

Higher Education Newsletter

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FERPA: The Health and Safety Emergency Exception

By Allison B. Newhart

Mental illness is a significant and growing concern for colleges and universities nationwide. Increasing numbers of students are seeking out on-campus mental health services for a variety of mental health issues. It is often a challenge for schools to weigh the interest in helping students who are struggling with mental illness against the duty and desire to protect student privacy. In trying to strike a balance, schools are faced with the question of when it is lawful to release confidential mental health records and information about students to third parties such as off-campus mental health professionals, law enforcement personnel or parents. In the past, schools often erred on the side of maintaining a distressed student's confidentiality in fear of violating confidentiality laws, including the Family Educational Rights and Privacy Act ("FERPA"). As discussed in the Higher Education Practice Group's January 2009 newsletter, however, the regulations implementing FERPA recently underwent significant amendment.

THE FERPA AMENDMENTS

As amended, FERPA should no longer be viewed as an insurmountable obstacle to disclosure. Specifically, the amendments to the health and safety emergency exception now make it easier for a college or university to release information to parents or other appropriate third parties without a student's consent. Under the prior 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 alter this standard. The amendments remove the requirement that the emergency exception be strictly construed and allow school officials to specifically notify parents when there is a health or safety emergency involving their child.

Under the amended regulations, a school may disclose confidential student information to appropriate parties, including parents, in connection with an emergency "if knowledge of the information is necessary to protect the health or safety of the student or other individual."¹ In deciding whether to disclose information under this exception, a school is permitted to consider all of the circumstances surrounding the threat.² If the school determines that there is "an articulable and significant threat" to the health or safety of a student or other individual, it may

1 34 CFR § 99.36.

2 34 CFR § 99.36.

disclose information from the student's confidential records to parties "whose knowledge of the information is necessary to protect the health or safety of the student or other individuals."³

If there is a "rational basis" for the school's decision to release the information, based on information available at the time, then the Department of Education will defer to the school and not substitute its judgment for that of the institution.⁴

Comments to the amended FERPA regulations explain that an emergency could be a 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 himself 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 poses a significant threat of substantial bodily harm to any person, including the student himself, then the official may disclose the confidential student information to any person whose knowledge of the information will help in protecting a person from that threat. Further, the person receiving the information does not have to be the person responsible for providing the protection. The information can also be disclosed in order to gather information from any person, including other students, mental health professionals, law enforcement, the potential victim, or other schools or institutions previously attended by the student, who has further information that would be necessary to provide the protection needed.⁵

The amendments also require a school to record what information is released under the exception, including the "articulable and significant threat" that was the basis for the disclosure and the parties to whom the information was disclosed. A school must make the record within a reasonable time period after the disclosure has been made and maintain it with the education records of the student for as long as they are maintained. The purpose of this recordation requirement is to demonstrate to parents, students and the Department of Education the circumstances that led school officials to believe there was an emergency

and how they justified the disclosure of information otherwise protected by FERPA.⁶

THE BALANCE HAS SHIFTED IN FAVOR OF DISCLOSURE

In general, the amendments present no downside to disclosure in situations where the indicators of risk to a student or others are significant. It is understandable that prior to the amendments schools felt constrained 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 or others. By erring on the side of disclosure in such situations, schools can minimize the likelihood of litigation on the theory that school officials should have taken action to protect a student based on a special relationship but failed to do so.

STEPS COLLEGES AND UNIVERSITIES CAN TAKE

Colleges and universities should view the increased discretion granted by the FERPA amendments as an opportunity to review their policies and resources for addressing student mental health issues. Even though it is important to know when, under FERPA's amended regulations, school officials can share confidential student information, schools should also work to (1) try to prevent emergencies by providing coordinated and effective mental health services for students, and (2) be prepared for when emergencies arise.

