of the determination, there is a rational basis for the determination, the Department of Education will not substitute its judgment for that of the educational agency or institution." *Id.*

50. 20 U.S.C. § 1232g(i) (2000).

51. *Id.*

52. *Id.* § 1232g(b)(1)(H).

53. U.S. Dep't of Educ., FERPA Guidelines on Emergency Management, <http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html> (last visited Mar. 6, 2008).

universities,⁵⁴ and for parents.⁵⁵ These pamphlets provide information about FERPA to address common misunderstandings that suggest that FERPA may prohibit certain communications. While reinforcing the important protections provided by FERPA, the pamphlets provide information about communications with parents and disclosures made for the purpose of protecting students and others.⁵⁶

Proposed amendments to the Higher Education Reauthorization Act, also known as the College Opportunity and Affordability Act of 2007,⁵⁷ include a brief section titled “Guidance on Mental Health Disclosures for Student Safety.”⁵⁸ The new language requires the Secretary of Education to provide additional guidance within ninety days after the enactment of the Act, to clarify the role of higher education institutions

with respect to the disclosure of education records, including to a parent or legal guardian of a dependent student, in the event that such student demonstrates that the student poses a significant risk of harm to himself or herself or to others, including a significant risk of suicide, homicide, or assault.⁵⁹

The Act further requires the guidance issued by the Secretary to clarify that “an institution . . . that, in good faith, discloses education records or other information in accordance with the requirements of this Act and . . . [FERPA] shall not be liable to any person for that disclosure.”⁶⁰ This express statement may address some current misunderstandings; however, as discussed above, even without this addition FERPA has permitted appropriate communications by colleges and universities with parents under existing exceptions.⁶¹

6. Disclosing Disciplinary Information

FERPA expressly permits the institution to include information in a student’s education record concerning disciplinary action taken against the student “for

54. U.S. DEP’T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (Oct. 2007), available at <http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf>.

55. U.S. DEP’T OF EDUC., PARENTS’ GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT: RIGHTS REGARDING CHILDREN’S EDUCATION RECORDS, available at <http://www.ed.gov/policy/gen/guid/fpco/brochures/parents.pdf>.

56. *Id.*

57. H.R. 4137, 110th Cong. (2007).

58. *Id.* § 865.

59. *Id.*

60. *Id.*

61. At the time this article went to press, the Department of Education issued proposed regulations to amend various sections of the FERPA regulations, 34 C.F.R. § 99. Family Education Rights and Privacy, 73 Fed. Reg. 15,573 (proposed Mar. 24, 2008). The proposed amendments provide several updates and clarifications, and for the most part, codify guidance that the Family Policy Compliance Office has provided in individual guidance letters. *See id.* The revisions include updated definitions and clarifications regarding permissible disclosures to parents and other disclosures without consent. *See id.* Proposed updates to the health and safety exception are described in footnote 49, *supra*.

conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community.”⁶² It also permits the disclosure of that information to “teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.”⁶³

In a separate and independent provision, FERPA permits institutions to disclose to anyone the final results of a disciplinary proceeding conducted against a student who is an alleged perpetrator of a crime of violence or a non-forcible sex offense if the institution determines as the result of that disciplinary proceeding that the student committed a violation of the institution’s own rules or policies with respect to the crime or offense.⁶⁴ FERPA also permits an institution to disclose the final results of such a proceeding to the victim regardless of whether the alleged perpetrator was found to be in violation of the institution’s rules or policies.⁶⁵ For the purpose of these two exceptions, “final results” is limited to the name of the student who is the alleged perpetrator, the violation found to have been committed, and any sanction imposed against the student by the institution.⁶⁶

7. Disclosure to Another Institution

A new institution may learn that a troubled student is leaving a previous institution, perhaps in an effort to avoid the consequences of past bad conduct or to make a clean start at a new institution. FERPA expressly permits the previous institution to disclose information from the student’s education record to the new institution at which the student seeks or intends to enroll.⁶⁷ The information may be disclosed without the student’s consent and may include concerns about health or safety but is not limited to information of that nature. To make the disclosure, the institution must either inform its students generally in its annual FERPA notice of its practice or make a reasonable attempt to notify the individual student that it has made such a disclosure.⁶⁸ In either case, upon the student’s request, the institution must provide the student with a copy of the disclosed records⁶⁹ and give the student an opportunity for a hearing to challenge the content of the disclosed records.⁷⁰ Of the FERPA exceptions that generally permit disclosure to another institution, the health or safety exception discussed above expressly includes teachers and officials at other schools if they have a legitimate educational interest

62. 20 U.S.C. § 1232g(h)(1) (2000).

