

Disclosure of Student Information Related to Emergencies and Disasters

The Virginia Tech shootings on April 16, 2007 left 33 dead, including the shooter/-student, Seung Hui Cho. There were extensive middle and high school records reflecting Cho's treatment for severe social anxiety and suicidal and homicidal ideation. Cho had been ordered by a judge to seek counseling after being declared an "imminent risk of causing harm" two years previously, a fact known by campus police. Cho had reported suicidal thoughts to campus police prior to the shootings. In a creative writing class, Cho wrote a story about a young man who hated the students at his school and planned to kill them and himself. Some faculty and students complained to Virginia Tech administrators about Cho's behavior in and out of class.

An investigation commissioned by the Governor of Virginia concluded in its report that the failure of the various departments at Virginia Tech to share information with one another was the primary reason that Virginia Tech failed to identify Cho as a threat to the community. The report found that the failure to share information was the result of confusion over certain federal laws, principally the Family and Educational Rights and Privacy Act (FERPA), that govern the privacy of student records. In each case, the department concerned believed that sharing information about Cho would be a violation of FERPA. A separate nationwide investigation was conducted by Health and Human Services (HHS) to examine the challenges that educators face in combating student violence. HHS confirmed that there was widespread confusion in schools across the country regarding what constitutes a FERPA violation. In its report, HHS referred to "information silos" on campuses preventing the sharing of information that could reveal a threat to the community from a particular student.

On March 24, 2008, the Department of Education (ED), the department responsible for administering FERPA, published proposed regulatory changes some of which were intended to address problems identified by investigations into the Virginia Tech shootings. Those proposed regulations became final with little modification on December 9, 2008, with an effective date of January 8, 2009.

These changes focused on a provision (34 CFR § 99.36) in the existing administrative regulations pertaining to the conditions applicable to the disclosure, without a requirement of student consent, of information in health and safety emergencies. At the time of the Virginia Tech shootings, this section permitted an educational institution to disclose personally identifiable information from an education record "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." The section at that time further provided that it is to be "strictly construed."

Under the new regulations the phrase "to appropriate parties" was amended to read "to appropriate parties, including parents of an eligible student." Under FERPA regulations, an "eligible student" is one who has reached age 18 or is enrolled in an institution of post secondary education. The specific inclusion of parents removes concerns of some that a parent was not an "appropriate party."

Most significantly, the strict construction provision was replaced by the following:

In making a determination [to disclose personally identifiable information in connection with an emergency], an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

The ED cautioned in the discussion accompanying the final regulation that removal of the strict construction provision must not be seen as creating a blanket exception for routine disclosures of student information. In this regard, the ED specified that:

. . . to be “in connection with an emergency” means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.

To facilitate review by the ED, another section in the administrative regulations (34 CFR § 99.32) regarding FERPA record keeping requirements for requests and disclosures of student information was amended. It now provides that any disclosure under the health or safety emergency exception must be recorded to reflect the articulable and significant threat to health or safety that was the basis for the disclosure and the parties to whom the information was disclosed. This record must be made within a reasonable time after the disclosure.

In June 2010, the ED published guidance entitled “Family Educational Rights and Privacy Act (FERPA) and the Disclosure of Student Information Related to Emergencies and Disasters.” This guidance states that “FERPA is not intended to be an obstacle in addressing emergencies and protecting the safety of students.” As evidence of this, the guidance identifies various statutory and regulatory bases for allowing the release of student information during an emergency. These bases include release of directory information (where the student has not

opted out of its release), release to parents of student information of a child who is claimed by the parents as a dependent for IRS tax purposes, and release based upon health or safety emergency.

The various grounds for release discussed above pertain to the disclosure of student information to appropriate individuals outside the educational institution. It should be remembered that disclosure of student information is permitted without consent of the student to other institutional officials, including teachers, determined by the institution to have legitimate educational interests in such information. Providing information about safety concerns regarding a student to a department chair, to a dean, to the University's counselors, or to the Dean of Students would be appropriate since they clearly have legitimate educational interests in such information by virtue of the duties of their positions.

If you have any questions regarding a particular situation, please contact the Dean of Students or this office.