

OFFICE OF GENERAL COUNSEL
The University of Texas System
201 West 7th Street
Austin, Texas 78701
Telephone (512) 499-4465 Fax (512) 499-4523

Barbara M. Holthaus
Attorney

THIS MEMORANDUM IS A GENERAL SUMMARY OF THE APPLICABLE LAWS AS OF THE DATE THIS MEMORANDUM WAS ISSUED.
IT IS NOT INTENDED TO SUBSTITUTE FOR SPECIFIC LEGAL ADVICE.

July 10, 2007

MEMORANDUM

TO: Barry D. Burgdorf

FROM: Karen Lundquist and Barbara Holthaus

SUBJECT: Sharing Information about Potentially Dangerous Students

The recently issued “Report to the President on Issues Raised by the Virginia Tech Tragedy”¹ found that while educators, mental-health officials, and law enforcement officers often have access to information about troubled students, they are reluctant to take action in response to this information because they are confused by what they can disclose under complex and overlapping privacy laws.

There are federal and state laws and regulations that limit how and with whom information obtained from students’ university education and medical records can be shared. However, university personnel can generally monitor and share information about potentially dangerous students without violating state and federal privacy requirements. This paper summarizes when and how information about a potentially dangerous student can be shared in an attempt to prevent violent behavior.

The Family Educational Rights and Privacy Act (FERPA)

Generally, any action by a university in response to a student’s conduct will involve the sharing and dissemination of information contained in the student’s education record. Therefore, it is important to understand the restrictions and allowances provided by the Family Educational Rights and Privacy Act (FERPA).

FERPA is a federal law² that, along with federal regulations³ implementing the law, protects the privacy of student education records. FERPA generally requires a university to have written permission from a student attending the university before the university may release any information from the student's education record. An education record is broadly defined as "those records that are directly related to a student and maintained by an education agency or institution or by a party acting for the agency or institution."⁴ A record may be a formal academic record or something as informal as an e-mail. Even a personal note kept by an individual to jog his or her own memory becomes an education record once it is revealed to any other person.⁵

FERPA is commonly perceived as an impediment to sharing information among university administrators, staff, and faculty to monitor and address potentially harmful student conduct. However, even though FERPA broadly protects a student's privacy in education records, it provides exceptions that allow the non-consensual disclosure of information from a student's education record to facilitate a university's efforts to address student conduct.

First, it is important to remember that FERPA applies only to the disclosure of information obtained from an education record. FERPA does *not* apply to the disclosure of information from any other source. This distinction means that university faculty or staff do not violate FERPA by disclosing information that is based on their own personal knowledge or observations or from a conversation with the student or another individual who has observed the student. (See the "Mental Health Records" section for the special requirements applicable to mental health care providers.) However, once that information is reported to a university official and becomes a record, the information in the record becomes subject to FERPA and further reporting or sharing of that information must be pursuant to a FERPA exception.

One of the most useful exceptions allows any staff or faculty member to access student education records if the university has designated that individual as a university official with a legitimate educational interest in those records.⁶ UT System has a very broad model definition for purposes of this exception that includes anyone who needs to review an education record in order to fulfill his or her professional responsibility and who is:

- a person employed by the university in an administrative, supervisory, academic, or support staff position (including a law enforcement unit or health staff);
- a person or company with whom the university has a contract or affiliation (such as an attorney, auditor, collection agent, or clinical facility);
- a member of the Board of Trustees; or
- a person assisting another university official in performing his or her tasks.⁷

Under this exception, any university or UT System official whose input is needed- such as the dean of students, the student's teachers and advisors, university police, or legal counsel- can meet, share, consider, and compile information about potentially dangerous student conduct

reported to the university and access other information contained in the student's education record to determine whether action should be taken to address the conduct.

In relying upon the "legitimate educational interest" exception, campus faculty and staff should determine whether the university has adopted the UT System model policy or, if that campus has adopted a non-standard definition, ensure that information from education records are shared in compliance with that campus's own definition of "a university official with a legitimate educational interest" in the records.

In addition, as discussed more fully under "Mental Health Records" in the next section, neither the "legitimate educational interest" exception nor any other FERPA exception allows a university mental health professional to disclose mental health records or client information that the professional has obtained through providing treatment to a student. Thus, while university mental health professionals can, and probably should, be a part of a university team investigating and evaluating student conduct, they should not provide input on a particular student where the input would cause them to violate their legal obligation of confidentiality to that student.

If the university determines that individuals outside of the university should be informed about student conduct, other FERPA exceptions permit student education records to be shared with third parties. Notably, disclosure of information in education records is always permitted in connection with a health or safety emergency under certain conditions.⁸ FERPA permits disclosure 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.⁹ This exception allows university officials to act quickly in emergencies to contact outside parties such as law enforcement or health authorities for assistance in arresting or detaining a student without regard to whether the information about the student is contained in the student's education record. (As stated above, FERPA exceptions would not apply to the release of a student's mental health records. The disclosure of these records is discussed in the section on Mental Health Records.)