63. *Id.* § 1232g(h)(2).

64. *Id.* § 1232g(b)(6)(B).

65. *Id.* § 1232g(b)(6)(A).

66. *Id.* § 1232g(b)(6)(C).

67. *Id.* § 1232g (i); 34 C.F.R. § 99.31(a)(2) (2006). The Department of Education has proposed amendments to this section to permit disclosure to another institution even after the student has already enrolled or transferred. Family Education Rights and Privacy, 73 Fed. Reg. 15,573, 15,595 (proposed Mar. 24, 2008).

68. 34 C.F.R. § 99.34(a) (2006).

69. *Id.* § 99.34(a)(2).

70. *Id.* § 99.34(a)(3).

in the behavior of the student.⁷¹

8. Disclosures Pursuant to a Subpoena or Court Order

FERPA expressly permits an institution to disclose education record information in response to a judicial order or lawfully issued subpoena.⁷² The general requirement is that the institution is required to notify the student of the order or subpoena in advance of compliance.⁷³ In cases of a law enforcement subpoena,⁷⁴ grand jury subpoena,⁷⁵ or an order for records sought pursuant to an investigation of domestic or international terrorism,⁷⁶ the subpoena or order may include an order to the institution not to disclose the existence or contents of the subpoena or order to anyone, including the student.

II. CONTRASTING FERPA PRIVACY RULES WITH PROFESSIONAL OBLIGATIONS OF CONFIDENTIALITY

Campus personnel who mistakenly believe that FERPA presents an obstacle to sharing information that appears to be necessary or desirable to address issues of campus safety may have confused the non-disclosure rules or privacy protections of FERPA with the much higher legal protections in place for medical and mental health care patient and client communications. This misunderstanding results in two types of problems that interfere with effective and necessary campus communications.

In the first instance, some members of the campus community mistakenly believe that very rigorous standards imposed by state and federal medical confidentiality laws for certain patient communications and medical records apply to all communications about mental health issues, even those that occur outside of the context of a professional relationship. As a result, these individuals may be reluctant to discuss dangerous, suspicious, or high-risk student behavior with others on campus who should be advised of the concerns. They may fail to recognize instances in which the disclosure does not involve education records and thus is not governed by FERPA. On the other hand, if education records are involved, they may fail to understand that the more permissive FERPA standard applies to these discussions among college or university personnel who are not bound by medical confidentiality laws. In this instance, important communications should occur so that the college or university does not miss an opportunity to develop an effective early response to an escalating student issue. Even if the student issue does not worsen, the individuals who believe they cannot discuss the problem may continue to have concerns and may be frustrated that the college or university is not providing more assistance or support. This may result in these

71. 20 U.S.C. § 1232g(b)(1)(B) (2000 & Supp. 2004); *Id.* § 1232g(h)(2000); 34 C.F.R. § 99.36(b) (2006).

72. 20 U.S.C. § 1232g(b)(2)(B) (2000); 34 C.F.R. § 99.31(a)(9) (2006).

73. 20 U.S.C. § 1232g(b)(2)(B).

74. *Id.* § 1232g(b)(1)(J)(ii).

75. *Id.* § 1232g(b)(1)(J)(i).

76. *Id.* § 1232g(j).

individuals being less likely to report future problems and may make them feel the need to address problems themselves without the benefit of the expertise of other college or university offices. Moreover, even if the situation does not ultimately pose a real danger, multiple offices or campus personnel may be involved with the student in a way that is neither efficient nor productive. Poor communication among campus offices rewards forum shopping and manipulative behavior and fails to provide clear guidance for students in need of assistance.

