

## Campus Safety after Virginia Tech

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In the wake of the tragedy at Virginia Tech in Blacksburg, Virginia, it was revealed that Seung Hui Cho, the young man responsible for taking the lives of 32 students and faculty members, had a history of mental instability and that numerous administrators, faculty members, public safety officials, and healthcare providers were aware of his erratic behavior in the year and half leading to the shootings. The Virginia Tech Review Panel found that these individuals failed to communicate with one another about the various incidents involving Cho because of their confusion about how state and federal privacy laws allow and/or limit the sharing of student information.<sup>1</sup> Government officials charged with reporting to the President of the United States on issues raised by the mass killings at Virginia Tech, noted a similar lack of understanding of the complex federal laws governing students' right to privacy and the potential liabilities to educators, law enforcement, and healthcare professionals for sharing information.<sup>2</sup> Furthermore, the Family Educational Rights and Privacy Act (FERPA), the federal law which limits access to students' educational records, requires that the exception for disclosure of records under an emergency be "strictly construed,"<sup>3</sup> which limits the circumstances under which information about a student who is a suspected threat might be shared, as well as the type of information.

The basic tenets of privacy for college students falls under the FERPA and state privacy laws. FERPA is a spending clause statute that deprives those educational agencies or institutes of funds for noncompliance with the student privacy rights outlined in the Act. The code requires that students be informed of their privacy rights and in most cases, it requires colleges and universities to obtain written consent before disclosing educational records, which are defined in

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<sup>1</sup> Virginia Tech Review Panel, *Mass Shootings at Virginia Tech April 16, 2007: Report of the Virginia Tech Review Panel Presented to Timothy M. Kaine, Governor Commonwealth of Virginia* (August 2007) p. 2. Retrieved March 18, 2007 from [governor.virginia.gov/TempContent/techPanelReport.cfm](http://governor.virginia.gov/TempContent/techPanelReport.cfm). Hereafter referred to as Virginia Tech Review Panel.

<sup>2</sup> United States, *Report to the President on Issues Raised by the Virginia Tech Tragedy* (Washington: GOP, June 13 2007) p. 7. Retrieved March 18, 2007 from [hhs.gov/vtreport.pdf](http://hhs.gov/vtreport.pdf). Hereafter referred to as Report to the President.

<sup>3</sup> Legal citation: 20 U.S.C. § 1232g; 34 CFR Part 99.36. Family Educational Rights and Privacy Act.

§99.1(b) as those records that are “directly related to a student” and maintained by the school or its agents. The United States Court of Appeals for the Sixth Circuit reaffirmed in a ruling on June 27, 2002 in *United States v Miami University and Ohio State University* that the Department of Education’s broad definition of educational records, includes but is not limited to transcripts, class schedules, financial records, social security number, disciplinary records, and other identification numbers, even post-it notes in a student’s file are considered an educational record.

The relevant exceptions for disclosure without consent under §99.31 are: disclosure to school officials within the institute who have a legitimate educational reason for having access to the information; disclosure to school officials at another institute in which the student seeks to enroll or transfer; disclosure to parents of a student claimed as a dependent under IRS rules; and disclosure on a need to know basis in connection with an emergency as it pertains to the protection of the health and safety of other students. For those postsecondary institutions that provide health and medical services to students, medical records are covered by FERPA and state health privacy laws, whichever are stricter. These student medical records are not covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which outlines the privacy rules for non-student records and records at non-educational facilities.<sup>4</sup>

Because FERPA governs most, if not all student records at a campus, a clear understanding of the scope and application of these rules is vital to avoiding situations where information about a student who poses a risk to him/herself or others is shared on a limited basis due to fear of liability. Yet in the “Report to the President” government officials stated that the misinterpretations and confusions about the application of FERPA was universal in the meetings they conducted throughout the nation:

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<sup>4</sup> Legal citation: Public Law 104-191. Health Insurance Portability and Accountability Act of 1996.

A consistent theme and broad perception in our meetings was that this confusion and differing interpretations about state and federal privacy laws and regulations impede appropriate information sharing. In some sessions, there were concerns and confusion about the potential liability of teachers, administrators, or institutions that could arise from sharing information, or from not sharing information, under privacy laws, as well as laws designed to protect individuals from discrimination on the basis of mental illness. It was almost universally observed that these fears and misunderstandings likely limit the transfer of information in more significant ways than is required by law.<sup>5</sup>

Clearly there was a need for guidance in understanding and applying these laws in campus situations. As of October 2007, the United States Department of Education provided these guidelines in the form of brochures that restate the regulations in language that is clear and provide contact information for further guidance.<sup>6</sup> Clear understanding of the regulations allows educators and administrators to understand their duties to students and liabilities for noncompliance, this will help all parties act in the best interest of students and empowers administrators when faced with potential threats to public safety.