One of the most effective ways of identifying students in distress is to provide training to people of all levels and positions on campus. Education on the common warning signs of such things as suicide and eating disorders is key. School officials and staff should be educated on the limits and applications of FERPA's emergency health and safety exception through training sessions and should know what steps to take in the case of an emergency or suspected emergency. In addition, employees should know where to go to find further information on the school's policies if they have questions or concerns. Schools can consider providing information through publications on the internet or in newsletters, or through speeches and seminars.

3 34 CFR § 99.36.

4 34 CFR § 99.36.

5 Federal Register, 34 CFR Part 99.

6 34 CFR § 99.32.

Although one-on-one contact between a student and an individual health professional is essential to averting student suicides and other destructive behavior, it is also vital that institutions develop mental health response teams or threat assessment teams that include professors, housing and security staff, counselors or mental health professionals, and deans. Cross-referencing and increased communication should allow these teams to better monitor high-risk students.

Schools can also extend awareness beyond their campuses to parents by encouraging parents to (1) inform school officials in advance if they know that their child has a history of mental health problems, and (2) file the necessary paperwork to establish that their child is a dependent. By taking steps to establish that a student is a dependent at the outset, the school will be in a position, if necessary, to release information to that student's parents without fear of liability under FERPA.

CONCLUSION

Each case involving a student's mental health is as different as are the students themselves. Therefore, there are no hard and fast rules for schools to follow when deciding whether to release information under FERPA's health and safety emergency exception. The new, more discretionary amendments do not provide a complete answer, but do suggest that the more prudent option is often disclosure.



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THE ADA AMENDMENTS ACT of 2008: One Court's Application

By Catherine E. Walters and Amy C. Foerster

Four months into 2009, readers are undoubtedly becoming more familiar with the ADA Amendments Act of 2008 ("ADAAA") as they face new and expanded requests for accommodation. The ADAAA, which took effect January 1, 2009, provides sweeping changes to prior statutory definitions and interpretations, and specifically rejects four U.S. Supreme Court rulings, including *Toyota Motor Manufacturing v. Williams*, which narrowly construed the concepts of "substantially limiting" and "major life activities."¹ The ADAAA retains the ADA's basic definition of an individual with a disability

as one who has an impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment; however, it opens the door for a much broader application of that definition.

The Supreme Court decisions rejected by Congress when it passed the ADAAA had permitted employers to consider "mitigating measures" — measures that help control or cope with an impairment — when determining whether an individual was disabled, thus creating a higher standard for proving a disability. The impact was to exclude from coverage many individuals who, without mitigating measures, would be substantially limited in a major life activity. Now, under the ADAAA, ameliorative effects of mitigating measures may no longer be considered in determining whether an impairment substantially limits a major life activity.²

The ADAAA also expands the definition of "major life activities" by including two non-exhaustive lists: *activities*, such as walking, bending, reading, communicating; and *major bodily functions*, such as digestive, bowel, bladder, respiratory and reproductive functions. Additionally, an impairment that is episodic or in remission is a

¹ 534 U.S. 184 (2002).

² The only exception is for ordinary eyeglasses or contact lenses.

disability under the ADA if it would substantially limit a major life activity when active.

The Sixth Circuit recently discussed the broadened scope of “disability” under the ADA in *Jenkins v. National Board of Medical Examiners*.³

Kirk Jenkins was a third-year medical student who was diagnosed with a reading disorder as a young child, and had received accommodations — in the form of additional time on examinations — at each stage of his education. He requested an accommodation for the United States Medical Licensing Examination, but his request was denied. Applying the standard set forth in *Toyota Motor Manufacturing*, the district court concluded that Jenkins’ reading difficulties did not limit his ability to perform tasks central to most people’s daily lives and, therefore, his claim of disability under the ADA must fail.⁴

On appeal, the Sixth Circuit determined that because Jenkins is seeking prospective relief — that is, an accommodation for his future licensing examination — as opposed to damages for a prior injury, the ADA, rather than the ADA, controls. In so determining, the Court noted that “a court applies the law in effect at the time it renders a decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary.”⁵