In the second instance, some people on campus may not realize that their colleagues who work directly with students in a medical or mental health capacity on campus are bound by more restrictive legal and professional standards with regard to medical confidentiality. Physicians, psychologists, and other health care providers who see students as patients or clients generally are not permitted to share information they learn in their professional interaction with students because they are bound by strict state and federal medical confidentiality laws⁷⁷ and professional rules of ethics.⁷⁸ As a result, many of these providers may not disclose otherwise confidential information that they learn in the course of treatment about a student patient or client unless they reasonably believe that the client or patient is at imminent risk of causing serious harm to self or others.⁷⁹ This may result in frustration when faculty members or other campus officials are concerned about a student's aberrant behavior and want to know whether the student is being seen by the counseling service or want a psychologist or other provider to disclose a student's diagnosis.

Campus mental and physical health professionals are subject to ethical rules and legal constraints that significantly limit what they may share with others on campus. For example, the code of Ethics of the American Medical Association provides:

The physician should not reveal confidential communications . . . or information without the express consent of the patient, unless required by law

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities.⁸⁰

The Ethical Principles of Psychologists and Code of Conduct similarly provide:

77. *E.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 201 (2000); Electronic Privacy Information Center, Legislative Survey of State Confidentiality Laws with Specific Emphasis of HIV and Immunization, http://www.epic.org/privacy/medical/cdc_survey.html (last visited Mar. 6, 2008) (containing a survey compiling state medical confidentiality laws).

78. *E.g.*, AM. MED. ASSOC., CODE OF ETHICS § E-5.05 (June 1994), available at <http://www.ama-assn.org/ama/pub/category/8353.html>.

79. The standards under state laws vary.

80. AM. MED. ASSOC. CODE OF ETHICS § E-5.05.

Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to . . . protect the client/patient . . . from harm . . . in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.⁸¹

As discussed above,⁸² FERPA does not apply to treatment records that are: [M]ade or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity . . . and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.⁸³

The Health Insurance Portability and Accountability Act ("HIPAA") defines protected health information so as to exclude individually identifiable health information that is included in education records covered by FERPA and that is in treatment records that are exempted from FERPA.⁸⁴

In other words, if a campus medical record is created for the purpose of treatment and it is not shared with anyone who is not directly involved in treatment even for purposes of insurance reimbursement then neither FERPA nor HIPAA applies. These records are protected, however, under federal⁸⁵ and state⁸⁶ medical confidentiality and disability laws. If state or federal medical confidentiality laws permit a campus medical record to be shared with someone not directly involved in treatment, then the record may be shared only if the disclosure qualifies as an exception under FERPA. Because state and federal confidentiality laws have a higher threshold for disclosure, this is generally not an issue. For example, if a state statute requires a campus psychologist to contact the police to report that a client has made an imminent threat of serious harm to a foreseeable victim, the disclosure would easily satisfy the FERPA health and safety exception.

The Family Policy Compliance Office discussed the interplay between FERPA and HIPAA in a guidance letter explaining that the health or safety exception under FERPA permits the sharing of school health and immunization records with a state health department.⁸⁷ The guidance, relevant here, is that the release of student health-related information is not governed by HIPAA. As these are health records provided to the school by the family and not treatment records, FERPA

81. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.05 (June 1, 2003), available at <http://www.apa.org/ethics/code2002.html>.

82. See *supra* Part I.A.2.

83. 20 U.S.C. § 1232g(a)(4)(B)(iv) (2000).

84. Treatment records are exempted from FERPA. *Id.* § 1232g(a)(4)(B)(iv); See also 42 U.S.C. § 1320d (2006).

85. 42 U.S.C. § 290dd-2 (2000); *Id.* § 10841(1)(H).

86. *E.g.*, ARIZ. REV. STAT. ANN. § 36-509 (2006); N.J. STAT. ANN. § 2A:62A-16 (West 2007).