Release under the health or safety emergency exception must be limited to "appropriate parties." FERPA does not define "appropriate parties," and thus it would be a matter for the university to determine who is an "appropriate party" based on the particular circumstances. So, for example, the emergency exception would permit university officials to share necessary information with local broadcast media as needed to alert the public to a threat posed by a student during an emergency situation, but it would not justify the university's sharing of information from a student's education record with a reporter for a news feature about the incident. In addition, once the threat of harm has dissipated, the exception is no longer available to the university.

Even in the absence of an emergency, FERPA permits an institution to contact its own law enforcement unit to investigate possible violations of and to enforce any local, state, or federal law.¹⁰ The university can utilize campus police to diffuse a crisis situation by arresting and detaining a student who has exhibited potentially dangerous conduct regardless of the source through which the university received the information. Records created by the campus police in their capacity as a law enforcement unit are not education records and are not subject to FERPA.¹¹ Records protected by FERPA and accessed by university police in a non-law

enforcement capacity would still remain subject to FERPA, but could be released by university police to appropriate parties under the FERPA health or safety emergency exception.

Mental Health Records

- **University Mental Health Records**

Records made or maintained by a university mental health care provider in the course of providing a student with medical or psychological care are generally not “education records”¹² and would not be subject to FERPA. Thus, none of the exceptions under FERPA that allow disclosure would apply.¹³

Unlike most other medical records, university medical records would not be subject to the Health Insurance Portability and Accountability Act of 1974 (HIPAA) and the federal Privacy Rules implementing HIPAA.¹⁴ The HIPAA Privacy Rules specifically exclude protected health information in student medical records as well as student education records subject to FERPA from the applicability of HIPAA.¹⁵

Instead, university mental health care providers are required to comply with the limitations imposed by the state laws that govern the disclosure of mental health records. In Texas, the Texas Health and Safety Code (the Code)¹⁶ makes confidential all information about the patient obtained through the therapeutic relationship, including information gleaned through the therapist’s conversations with and observations of the patient within the therapeutic relationship, as well as the records themselves.¹⁷

The Code applies to any professional who diagnoses, evaluates, or treats any mental or emotional condition or disorder, including alcoholism or drug addiction. Communications between such professionals and their clients, and records of the identity, diagnosis, evaluation, or treatment of a client, are confidential. The professional is prohibited from disclosing even the identity of a client to third parties unless specifically authorized by state law.

The Code does specifically authorize a mental health care provider to disclose patient information to *medical or law enforcement personnel* if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others, or determines there is a probability of immediate mental or emotional injury to the patient.¹⁸ This exception does not permit the mental health professional to disclose information to university officials who are neither medical nor law enforcement personnel.

Therefore, in an emergency situation, a mental health professional treating a potentially dangerous student would be able to share confidential information about the student freely with other campus and non-campus medical and mental health professionals and campus police and off-campus law enforcement officials to take steps to assess whether to detain or arrest the student, to help police to locate a student, and to make arrangements for a mental inquest warrant. However, the mental health professional could not share the information with university officials who are neither medical nor law enforcement personnel.

- **Court Records Of Mental Health Proceedings**

The ability of a university to access the results of a civil court proceeding regarding a student's mental health, such as an involuntary commitment, depends on the circumstances. If university officials are involved in the commitment proceedings, they may have formal or informal access to information about the proceedings.

Public information available about mental health legal proceedings is very limited in Texas. Judicial records are not subject to the Texas Public Information Act. The statute governing involuntary commitments and other mental inquest proceedings¹⁹ provides that "each paper in a docket for mental health proceedings . . . is a public paper of a private nature that may be used, inspected or copied only upon written order issued by the county judge." A review of county clerk office websites indicates that most clerks deem all records from the docket to be confidential.

Thus, unless the university is involved in the commitment or the court orders that the results are to be shared with the university, there is little the university can do to track court records of mental health proceedings relating to its students.

Sharing Information with Parents

Regardless of the age of the student, the parents of a student enrolled in a university do not have automatic access to the student's education record. FERPA permits parents to access a student's education record if the student is the parent's tax dependent for federal income tax purposes.²⁰ However, the student is entitled to rebut a parental claim of dependency status by establishing that the student has claimed himself or herself for tax purposes. Therefore, this exception may not always be available.

As previously discussed, it would not be a FERPA violation for the university official to contact a parent with information about a student gained from personal observation or from a conversation with the student or another individual who has observed the student. Provided that care is made to articulate that the information has not been accessed from an education record, it would be possible for parents to be informed about their child's behavior gained from first hand observation if the university official believes that parental involvement would be helpful in a given situation involving student conduct. Also, the FERPA exception for a health or safety emergency would allow the university to share information from a student's education record with a parent if the disclosure to the parent was necessary to protect the health or safety of the student or others. However, neither of these options would be available to a health care provider whose observations occurred in his or her confidential treatment relationship with a student.