Not yet having the ADA available as law at the time of its decision, the district court relied on the Supreme Court’s analysis in *Toyota Motor Manufacturing*, concluding that Jenkins would only be deemed disabled if his disability “precluded” him from performing reading tasks that were central to most people’s daily lives. The district court determined that Jenkins was not substantially limited in his ability to read and deemed him not disabled. The Sixth Circuit concluded that because the district court relied on *Toyota Motor Manufacturing*, a case expressly repudiated by the ADA, its conclusions require reconsideration. Specifically, the ADA provides that an individual is disabled if he has a physical or mental impairment that *substantially limits* one or more of the major life activities of *such individual*. The Sixth Circuit therefore remanded

the case to the district court for consideration under the newly expanded provisions of the ADA.⁶

Jenkins leaves colleges and universities — as both employers and educators — with two lessons. First, the amendments to the ADA are indeed as far-reaching as they initially appeared. The pool of employees and students seeking accommodation is bound to increase significantly as the ADA becomes more established law. Second, to the extent institutions have denied requests for accommodation under the ADA, they may see those requests renewed or continued on appeal under the ADA analysis. Schools may wish to take a proactive approach by reviewing recent denials to identify the appropriate accommodations in the event the requests are re-lodged, and by determining whether any denials that are currently on appeal would have been granted under the ADA.



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HEOA Amends the Clery Act

By Jodi Furr Colton

As part of the Higher Education Opportunity Act (“HEOA”), signed into law by former President George W. Bush on August 14, 2008, Congress included several significant amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the “Clery Act”).¹ These changes went into effect immediately, but the U.S. Department of Education (“USDE”) has yet to promulgate regulations or issue specific guidance on the amendments.

The Clery Act, originally enacted in 1990, requires all colleges and universities that participate in federal financial aid programs to

³ 2009 WL 331638 (6th Cir. February 11, 2009).

⁴ *Id.* at *1.

⁵ *Id.* at *2 (citations omitted).

⁶ *Id.* at *3

¹ 20 U.S.C. § 1092(f), with implementing regulations in the U.S. Code of Federal Regulations at 34 C.F.R. § 668.46.

maintain and disclose to all current students and employees² certain information concerning their security policies and crime on and near campus. This information must be disseminated via an Annual Security Report distributed no later than October 1 of each year. Under the Act, institutions are also required to give timely warnings of certain enumerated crimes that represent a threat to the safety of students or employees. Compliance is monitored by USDE, which can impose fines up to \$27,500 per violation against institutions, and can suspend institutions from participating in federal student financial aid programs.

EMERGENCY RESPONSE AND EVACUATION POLICIES

The most significant change made by the HEOA amendments to the Clery Act is the requirement that institutions create and implement “policies regarding immediate emergency response and evacuation procedures.” The Act now mandates that institutions “immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff” on campus. Warnings must be given unless they would “compromise efforts to contain the emergency.” These new emergency response policies and procedures should be included in each institution’s 2009 Annual Security Report, due October 1, 2009.

The Act itself does not define what constitutes a “dangerous situation” or “significant emergency” sufficient to warrant campus-wide notification. Rather, according to the legislative history, each institution’s policies and procedures should “articulate a method to promptly determine whether incidents pose an immediate threat to the health or safety of students or staff.”³ The Act likewise does not give any guidance as to the means by which information about a threat is to be disseminated, or how “immediately” it is to be circulated. However, the legislative history advises that the notification should happen “without any delay following a professional determination by law enforcement or other authorities that an emergency exists.”⁴

In addition to disclosing its emergency response policies and procedures in the Annual Security Report, each institution is required to publicize the policies and procedures annually “in a manner designed to reach students and staff.” Institutions are

also required to test all of their emergency response and evacuation procedures annually, including in 2009.

