



To Avert Campus Violence, Balance Shifts Towards Disclosure

by Ira Michael Shepard
ACCT General Counsel

One of the many lessons learned in the wake of the Virginia Tech tragedy was that the student who committed the mass murders had a known history of mental illness. While we will never know for sure if this tragedy could have been averted, some pointed to the Family Educational Records Protection Act (FERPA) as an obstacle to the possible disclosure of information that could have potentially prevented the 2007 massacre, the deadliest mass shooting in U.S. history.

In the wake of this tragedy, FERPA regulations were amended last year, and the law should no longer be viewed as an obstacle to the disclosure of confidential information in such circumstances. The amended regulations to FERPA's Health

and Safety Emergency Exception make it easier for a college to release information to any person whose knowledge of the information would help in protecting the community or individual from danger. Information can also be disclosed in order to gather additional details about the person in question from other sources. Information can be shared with other students, mental health professionals, law enforcement, potential victims, or other schools or institutions that the student previously attended. This will empower officials to understand the depth of the potential problem, provide for possible protection, or develop ideas useful to protect the individual student and others.

Under previous FERPA regulations, the term "emergency" had to be strictly construed before a school was permitted to disclose confidential information without a student's consent. The amended regulations significantly alter this standard, removing the "strictly construed" requirement and allowing school officials to notify third parties and parents whenever there is a health or safety emergency involving the student.

The amended regulations state that a school may disclose confidential student information to "appropriate" parties in connection with an emergency. In deciding whether to disclose information under this exception, a school is permitted to consider all of the circumstances



"It's not our policy to disclose details of a future operation."

Must-Attend Congress Legal Sessions

Ira M. Shepard, ACCT's general counsel and a partner in the Washington, D.C., law firm of Saul Ewing LLP, will present three must-attend sessions at the 2010 ACCT Leadership Congress in Toronto. Register today at www.acct.org/events/annualcongress/10/registration.php.

Federal Infrastructure Tax Credit Program

Your college could be eligible for a federally financed tax credit program to support infrastructure projects such as the building of classrooms, auditoriums, book stores, performing arts centers, administrative and faculty offices, physical education facilities, parking garages, and even multi-use dorm projects. The New Markets Tax Credit Program was established in 2000 and has funded billions of dollars of infrastructure projects. This session is a must for any trustee looking for such financing in the wake of state budget cuts.

Legal Academy for Trustees

Learn the basics, improve your existing knowledge, and ask legal questions during this popular session, co-presented annually for the past 10 years by Shepard and University of North Carolina Law Professor Robert Joyce, an expert on community college legal issues.

Community College Lawyers Roundtable

This session, chaired by Shepard, is open to all lawyers attending the ACCT Congress, as well as non-lawyer trustees who are interested in legal issues. The roundtable will address board/foundation relations, FERPA developments, the NMTC program, and a community college vulnerability review. Two hours of CLE credit will be awarded to all qualified lawyers who have a state CLE requirement. Over the years, more than 20 state bars that grant CLE credit have recognized this session, a favorite of community college lawyers and trustees.

surrounding a potential threat. If the institution determines that there is "an articulable and significant threat" to the health or safety of a student or other individual, it may disclose information from that student's confidential record to parties "whose knowledge of the information is necessary to protect the health and safety of the student or other individuals." So long as there is a "rational basis" for the school's decision based on the information available at the time, the U.S. Department of Education will defer to the school and not substitute its judgment for that of the institution.

Comments to the amended FERPA regulations explain that an emergency could be any situation where a student gives "sufficient cumulative warning signs" that lead a school or school officials to believe that the student may be a danger to him or herself or others at any moment. If a school official is able to express in words the circumstances leading the official to reasonably conclude that a student possesses a significant threat of substantial bodily harm, then the official may disclose confidential student information to any person whose knowledge of the information will help protect the student or other individuals from the threat. Further, the person receiving the information does not have to be the person responsible for providing protection. The information can also be disclosed in order to gather other information from third parties who may have information relevant to the emergency at hand.

The FERPA amendments require the school to document what information is released under the exception. Officials must also document the "articulable and

significant threat" that was the basis for the disclosure and the parties to whom the information was disclosed. A school must document the information within a reasonable time period after the disclosure has been made and maintain the disclosure information with the student's educational records for as long as the records are required to be maintained. The purpose of this requirement is to document the circumstances that led school officials to believe there was an emergency and the way in which the school justified the disclosure of information otherwise protected by FERPA.

In general, FERPA's amended regulations present no downside to disclosure in situations where the risk of danger to a student or others is significant. It is understandable that prior to these amendments, school officials felt constraints to maintain confidentiality. Because the amended FERPA regulations no longer require that an emergency be strictly construed, school officials have greater flexibility to notify law enforcement, mental health professionals, or a student's parents in an attempt to prevent harm if they consider a student a danger to himself, herself, or to others.

By erring on the side of disclosure in such situations, schools can minimize the likelihood of litigation based on the premise that school officials should have taken action to protect a student based on their special relationship but failed to do so.



Ira Michael Shepard is a partner with the law firm of Saul Ewing, LLP, in Washington, D.C., and ACCT's general counsel.