87. Holloway Letter, *supra* note 46.

applies with the following caveat:

[A]ny release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under State law.⁸⁸

With limited exceptions, campus health care providers generally may not share information learned in communications with patients and clients, even with other concerned parties on campus, the campus administration, or the student's family, unless they meet a standard much higher than that required under the FERPA health or safety exception or unless the client or patient consents to the disclosure. This issue generally arises in situations in which anxiety levels are high due to troubling or puzzling student behavior. Therefore, before any particular student issue arises, professionals should take care to educate campus constituencies of the potential constraints on communications.

When the professional relationship is initiated, the provider is responsible for explaining to the patient or client the limits of confidentiality in the relationship.⁸⁹ This is especially important when the provider is seeing students on campus. The student should be advised of the protections afforded communications made during treatment and the degree to which those communications will or will not be shared with others on campus. Implicit in this is the need to communicate to the student that any statements that indicate that the student will engage in serious self-harm or threats to others will be disclosed and acted upon as required under state law.

To address the tensions that arise on campus when a member of the campus community such as a faculty member, an administrator, a conduct official, or the parent of the student's roommate seeks information from a mental health care provider or other medical or mental health care professional on campus regarding a student's aberrant or challenging behavior, the provider is limited in providing information within the constraints of the confidential relationship. The providers may not be able to acknowledge or disclose any information about their relationship with a student if they do not believe that the student poses the imminent threat to self or others as required by law for disclosure.⁹⁰ The provider may, however, be able to provide some information that may ease this tension. First, the professional staff should explain the requirements of applicable state law. Second, the professional staff should then assure those concerned that if the staff had a basis for believing an imminent threat to be present with respect to the behavior of any patient or client, they would have a duty to disclose that

88. *Id.* at 4 (emphasis added).

89. AM. PSYCHOLOGICAL ASS'N, *supra* note 81, § 4.02(b) ("Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.").

90. *See, e.g.*, CAL. CIV. CODE § 56.10(c)(19) (West 2007) (allowing disclosure by psychotherapists where the psychotherapist thinks disclosure is necessary to "prevent a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims").

information as required under the applicable state standard.⁹¹ Third, the provider may also encourage the concerned individual to contact other campus officials, such as the Dean of Students, to report conduct violations or to discuss problematic behavior. The Dean's office and most other offices on campus will be bound only by FERPA which imposes a "lower" standard and which expressly contemplates sharing information with other school officials, parents, and other interested parties when appropriate. Behavior that appears to be threatening to the student or to others should also be immediately reported to campus security or police.

III. ISSUES IN CAMPUS COMMUNICATION AND FAMILY NOTIFICATION

Disclosure of information about a distressed student to the student's parent raises many of the same general issues as disclosure to another family member or an outside mental or physical health provider, although disclosures to parents are facilitated by several FERPA exceptions that are limited to parents. Colleges and universities have come to understand that while in the majority of cases family members may provide excellent support for a student, in some cases these relationships also may be problematic. To add a layer of complication, the student—particularly when in distress—may not be the best judge of whether the family or parent will be a good source of support. A student may be reluctant to contact a parent out of fear that the parent will be angry or disappointed over the student's "failure" when in fact the parent, once contacted, may be very supportive and understanding.

As discussed above, the privacy obligations of administrators and campus personnel under FERPA provide much greater flexibility than the confidentiality obligations of professional medical and mental health care staff in notifying parents or family of a student in distress.⁹² Administrators operating under FERPA may notify a family member of a distressed student by meeting any of several exceptions under FERPA. They may disclose information to parents who have established that the student is their tax dependent.⁹³ They may disclose information about disciplinary proceedings and about drug or alcohol violations to parents of students under the age of twenty-one⁹⁴ as described above.⁹⁵ Even if proceeding under the health or safety exception, administrators do not need to establish an imminent threat of serious harm to an identifiable victim. FERPA permits disclosure of information regarding a student's high-risk behavior or troubling statements "in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons"⁹⁶ The goal should be to facilitate appropriate

91. State law may determine to whom the permissible disclosure is made and may include the foreseeable victim and law enforcement.