ADDITIONAL REPORTING REQUIREMENTS

The HEOA amendments to the Clery Act include additional reporting requirements. A more detailed disclosure of any “working relationship” between campus security personnel and state and local law enforcement is now required, including whether the institution has any agreements, such as a written memorandum of understanding, with state or local police. The amendments also add several new crimes—larceny-theft, simple assault, intimidation and destruction, damage, or vandalism—to the list of crimes institutions must report as hate crimes in cases where the victims are intentionally selected because of their actual or perceived race, gender, religion, sexual orientation, ethnicity or disability.

WHISTLEBLOWER PROTECTION

The Clery Act now includes a safeguard for “whistleblowers” by prohibiting retaliatory action against any individual “with respect to the implementation of any provision” of the Act.

REQUIREMENTS FOR THE DEPARTMENT OF EDUCATION

The HEOA amendments also contain a requirement that USDE report annually to Congress on Clery Act compliance and its efforts to implement the law. In addition, the amended Clery Act specifically authorizes USDE to consult with the Department of Justice to develop and disseminate best practices information to colleges and universities.

STATUS OF FEDERAL REGULATIONS

The Clery Act is implemented by federal regulations that have the full force and effect of law. USDE has established five negotiated

2 Prospective students and employees are also entitled to this information upon request.

3 154 Cong. Rec. H7353-01, H7494 (2008).

4 154 Cong. Rec. H7353-01, H7494 (2008).

rulemaking teams to prepare proposed regulations for implementing the HEOA. The team developing regulations relating to the Clery Act amendments began meeting in March, 2009, and will meet again in April and May to finalize the proposed regulations. The final regulations must be published by November 1, 2009 (note: after the October 1, 2009, reporting deadline).

It is anticipated that the regulations will provide additional guidance regarding emergency response policies, as well as the procedures for testing and annual notification. Because institutions were required to be in compliance with the amendments as of August 14, 2008 – obviously prior to the publication of the regulations –

schools will need to reassess and potentially modify their emergency response policies and procedures and their testing protocols now, and likely again in 2010, after the regulations are promulgated.



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More on Safety: The CAMPUS Safety Act

By Kristyn L. Byrnes

On February 3, 2009, the United States House of Representatives unanimously passed "The Center to Advance, Monitor, and Preserve University Security Safety Act of 2009."¹ Known as the CAMPUS Safety Act (the "Act"), this legislation would establish the National Center for Campus Public Safety in order to streamline and centralize the coordination of emergency responses on college campuses across the country. The Center would have several functions, including:

- Providing training for campus public safety and mental health agencies;
- Researching campus safety and security measures;
- Developing plans to prevent, protect against and respond to natural and man-made emergencies involving an immediate threat to the health or safety of university campuses, in conjunction with the Department of Homeland Security, the Department of Education, the Attorney General, and state and local law enforcement agencies;

- Promoting the development and dissemination of effective behavioral threat assessment and management models to prevent violence on campus; and
- Coordinating the dissemination of campus safety information.

The Act was introduced by Rep. Robert Scott (D-VA) in response to the tragedies at Virginia Tech and Northern Illinois University, and it proposes to appropriate \$2.75 million annually for fiscal years 2009 through 2013 for educational and training grants to campus public safety and mental health agencies. While supporters contend that the Center is designed to serve as a clearinghouse where colleges and universities can obtain information about best practices for emergency responses, critics have cautioned that the Center could be used to implement more repressive practices and that a federal mandate for a proper emergency response denies local officials autonomy in the decision-making process.

The Act moved to the Senate on February 4, 2009, and has been referred to the Senate Judiciary Committee. We will keep readers apprised of any further action as it progresses through the legislative process.



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¹ H.R. 748, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-748>.

