Legal Issues Associated with Critical Incidents

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- "Education officials, healthcare providers, law enforcement personnel, and others are not fully informed about when they can share critical information on persons who are likely to be a danger to self or others, and the resulting confusion may chill legitimate information sharing."

  --- Report to the President on Issues Raised by the Virginia Tech Tragedy
  June 13, 2007

FERPA

- FERPA applies to "education records": all records, files, documents and other materials which contain information directly related to a student and are maintained by the ... institution or by a person acting for such ... institution.
FERPA

- "Education Records" do not include (among other things):
  - Personal observations of student behavior;
  - Records of the institution's law enforcement unit if the record is created by the unit for law enforcement purposes, and is maintained by the law enforcement unit; or
  - Records created by a physician, psychiatrist, psychologist, or other recognized professional which are made, maintained, or used only in connection with the treatment of the student.

FERPA

- General Rule: Education record information may not be disclosed without the written consent of the student to whom they pertain.

FERPA

- Exceptions to Requirement for Consent to Disclosure:
  - An institution may disclose personally identifiable information from a student’s education records, without the student's written consent, to school officials who have legitimate educational interests:
    - Persons employed by the institution in an administrative, supervisory, academic, research, or support staff position.
    - Members of the Board of Trustees.
    - Persons or entities employed by or under contract to the institution to perform a special task, such as attorneys or auditors.
    - Students serving on an offical committee.
FERPA

- Exceptions (cont’d)
  - FERPA’s “health or safety emergency” exception permits non-consensual disclosure of educational records.
  - Disclosure may be made 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.”
  - Strictly construed: “present or imminent threat.”

FERPA

- Exceptions (cont’d)
  - FERPA permits non-consensual disclosure of educational records to parents of a student who claim the student as a dependent for income tax purposes.

FERPA

- There is no private right of action for a violation of FERPA.
- Administrative complaint to U.S. Department of Education (Family Policy Compliance Office)
  - If the FPCO finds that the institution has not complied with FERPA, then it will:
    - Specify steps that the institution must take to comply; and
    - Provide a reasonable period of time to comply voluntarily.
FERPA

Summary:
- Enforcement actions are taken against institutions, not individuals.
- There is no right to sue for damages under federal law.
- Funds will be withheld only if the institution has a policy or practice that violates FERPA.

Proposed FERPA Amendment – HR 2220
- Would amend FERPA to allow institutions to disclose confidential information to a parent or guardian about any student who appears to pose “a significant risk of harm to himself or herself, or to others.”
- Would shield institutions from liability in response to such disclosures, so long as they consulted a mental-health professional before relaying the information.

HIPAA-- Overview of Privacy Standards
- General Rule
  - A covered entity may not use or disclose protected health information without a written authorization from an individual, unless the disclosure is specifically related to treatment, payment, or other health care operations, or unless a public policy exception applies.
Protected Health Information

- Protected Health Information ("PHI") includes:
  - All individually identifiable health information transmitted or maintained by a covered entity regardless of its form (oral, written, or electronic);
  - Relating to past, present, or future physical or mental health or condition; and
  - Relating to the provision of health care services, or
  - Relating to the past, present, or future payment for health care.

Health/Safety Public Policy Exception

A covered entity may disclose PHI if it believes in good faith that the disclosure is:

- Necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and
- Made to persons reasonably able to prevent or lessen the threat.