92. *See supra* Part II.

93. 20 U.S.C. § 1232g(b)(1)(H) (2000).

94. *Id.* § 1232g(i).

95. *See supra* note 51 and accompanying text.

96. 20 U.S.C. § 1232g(b)(1)(I).

communication with family members to prevent harm to the student and to the campus community.

Reluctance to communicate with parents may at times be a function of campus culture rather than any constraint under the law. Student affairs and other campus administrators have long seen assisting students in the transition and development from child to adult as part of their role in working with students. This effort has often involved reinforcing the role of the student as an autonomous adult decision-maker and responding to parent inquiries by encouraging parents to discuss their concerns with their son or daughter rather than having the college or university play an intermediary role. This student development paradigm has been challenged in recent years as students and parents have closer and more involved relationships than were presumed by the previous model. The mildly pejorative "helicopter parent"⁹⁷ has been used to describe the hovering parent, always ready to participate in decisions affecting the student. Many college and university administrators may have previously seen themselves as advocates assisting students in separating from unwanted interference by overbearing parents. More recently, however, institutions are recognizing that many students seek and desire this support from parents and are very comfortable with this level of involvement by their parents. Students use instant messaging and e-mails to keep in regular contact with parents and may not be asking to be rescued from this involvement by well-intentioned college administrators. Colleges and universities are reexamining these relationships, and some research suggests that this enhanced relationship between parents and students may even advance learning outcomes.⁹⁸

Parents have also challenged the previous paradigm as they increasingly demand to be contacted by colleges and universities when their student is in distress. If a parent is not contacted and the student inflicts self-harm or injures another, the family may file legal action against the institution for failure to disclose this important information to the family, alleging or implying that had the family known what the institution knew, it could have taken steps to prevent or avoid the harm.

Two related questions arise in the context of what has come to be known as "parental notification." The first question is under what circumstances a college or university may notify parents of a student's serious distress, either without the consent of the student or even over the express objection of the student.⁹⁹ The second question is whether colleges and universities ever have a duty to notify parents of a student in distress.

97. Sara Lipka, *Helicopter Parents Help Students, Survey Finds*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Nov. 9, 2007, at A1.

98. *Id.*

99. A general discussion of the broader liability issues with respect to campus safety and assault or suicide is beyond the scope of this article. Other contributors to this volume provide a thorough and detailed analysis of potential tort liability. See generally Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing College Student Suicide Crisis*, 34 J.C. & U.L. 253 (2008); Barbara A. Lee & Gail E. Abbey, *College and University Students with Mental Disabilities: Legal and Policy Implications*, 34 J.C. & U.L. 349 (2008); Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

As discussed above, FERPA permits appropriate communications with family under several provisions, including: with the consent of the student, following a determination that the student is a tax dependent, under certain circumstances with respect to alcohol and drug violations, serious conduct violations, and in circumstances as appropriate to address a health or safety emergency.¹⁰⁰

Although FERPA permits appropriate communications with parents, courts have not yet held that colleges or universities have an affirmative duty to notify parents of a distressed student. In many cases, however, such notification may permit parents to intervene and may create a partnership between the family and the college or university to coordinate an appropriate response to concerns about the distressed student. Even if parents are not able to respond, or choose not to respond, notification will also preclude a later claim alleging that notification should have been made. Furthermore, colleges and universities now regularly contact parents for financial support and send a multitude of brochures, pamphlets, letters, e-mails, and promotional materials to families.¹⁰¹ It would be ironic indeed if the one time institutions were reluctant to communicate with families was when the student was at risk, the time when families were most interested in hearing from them.