Though the additional guidance clarifies the misunderstandings related to sharing student information under FERPA, the “strictly construed” concept of an emergency still hinders the transfer of information. Under § 99.31(a)(10) and § 99.36 of the FERPA allows for an exception of disclosure in the event of an imminent threat or an emergency situation.

Under § 99.36(a), an educational agency or institution may disclose personally identifiable information from 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. Under § 99.36(b), educational agencies and institutions may include in a student’s education records appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community. Educational agencies and institutions may also disclose appropriate information about these kinds of disciplinary actions to teachers and school officials within the agency or institution or in other schools who have legitimate educational interests in the behavior of the student. Under § 99.36(c), all of these regulatory provisions must

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<sup>5</sup> “Report to the President,” p. 7.

<sup>6</sup> “Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities” (Washington: GPO, 2007) and “Parents’ Guide to the Family Educational Rights and Privacy Act: Rights Regarding Children’s Education Records” (Washington: GPO, 2007) were both released by the U.S. Department of Education.

be strictly construed.<sup>7</sup>

The problem is that this consent is temporally restricted to the period of the emergency and only allows for specific information to be released. In the case of Cho, it would have served Virginia Tech well if they could have released preemptive information to Cho's parents and spoken openly with other resources that might have been of assistance. Forcing the institution to wait until an emergency arises denies the administrators of the opportunity to use their discretion in determining when student information needs to be disclosed to individuals beyond those allowed under the current rules. Waiting for an emergency situation to arise can prove to be too late for an exception to be made to the disclosure rules. Instead the burden should be lessened to "an articulable and significant threat to the health or safety of a student or other individuals,"<sup>8</sup> which allows for a more equitable balance between the privacy rights of the individual and the public safety. And rather than constrict the information that can be disclosed, the discretion should left to the administrator to decide what information is "necessary to protect against the threat." This flexibility, as it is pointed out in the proposed changes to FERPA regulation § 99.36(c), will allow administrators who are on the ground to use their judgment based on the "totality of the circumstances."

At the same time, the law alone cannot prevent a tragedy like the mass killings of Virginia Tech. In order for the administrators' discretion of disclosure to be effective, there must be collaboration and assessment in place as well. Members of the Care Team, a team responsible for evaluating potentially dangerous students at Virginia Tech, knew of Cho's erratic behavior and though some of the incidents related to his behavior were discussed with the team, most were

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<sup>7</sup> U.S. Department of Education, "34 CFR Part 99 Family Educational Rights and Privacy; Proposed Rule." *Federal Register* 73:57 (24 March 2008) pp. 15589. Hereafter referred to as Proposed Rule.

<sup>8</sup> Proposed Rule.

not. Even with some incidents being reported, the Care Team did not flag Cho. The establishment of a Care Team as a centralized interdisciplinary body to which concerns and reports about troubled students can be brought is a good start, but the assessment team must consist of people who are sensitive to the warning signs of individuals who might pose a risk to the community and who know how to conduct an investigation and use reliable assessment tools to evaluate students. The Department of Education and the Secret Service have worked together to create resources that institutions can use as guidelines for developing threat assessment teams and tools. In *Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* and *Threat Assessment in Schools: A Guide to Managing Threatening Situations and Creating Safe School Climates*, the DOE and SSI offer recommendations for developing a methodological analytical approach to preventing targeted violence by being aware of the potential attacker is doing and saying.

The danger in creating laws that define student privacy too broadly is a stifling of information that might prevent a tragedy and added tension between the students' right to privacy and public safety on college campuses. The proposed changes in the FERPA regulation § 99.36(c) is a move toward balancing individual student privacy and public safety by empower administrators at the local level. This empowerment allows administrators to work with students on a case by case basis, which provides more protection for all students, both in terms of privacy and public safety. In combination with the new guidelines that are alleviating the confusion about the regulations and resulting in more accurate institutional privacy policies, the proposed changes will lead to more effective protection of students' privacy and increased public safety.

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