State Law – General Rule

- Unless otherwise specified by law, a health care or mental health professional may not reveal confidential information about a patient without the permission of the person who consented to the health care.
- Revealing confidential information about a patient without his or her permission constitutes professional misconduct and may be punished by fine, reprimand or revocation of license.
- There is a private right of action for damages for a patient whose confidences have been betrayed by a health care professional.
State Law -- Exceptions

Confidential information can be released to an endangered individual and a law enforcement agency when a treating psychiatrist or psychologist has determined that a patient or a client presents a serious and imminent danger to that individual. The reasons for any such disclosures shall be fully documented in the medical record. Nothing in this paragraph shall be construed to impose an obligation upon a treating psychiatrist or psychologist to release information pursuant to this paragraph.” Mental Hygiene Law §33.13 (c)(6)

State Law -- Exceptions

- “Confidentiality ... must yield to disclosure in the face of a stronger countervailing public interest such as where it becomes known that the patient presents a particular risk or danger to others.” Kolb v. United States (W.D. N.Y. 1996)
- “[W]here a patient may be a danger to himself or others, a physician is required to disclose to the extent necessary to protect a threatened interest.” MacDonald v. Clinger (N.Y. App. Div. 1982)

Campus Security Act

Timely Warning Requirement
- Institutions must, in a manner that is timely and will aid in the prevention of similar crimes, report to the campus community on certain crimes that are reported to campus security authorities or local police agencies and considered by the institution to represent a threat to students and employees.
- Not required with respect to crimes reported to pastoral or professional counselors.
Schieszler v. Ferrum College (W.D. Virginia 2002)

- Michael Frentzel, a freshman, had disciplinary infractions and was required by the College to participate in anger management counseling.
- Frentzel and his girlfriend had an argument in his dorm, and campus security responded. The girlfriend gave them a note indicating that Frentzel intended to hang himself with a belt. Frentzel had bruises on his head, which he told campus security were self-inflicted.

Schieszler v. Ferrum College

- Dean of Student Affairs was called, and he required Frentzel to sign a statement promising that he would not hurt himself. The College took no other actions.
- Over the next few days, Frentzel sent two additional notes indicating his suicidal thoughts. These were brought to the attention of the College. Administrators visited Frentzel in his dorm room and discovered that he had hanged himself with his belt.

Schieszler v. Ferrum College

- The Court held that the relationship between a college and its students is the kind of relationship which gives rise to a duty to protect the students from harms of which the college is aware.
  ➤ This finding of a special relationship was "new law."
  ➤ Court based its ruling on the college’s knowledge of Frentzel’s emotional problems and suicidal threats.
  ➤ Case was later settled and the College admitted "shared responsibility" for Frentzel’s death.
Jain v. State of Iowa (Iowa 2000)

- Sanjay Jain experienced academic difficulties during his first semester at the University of Iowa, and began experimenting with drugs and alcohol.
- The University did not inform Jain’s parents of these problems.
- Late in the Fall, resident assistants were called to Jain’s room, Jain’s girlfriend reported that he was attempting to commit suicide by inhaling fumes from his moped.

Jain v. State of Iowa

- Jain admitted that he was indeed attempting to commit suicide, but agreed to seek counseling.
- He refused to permit the University to notify his parents, but claimed that he would speak with them himself.
- University policy permitted the Dean of Students to notify the family, but the Dean was not made aware of Jain’s issues.
- Jain subsequently turned on the moped and asphyxiated himself.

Jain v. State of Iowa

- Jain’s father sued, alleging that the University was negligent in failing to notify the family.
- The Iowa Supreme Court affirmed a lower court ruling that the University had no “special relationship” with Jain sufficient to impose a duty to notify the family or otherwise prevent the suicide.
- Policy and FERPA provisions permitting disclosure did not create a duty of disclosure.
Mahoney v. Allegheny College (PA 2005)

- Chuck Mahoney enrolled at Allegheny College in 1999.
- He participated in regular counseling and received medication for depression throughout his first year.
- In the Fall of 2000, Mahoney disclosed suicidal thoughts to his girlfriend.
- He was hospitalized and his parents were notified.
- Apparently stabilized and on medication, Mahoney returned to the College in time to start the Fall 2000 semester.
- Mahoney’s distress continued throughout 2000 and 2001, but without any overt threat of self-harm.
- Resisted counselor’s request to notify parents.
- On February 11, 2002, Mahoney hanged himself in his off-campus fraternity house.