The first case to address the issue of an affirmative duty to notify parents was *Jain v. Iowa*.¹⁰² After a freshman at the University of Iowa committed suicide in his dormitory room, his father sued the University for wrongful death.¹⁰³ He sought damages for the University's failure to notify him of serious concerns regarding the student's self-destructive behavior.¹⁰⁴ The Iowa Supreme Court affirmed the lower court in dismissing the case on the basis that FERPA does not create a legal duty to notify parents of a health or safety emergency.¹⁰⁵

The student's first semester was troubled. He did not do well academically, and he was disciplined for smoking marijuana.¹⁰⁶ His parents were not contacted, even after the student's girlfriend reported (and he later admitted) that he was attempting to commit suicide by inhaling exhaust fumes from his moped.¹⁰⁷ The student assured the resident assistants who reviewed this incident that he would seek counseling and would talk to his parents.¹⁰⁸ Later in the semester, the student

100. See *supra* Part I.C.

101. Promotional materials may raise other issues. In *Bash v. Clark University*, the family of a student who overdosed on narcotics raised a negligent misrepresentation claim arising from representations in a handbook distributed by the university to parents at orientation. *Bash v. Clark Univ.*, No. 200600745, 2006 WL 4114297 (Mass. Super. Ct. Nov. 20, 2006). The handbook stated that "the '[s]taff in the Dean of Students Office manages the nonacademic services that [they] provide to ensure the health and safety of the individuals who are living and learning at Clark University.'" *Id.* at *1. The claim failed, in part, because it was deemed to be too vague and indefinite to give rise to a cause of action. *Id.* at *7.

102. 617 N.W.2d 293 (Iowa 2000).

103. *Id.* at 296.

104. *Id.* at 296.

105. *Id.* at 297.

106. *Id.* at 295.

107. *Id.* at 295-96.

108. *Id.*

brought his moped into the residence hall suite and asphyxiated himself through carbon monoxide poisoning, also endangering but not killing his suitemates.¹⁰⁹

At the time, the University of Iowa had an unwritten policy permitting the Dean of Students to notify parents in case of a suicide attempt.¹¹⁰ Unfortunately, no relevant information about this student was shared with the Dean of Students until after the student's death.¹¹¹ The Supreme Court of Iowa did not find a special relationship between the student and the University sufficient to give rise to a duty to prevent his suicide.¹¹² The student's father argued that because an exception to FERPA would have permitted the University to contact the family, the University had a duty to contact them.¹¹³ The Iowa Supreme Court held that this issue was not properly before the court on appeal but not without commenting that it entertained "serious doubts" about the merits of this argument because the claim rested "not on a violation of the Act but on an alleged failure to take advantage of a discretionary exception to its requirements."¹¹⁴

When parents of a deceased student sued Massachusetts Institute of Technology ("MIT") in *Shin v. Massachusetts Institute of Technology*¹¹⁵ over the apparent suicide of their daughter,¹¹⁶ the country and the media focused intently on the issue of parental notification. Although the case ultimately settled on terms that indicated that the student's death may have been accidental,¹¹⁷ the lawsuit inspired serious consideration of the issue of parental notification and student mental health issues. *Shin* involved a sophomore student with an apparent history of psychiatric problems which predated her enrollment at MIT.¹¹⁸ The student experienced a series of incidents while at MIT, including hospitalization for an overdose of Tylenol with codeine, at which time her parents were notified.¹¹⁹ She received counseling by MIT but continued to make increasingly serious threats of self-harm.¹²⁰ MIT employed a collaborative case management model approach to working with this student,¹²¹ but unfortunately the student died of burns sustained in a fire she started, perhaps accidentally, in her residence hall room.¹²²

Although the case settled before the court reached any decision on liability,¹²³ it caused administrators and health care providers on campus to have additional

109. *Id.* at 296.

110. *Id.*

111. *Id.*

112. *Id.* at 296-97.

113. *Id.* at 298.

114. *Id.*

115. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

116. *Shin*, 2005 WL 1869101 at *1.

117. Marissa Vogt, *MIT Settles Shin Case, Parents Agree Death Likely an Accident*, THE TECH ON-LINE EDITION, Apr. 4, 2006, <http://www-tech.mit.edu/V126/N15/15shin.html>.

118. *Shin*, 2005 WL 1869101 at *1-2.

119. *Id.* at *1.

120. *Id.* at *1-2.

121. *Id.* at *5.

