

## **A Response to the U.S. Department of Education’s August 8, 2015 Dear Colleague Letter: Refine Rather than Amend**

The shooting at Virginia Tech not only bring to light the growing issue of mental health on college campuses, it also generates uncertainty regarding how colleges and universities share information with the families of students of concern. The Virginia Tech Review Panel’s (2007) examination of the incident states that “privacy laws make it difficult to respond effectively to troubled students. . . [and] can block some attempts to share information” (p. 63). In fact, multiple reports indicate that privacy laws played a significant role in Virginia Tech’s inability to share information about the assailant’s mental health, especially with his parents (Ward, 2008).

In the aftermath of the actions taken by Virginia Tech shooter Seung Hui Cho, Cho’s parents regret not learning about their son’s condition until after the event, and believe had they been able to intervene, thirty-two lives might have been saved (Virginia Tech Review Panel, 2007). As Donovan and McKelfresh (2008) explain, “Today’s students report their parents and family members as the most significant source of support during the period between high school and college graduation” (p. 385). Though the respect for an individual’s privacy is one of our nation’s greatest strengths, it also lead to one of the greatest tragedies to occur on a college campus.

### **Can institutions ensure the safety of their students without the assistance of their families?**

Recent changes technology and cyber bullying legislation call for greater attention to be paid to a student’s privacy and safety outside the confines of a traditional campus. However, the Family Educational Rights and Privacy Act of 1974 (FERPA) prohibits institutions from sharing important information about the wellbeing of their children, leaving students’ safety and family

relationships in jeopardy. Many universities actively engage in early intervention practices with at-risk students but fail to communicate with their families not only out of the need to comply with federal law, but the fear of facing hefty fines; yet, administrators alone cannot be to blame. FERPA is unclear and outdated, leaving those responsible for complying with the law unsure of how to self-regulate, and those who need important information empty-handed. In fact, attorney and mental health expert Nancy Wolf comments, “A student having a major depressive episode can hide out in his dorm room for two weeks and the college does not have to say anything to his parents because of the student’s privacy rights under FERPA” (Grasgreen, 2014, n.p.). All higher education institutions, including both non-and for-profit as well as public and private, that receive federal funds must abide by this law. Therefore, an estimated 4,400 universities and 18 million students may suffer as a result of inappropriate applications of privacy legislation (Steinbuch, 2012).

Despite the U.S. Department of Education’s eleven modifications to FERPA’s since Congress signed it into law in over years ago, administrators still struggle to understand what qualifies as a student’s educational record and if any of that record can be shared, thus leaving universities' general counsel offices recommending that institutions take a conservative stance (Graham, Hall, & Gilmer, 2008). The vague nature of this law leads to unclear institutional policies and inconsistent risk-management practices. These concerning actions may come from a “lopsided incentive system—reveal too much and your institution risks the financial death penalty; reveal too little and you might get a court order directing you to disclose—colleges almost invariably err on the side of secrecy” (Lamont, 2010, p. A56). Striking a balance between a student’s best interest and complying with federal law may be the greatest challenge our higher education system faces today in ensuring the safety and future of young Americans.

## **Recommendations**

Even though the roadblock at the intersection of privacy and safety seems impenetrable, it can be overcome. Since 2002, the U.S. Supreme Court has consistently taken a much more liberal interpretation of higher education privacy law. As *The Chicago Tribune v. The University of Illinois* demonstrates, FERPA reform can “restore, (or more likely, create) the proper balance between confidentiality and accountability in [government] funded higher education” (Steinbuch, 2012). Furthermore, since the Sandusky scandal at Penn State, a new level awareness of the need for better information sharing not demonstrates that this statute not only impacts student with mental health concerns, but also ensures the safety of college athletes. These shifts in understanding of how FERPA makes even the most healthy college students vulnerable in a variety of ways demonstrates that education privacy law must immediately undergo revision.

In the fall of 2015, the U.S. Department of Education announced a notice and comment period for a new FERPA amendment which would allow for a more seamless integration of FERPA and HIPAA. But, FERPA reform is not enough. Editing once again a law which rest in a penumbral right of privacy will only lead to more confusion and continue to cut away at the safety of our students (Graham et al., 2008). Furthermore, attempting to expand upon a law meant to cover both K-12 and higher education will only miss the mark for at least one of these vulnerable populations. Taking action is the only option. The U.S. Department of Education and Health and Human Services, with the support of Congress, must work together to create new privacy legislation that not only preserves the rights of students but also provides higher education institutions the clear-cut ability to keep families informed in times of concern or crisis.

The first step is drafting a new, collaborative law that addresses the specific needs of college students and their families; the second is education. A great degree of confusion across

the nation's colleges and universities has led to incidents such as Virginia Tech, and the only way to prevent this issue from arising once again is by ensuring that all institutional administrators, faculty and staff have a working knowledge of privacy law that make sense for America's higher education system. Furthermore, the institutions must take on the responsibility of educating their students and families from the moment they step on campus their freshman year (Anonymous, 2011).

A student's privacy is and must remain a priority, but not at the sake of the student's safety. Redeveloping FERPA from the ground up will not eliminate the need for discretion but will enhance institutions' ability to better serve their students in a broader capacity with a wider range of resources by expanding privacy laws and "institutional relationships to include student's families extends the base of support for student access, persistence, and achievement." (Donovan & McKelfresh, 2008).

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*Journal of Health Care Law and Policy*, 11(2), 407-435.