WHEN USDE COMES KNOCKING: Federal Student Aid Program Reviews

By Amy C. Foerster and Jennifer L. Beidel

Title IV of the Higher Education Act, as amended by the Higher Education Opportunity Act, authorizes the federal government to issue financial aid through a variety of loans and grants.¹ The Student Financial Assistance Programs Division of the United States Department of Education ("USDE") is charged with monitoring the proper administration of these financial aid programs. As a component of the monitoring process, USDE conducts periodic program reviews at participating schools. Adverse program review findings carry the risk of hefty penalties.

The recent economic downturn has increased the need for financial aid. In fact, the number of federal aid applications has grown more than twenty percent for the 2009-2010 school year.² It will be increasingly important for participating schools to ensure that they are prepared for USDE program reviews. The old adage "an ounce of prevention is worth a pound of cure" holds true in the world of Title IV program reviews. Here are a few suggestions:

1. **Plan, plan, plan!** USDE gives program review "priority" to schools with high default rates and other perceived deficiencies. That being said, however, any school that administers Title IV financial aid – no matter how spotless its record – may become the subject of a program review. While USDE is technically required to

provide schools with a written request to conduct a program review, the request can be made immediately before beginning the review. In other words, schools need to be prepared for what may be, in essence, an unannounced review.³

2. **Follow Established Records Policies.** When USDE arrives to conduct a program review, the school is expected to have its financial aid records organized and readily available. Given USDE's authority to conduct unannounced reviews, this requirement makes implementation of an effective document management system paramount. Schools should establish — and adhere to — appropriate document management and retention policies.
3. **Regularly Review Program Requirements.** USDE takes the position that the absence of negative program review findings cannot be construed as approval of a school's conduct. In other words, a school that has never had an adverse finding cannot let itself become complacent about its financial aid administration based on its success in earlier reviews.
4. **Take Advantage of the "Free Look."** After a program review is conducted, USDE prepares an initial report that is submitted to the school for review. The school is permitted to respond to this report with any available arguments or documentation that may reduce or eliminate areas of concern. Take advantage of this "free look." Construct the strongest response possible to any adverse findings in the preliminary report.
5. **Use Caution When Crafting a Final Program Review Appeal.** After considering the school's response to its initial report, USDE will issue a final program review determination. The school must then elect to either repay the funds or file a request for administrative review with USDE's Office of Higher Education Appeals. If a school appeals, it should don its litigation hat in order to ensure that it fully articulates the basis for its appeal and does not waive any key arguments.⁴
6. **Consider Whether Final Program Review Exceeds USDE's Authority.** On appeal, a school should consider whether any of the final program review findings exceed USDE's regulatory authority. Only statutes and

1 See 20 U.S.C. §§ 1070 – 1099.

2 The Chronicle of Higher Education, *Applications for Federal Student Aid Are Up So Far This Year*, http://chronicle.com/news/article/6090/applications-for-federal-student-aid-are-up-so-far-this-year?utm_source=at&utm_medium=en (accessed March 10, 2009).

3 United States Dep't of Educ. Fed. Student Aid Div., Fed. Student Aid Handbook at 2-162 (2008-2009), available at <http://www.ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2008-2009>.

4 See 34 C.F.R. §§ 668.113, 668.116(e) (limiting the admissibility of evidence on appeal).

regulations have the force of law. USDE's statements of policy, including Dear Colleague letters, may assist in interpreting the law, but cannot carry the weight of law. If USDE's findings are not premised on legal requirements but rather on statements of policy, the school should consider arguing that USDE exceeded its authority when crafting the program review.

7. **Search For Potential Liability Exceptions.** The regulatory framework surrounding Title IV financial aid procedures is complex. A school should scrutinize the final program review to ensure that USDE has not overlooked any regulations that would provide the school with safe harbor. For example, the regulations create a liability exception for violations that result from "an

administrative, accounting, or recordkeeping error" that "was not part of a pattern of error." Should this or any other exception apply, be sure to assert it on appeal.

8. Settlement is always an option worth exploring with USDE and you likely will have nothing to lose by broaching the subject while the appeal is pending.



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⁵ See 34 C.F.R. § 668.113(d)(1).

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