122. *Id.* at *5-6.

123. Vogt, *supra* note 117.

concerns for liability when working with distressed students.¹²⁴ It also highlighted the relationships among the student, the institution, and the family and the importance of timely and effective communications among all parties.¹²⁵

*Mahoney v. Allegheny College*¹²⁶ involved a junior student with some history of depression.¹²⁷ He sought counseling and medication, and his parents were notified when he was hospitalized.¹²⁸ Apparently stabilized, he returned to Allegheny but continued to be distressed.¹²⁹ He hung himself in an off-campus fraternity house.¹³⁰

The student's family moved for summary judgment against Allegheny, alleging breach of the duty of care,¹³¹ duty to notify parents,¹³² and breach of contract.¹³³ The court weighed the importance of the therapist-patient privilege and student privacy and considered problems with involuntary withdrawal policies and disability discrimination. It relied on *Jain*¹³⁴ to find "no 'special relationship' nor 'reasonably foreseeable' events that would justify creating a duty to prevent suicide or notify . . . parents . . ."¹³⁵ The court encouraged efforts at prevention rather than search for a legal duty.¹³⁶

The previous cases discuss claims that arose when seriously troubled students remained at school and ultimately took their own lives. The issue of communications with parents may also arise when schools are evaluating the need or desire to dismiss students involuntarily. Cases in which involuntary dismissal is considered based on concerns that a student may be a threat to self or others raises important disability law issues that are beyond the scope of this article, but the evaluation of such a student also raises issues involving disclosure of information and communications with families that reinforce the issues discussed above.

The Office of Civil Rights ("OCR") has confirmed that nothing in § 504¹³⁷ prevents educational institutions from addressing the dangers posed by a student who represents a "direct threat" even if that student has a disability. OCR has issued several rulings with regard to the involuntary dismissal of students who threaten self-harm or harm to others, reviewing complaints from students who have been dismissed and students who allege disability discrimination.¹³⁸ To rise to the

124. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED, Apr. 4, 2006, <http://www.insidehighered.com/news/2006/04/04/shin>.

125. *Id.*

126. No. AD 892-2003, (Pa. Ct. Com. Pl. Dec. 22, 2005), available at <http://www.asjaonline.org/attachments/articles/35/Allegheny%20college%20SJ%20decision.pdf>.

127. *Id.* at 1–2.

128. *Id.* at 4.

129. *Id.* at 7.

130. *Id.* at 2.

131. *Id.* at 15–18.

132. *Id.* at 18–22.

133. *Id.* at 23–26.

134. *Id.* at 20–22.

135. *Id.* at 22.

136. *Id.* at 25.

137. Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000).

138. *E.g.*, Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-

level of direct threat, the school needs to show a high probability of substantial harm not merely a speculative or remote risk.¹³⁹ To establish this, the school will need to conduct an individualized and objective assessment based on the most current medical knowledge or best available objective information.¹⁴⁰ The purpose of the assessment is to evaluate the probability that the potentially threatening action or injury will occur and to consider whether reasonable modifications of policies, practices or procedures could mitigate the risk.¹⁴¹ The student is entitled to receive due process, based on the student's observed conduct.¹⁴²

To conduct a direct threat analysis, the institution will need current and accurate information from a variety of sources. For this to occur, faculty and staff will need to understand their ability to communicate with appropriate individuals on campus regarding student concerns. The institution may also wish to contact the student's family, both to apprise them of the concern and to solicit additional information that may be relevant to the threat analysis. Many campuses have chosen to coordinate these communications, as well as communications regarding continuing students who intend to remain on campus during a period of distress, through a consultative campus group using some form of case-management model.

IV. CONSULTATIVE CASE MANAGEMENT MODELS

Many colleges and universities have developed effective communication protocols as part of a coordinated approach to address environmental issues such as drugs, alcohol, high-risk behavior, and disruptive or dangerous student conduct. Although these protocols may be both preventive and reactive, the focus in this section is on the use of case management strategies to combine information from multiple sources across campus (and, as appropriate, including family and off-campus providers) to inform decisions made with regard to distressed and distressing students. A consultative approach across departments and administrative lines is very useful in managing the campus response to difficult student issues. The approach should be interdisciplinary to develop comprehensive and campus-wide responses.