FERPA also provides an exception that permits a university to disclose to the parent of a student under the age of 21 that the student has violated an applicable law or institutional policy governing alcohol or controlled substances.²¹

Regardless of FERPA, parents have no right of access to medical records, including mental health records, of students 18 years of age and older. Chapter 611 of the Texas Health and Safety

Code provides no exception that would allow a mental health professional to divulge information to a patient's parent unless the patient is less than 18 years of age.

Determining What Actions Should Be Taken

Obviously, the university's response in a specific situation will depend on the particular circumstances involved. Students may not be discriminated against solely because they have a mental or physical condition.²² The focus must be on the conduct of the student.

In a crisis situation, the temporary removal of a student through an arrest or an involuntary commitment may be necessary for the safety of the student or individuals at the university and in the surrounding community. However, once the emergency situation has been addressed, the student will generally be entitled to some level of due process, such as a disciplinary hearing, before he or she can be finally dismissed or barred from the university. In addition, the disciplinary process may serve as a mechanism for requiring a student to receive treatment to address potentially dangerous behavior and to consent to the disclosure of the student's treatment records to the university. The Office of General Counsel has prepared a memo, "Procedures for Responding to Dangerous Student Conduct," dated May 4, 2007, that explains the role of the disciplinary process in addressing student conduct in greater detail.

Summary

Below is a general summary of the application of the relevant privacy laws to the disclosure of information concerning potentially dangerous student conduct on a UT campus. This summary should be used only as an initial reference tool. It is not intended to provide a full analysis of the laws and exceptions applicable to a particular situation nor is it intended to be a substitute for legal advice.

FERPA (Family Educational Rights and Privacy Act)

- Generally requires a university to have written permission from a student before the university may release information from the student's education record.
- Allows access to a student's education record by university officials with a legitimate educational interest in the record.
- Allows disclosure of information in a student's education record to appropriate parties in connection with an emergency if necessary to protect the health or safety of a student or other individuals.
- Allows a university to contact its law enforcement unit to investigate possible violations of and enforce any local, state, or federal law.
- Does not apply to records gathered through an investigation conducted by campus police in their capacity as a law enforcement unit.

- Does not apply to direct observations of a student's behavior; thus, information from direct observation may be freely shared with anyone. (Different rules apply if the observation was obtained by a health professional during the course of a therapeutic relationship.)
- Generally does not apply to records made or maintained by a university student health facility in the course of providing a student with medical or psychological care. (Texas mental health laws govern the disclosure of these records.)
- Limits circumstances in which student education records may be shared with a parent.

Texas Health and Safety Code

- Generally provides that all information about a patient obtained through the therapeutic relationship with a mental health care provider is confidential, including records as well as information gleaned through the therapist's conversations and observations.
- Allows a mental health care provider to disclose patient information to medical or law enforcement personnel without the patient's consent if there is a probability of:
 - Imminent physical injury by the patient to the patient or others; or
 - Immediate mental or emotional injury to the patient.
- Provides that each paper in a court docket for mental health proceedings is a public paper of a private nature that may be used, inspected, or copied only on written order issued by the county judge.

HIPAA (Health Insurance Portability and Accountability Act of 1974)

- Does not apply to student medical records.
- Does not apply to student education records subject to FERPA.

¹ US Department of Health & Human Services, June 13, 2007,
http://www.usdoj.gov/opa/pr/2007/June/vt_report_061307.pdf

² 20 U.S.C. §1232g

³ 34 CFR Part 99

⁴ 34 CFR §99.2, "Education Record,"(a)

⁵ 34 CFR §99.2 (b)(1)

⁶ 34 CFR §99.31(a)(1)

⁷ <http://www.utsystem.edu/ogc/CATALOG/ferpa.htm>.

⁸ 34 CFR §99.31(a)(10)

⁹ 34 CFR §99.36(a)

¹⁰ 34 CFR §99.8(c)(1)

¹¹ 34 CFR §99.8(d)

¹² 34 CFR §99.3, "Education Records," (b)(4)

¹³ A record that originates as a university medical record but is subsequently shared with another university official for a legitimate educational purpose becomes an education record subject to FERPA. For example, if a medical record is provided at a student's request to a faculty member or the dean of students in support of the student's request to be granted a medical leave of absence, that record would become part of the student's education record and would be subject to FERPA.

¹⁴ 45 CFR Parts 160 and 164

¹⁵ 45 CFR §160.103

¹⁶ Texas Health & Safety Code Chapter 611

¹⁷ Texas Health & Safety Code § 611.002

¹⁸ Texas Health & Safety Code § 611.004(2)

¹⁹ Texas Health & Safety Code §571.015(a)

²⁰ 34 CFR §99.31(8)

²¹ 34 CFR §99.31(15)

²² Rehabilitation Act of 1973, Section 504, 29 USC § 794; 34 CFR Part 104