Mahoney v. Allegheny College

- Family sued, claiming that the College breached a duty to prevent Mahoney’s suicide, breached a duty to notify the parents, failed to require a leave of absence, and breached a contractual obligation.
- Court held that no duty had been breached.
- Acknowledged importance of therapist-patient privilege and student privacy.
- Considered problems with involuntary withdrawal.
- No generally applicable duty or “special relationship” that would create a duty to prevent suicide or notify parents.
- “Rather than create an ill-defined duty of due care the University and mental health community have a more realistic duty to make strides towards prevention.”

Mahoney v. Allegheny College

- The malpractice claims against the counselor, and against the College as her employer, went to a jury trial in August 2006.
- On August 31, 2006, the jury rendered an 11-1 verdict finding that neither the College nor the counselor played a negligent role in connection with Mahoney’s suicide.
Non-Discrimination Issues

- Section 504 of the Rehabilitation Act of 1973
  - “No otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination in any program or activity.”
  - “A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.”
  - “Handicapped person” means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Non-Discrimination Issues

- Title II of the Americans with Disabilities Act
  - Applies to public colleges and universities.
  - Provides that “no qualified individual with a disability shall, solely by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

- New York State Human Rights Law
  - Applies to non-sectarian real estate tax exempt educational institutions.
  - Provides for a broad definition of “disability,” which includes a “physical, mental, or medical impairment which ‘prevents the exercise of a normal body function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”

Non-Discrimination Issues

- Direct threat exception
  - *Ascani v. Hofstra University* (2nd Cir. 1999) – student who threatened her professor due to mental illness was a “direct threat.”
  - OCR’s Letter to Marietta College (March 18, 2005) – student with prior suicide attempts did not present direct threat.
  - Requires an individualized analysis.
Non-Discrimination Issues

- Mandatory Withdrawal Policies
  - OCR’s 2004 Letter to Bluffton University
    - Student attempted suicide in her dorm room.
    - She was hospitalized for one week and diagnosed with bipolar disorder. The mental health care providers opined that she should return to Bluffton University upon her discharge.
    - In the meantime, three days after the suicide attempt, Bluffton informed her that it would suspend her unless she opted to withdraw.
    - Student and her mental health care provider contacted Bluffton and indicated that she was no longer suicidal.

Non-Discrimination Issues

- Bluffton did not reconsider its decision based on this information and did not attempt to get any additional information. Bluffton stood by its decision that Student’s situation presented the need for an emergency withdrawal.
- OCR found a violation:
  - Evidence of discriminatory treatment of students with mental, as opposed to physical, disabilities.
  - OCR concluded that Bluffton could not rely on the threat of suicide.
  - Decision must be based on “reasonable medical judgment.”
- OCR determined that Student was denied due process.
  - Initial decision was never reconsidered in light of medical evidence.
  - Bluffton did not provide a grievance procedure for disability-related issues.

Non-Discrimination Issues

Noff v. George Washington University

- Following the suicide of a friend, Jordan Noff sought treatment at a University medical facility for depression and suicidal ideation (no overt threat or attempt).
- Within a day after seeking treatment, Noff received a letter from a University administrator informing him that he had violated the student conduct code.
- The University offered Noff the option of a hearing on the interim suspension or the ability to voluntarily withdraw.
Non-Discrimination Issues

- Nott did not request a hearing; he withdrew and sued the University.
- Alleged violation of rights under ADA, Section 504, and various other statutory and common law causes of action.
- University moved to dismiss.
- Case settled in Fall 2006
  - Details confidential but University acknowledged that it had "agreed to review" its policies on dealing with troubled students.

Pick Your Lawsuit?

- Most situations do not lend themselves to risk-free choices.
  - Risk of wrongful death suit vs. risk of privacy or disability related violation.
  - Risk analysis may be different where disclosure without consent is made to parents who are "part of the problem."
- Risk of harm to educational environment vs. risk of lawsuit.

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