Many campus models involve some form of a consultative group to coordinate the response to student conduct that has engaged multiple offices or issues. To be successful, the group should include a diverse membership from various offices across campus. This is necessary to gather information about a student who may be visiting multiple offices across campus (either as a "forum shopper" to seek the most advantageous response to an inquiry or perceived problem or simply because the nature of the behavior creates problems in multiple arenas, from academic departments to administrative units). This consultative model works best when the

06-2060 (Mar. 18, 2005); Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-04-2042 (Dec. 22, 2004).

139. *E.g.*, Dep't. of Health and Human Resources, Office of Civil Rights, Complaint No. 15-04-2042 (Dec. 22, 2004) at 4-5.

140. *Id.*

141. *Id.*

142. *Id.*

participants have diverse experience and problem solving skills from different offices and professions across campus. It is also valuable to have representation from campus health and counseling centers if available. Sometimes these offices are initially reluctant to participate due to concerns about confidentiality and, if necessary, legal counsel may assist in explaining the applicable FERPA and other legal issues to the group. Without revealing any protected information about an individual student, physicians, psychiatrists, and psychologists can listen to everything that other members of the group share, can encourage appropriate referrals to their campus offices or off-campus providers, and can describe for the group the general response they and other professionals would have for a student presenting any serious issues described, such as the general protocol for responding to a student with an eating disorder, a student who makes serious threats, or a student who describes suicidal ideation. The group may decide to appoint a primary point of contact for the student to limit the number of offices the student contacts for services and may also agree on common and consistent messages to be provided to the student. If parents are to be notified, police contacted, or involuntary commitment sought, the group can develop a coordinated approach and may agree on services to be provided to the student in the transition. These groups generally do not, as a single entity, work with the student directly, but by sharing information, these groups are effective in coordinating the responses of individual units within the college or university. If the group maintains notes or minutes of its discussions about an identifiable student, then the student would have the right under FERPA to review and inspect those notes or minutes as part of the education record.¹⁴³ The student also would be able to inspect any records maintained by the offices that interact with the student directly.¹⁴⁴ Some of these groups may avoid this issue by not maintaining minutes or notes of the group meetings regarding the students they discuss. In addition, the group approach can be valuable in both coordinating services for students and in coordinating appropriate responses by the campus to difficult and dangerous behavior.

CONCLUSION

FERPA has become an integral part of campus life. Protecting the privacy of student records reflects values that many on campus share. In addition, these protections have been used by student affairs professionals and academic administrators to foster and support a student development model that facilitates the student's transition from high school to higher education. Colleges and universities regularly encourage students and parents to embrace this transition by placing appropriate decision-making responsibility in the hands of students while recognizing the importance of sharing information with families and other appropriate persons when necessary to address serious issues of individual or campus safety.

FERPA does not create an obstacle to effective communications to promote student welfare or to protect campus safety. Accurate information about FERPA

143. 20 U.S.C. § 1232g(a)(1) (2000).

144. *Id.*

may be used to encourage appropriate sharing of information to benefit students, their families, and the campus community. FERPA not only provides important protections for the privacy of student records but also provides for appropriately limited disclosure of records under several exceptions designed to address campus safety and student well being. Some campus records may be more difficult to disclose under applicable state and federal medical confidentiality laws, but a collaborative approach that draws on the expertise of multiple campus professionals from diverse fields will increase communication options necessary to promote campus safety.

Campuses should take immediate steps to address any misinformation about the role of FERPA in campus safety. Anyone worried about violating FERPA in making a disclosure intended to protect a student or another person from serious harm should make campus safety the priority. If the potential harm does not appear to be imminent, concerned individuals should consult first with legal counsel or other campus resources to address any uncertainty about the permissibility or scope of an intended communication. Through the appropriate sharing of information, campuses will be able to make better decisions to protect students and the community.

