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## Clarity Instead of Confusion; Available Solutions Under the HIPAA Privacy Rule and FERPA To Prevent Student Violence

By

Angela Burnette, Esq. and Julia Dempewolf, Esq.

Tragic school shootings, such as at Virginia Tech, Sandy Hook Elementary, and Arapahoe High in Colorado, have heightened public discussions regarding whether prior disclosure of a perpetrator's mental health information or disturbing behavior could have prevented harm to others.<sup>1</sup> In response to the tragedies, lawmakers at both the state and federal levels are considering how mental health information can be disclosed while protecting individual privacy interests and public safety.<sup>2</sup> These privacy and safety issues directly intersect when the perpetrator is a student, whether the student was under the care of a mental health provider or when a school otherwise becomes aware of a student's threats/potential for violence. When the student is an adult (18 years or older), there appears to be particular confusion among providers and schools as to whether and when the adult student's parents can be contacted.

While some states seek increased disclosure of student information, others seek to tighten the safeguards for such information.<sup>3</sup> Such competing and conflicting objectives on the state level, while well-intended, will likely further compound misunderstanding, particularly as to whether and when a school can contact law enforcement, communicate with a student's

current mental health provider, and/or contact a student's parent.

As outlined below, there is no need for confusion. Two federal laws which regulate disclosure of student health information already permit disclosure of information in emergency situations: the Health Insurance Portability and Accountability Act of 1996 (HIPAA), enforced by the U.S. Department of Health & Human Services (HHS), and the Family Educational Rights and Privacy Act (FERPA), enforced by the U.S. Department of Education (ED). HIPAA's Privacy Rule protects an individual's identifying health information, while FERPA protects a student's educational and treatment records. Both laws' emergency exceptions were in place and available to schools and providers even before the Virginia Tech shooting, and a better understanding of those laws could improve safety going forward for both students and staff. To the extent a school or provider is unsure whether an emergency situation exists, practical solutions are offered below to enhance safety and communication, and possibly prevent another tragedy.

### What is HIPAA and What Information Does It Cover?

As an overview, the HIPAA Privacy Rule (hereinafter "Privacy Rule") is a set of federal regulations which seek to protect the privacy of individually identifiable health information.<sup>4</sup> The information protected by the Privacy Rule is commonly referred to as protected health information (PHI), which includes written, electronic, and oral information. PHI specifically includes individually identifiable mental health information, e.g., "information that

<sup>1</sup> See e.g., Stephen Rex Brown, *Arapahoe High Administrators Ignored Warning Signs of Disturbed Student*, N.Y. DAILY NEWS (Jan. 17, 2014), available at <http://www.nydailynews.com/news/national/arapahoe-high-administrators-warning-signs-gunman-security-guard-article-1.1583042#ixzz2r9CYb5VG>; Laura McCrystal, *Sandy Hook Victims' Families, Gun Supporters Testify on Background Check Bill*, CONCORD MONITOR (Jan. 22, 2014), available at <http://www.concordmonitor.com/news/10320230-95/sandy-hook-victims-families-gun-supporters-testify-on-background-check-bill>.

<sup>2</sup> Rachel Slajda, *Lawmakers Question Whether HIPAA Hurts Mental Health Care*, LAW360 (Apr. 26, 2013), available at <http://www.law360.com/articles/436599>; *Deep Divisions Remain after Sandy Hook*, MY DAYTON DAILY NEWS (OH) (Dec. 8, 2013).

<sup>3</sup> Benjamin Herold, *Legislative-Advocacy Group's Model Bill Tackles Privacy of Student Data*, EDUCATION WEEK (Dec. 3, 2013), available at <http://www.edweek.org/ew/articles/2013/12/03/14alec.h33.html>.

<sup>4</sup> The HIPAA Privacy Rule is found at 45 C.F.R. pts. 160 and 164 Subpts. A and E. This article focuses on the HIPAA Privacy Rule and not on the other regulations issued pursuant to HIPAA, such as those regarding security, transactions and code sets, or breach notification.

relates to the past, present, or future physical or mental health or condition of the individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care.”<sup>5</sup> Significantly, the definition of PHI includes “psychotherapy notes,” which are defined in the Privacy Rule as:

notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.<sup>6</sup>

Psychotherapy notes are afforded extra protections under the Privacy Rule and may only be disclosed in limited circumstances.<sup>7</sup> For example, a patient must sign a separate authorization in order to authorize the release psychotherapy notes; a general HIPAA authorization that permits the release of records that do not constitute psychotherapy notes will not suffice.<sup>8</sup> In addition, the Privacy Rule does not provide patients with a right to access psychotherapy notes about themselves.<sup>9</sup>

The confusion may lie in the Privacy Rule’s express reference to FERPA. The Privacy Rule’s definition of PHI specifically excludes health information contained in education records covered by FERPA and contained in treatment records specifically described in FERPA at 20 U.S.C. 1232g(a)(4)(B)(iv).<sup>10</sup> Although the Privacy Rule’s definition of PHI contains these exceptions, it need not result in confusion among health care providers and educators. The overall framework for determining whether HIPAA or FERPA applies is suggested below. Regardless of whether a school’s information regarding a particular student is governed by the Privacy Rule or FERPA, both laws permit disclosure of such information in an emergency.

### Is The School Covered By the Privacy Rule?

The Privacy Rule applies to covered entities, which are (1) health plans, (2) health care clearinghouses,

and (3) health care providers which engage in certain electronic health care transactions set forth in the Privacy Rule.<sup>11</sup> For example, a HIPAA-covered health care transaction includes electronically submitting a health care claim to a health plan. Not all health care providers are covered entities as defined by the Privacy Rule. This means that not all health care providers are covered (e.g., governed) by HIPAA’s Privacy Rule.

Privacy Rule regulations were issued by HHS, and HHS (along with ED) later provided guidance regarding whether a school constitutes a HIPAA covered entity. Although the HHS guidance was issued in 2008 after the Virginia Tech shooting, the guidance did not necessarily provide any new or different information – it merely applied the Privacy Rule’s well-established definitions of covered entity and PHI.<sup>12</sup>

#### *Is the School a “Covered Entity” Under the Privacy Rule?*

The initial inquiry when determining whether a school is covered by HIPAA is whether the school is a covered entity. HHS expects that most elementary and secondary schools would not be HIPAA covered entities. As HHS explained, “even though a school employs school nurses, physicians, psychologists or other health care providers, the school is not generally a HIPAA covered entity because the providers do not engage in any of the covered transactions, such as billing a health plan electronically for their services.”<sup>13</sup> If a school does not fit the definition of a HIPAA covered entity (a definition which has been in effect for several years), then the school would not be covered by HIPAA regarding

<sup>5</sup> 45 C.F.R. § 160.103.

<sup>6</sup> 45 C.F.R. § 164.501.

<sup>7</sup> 45 C.F.R. § 164.508(a)(2).

<sup>8</sup> 45 C.F.R. § 164.508(b)(3)(ii).

<sup>9</sup> 45 C.F.R. § 164.524(a)(1)(i).

<sup>10</sup> 45 C.F.R. § 160.103.

<sup>11</sup> 45 C.F.R. § 160.103.

<sup>12</sup> See U.S. DEP’T OF HEALTH AND HUMAN SERVS. & U.S. DEP’T OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) TO STUDENT HEALTH RECORDS 1 (2008) [hereinafter “*Joint Guidance*”], available at [www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf](http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf). See also HHS FAQs, available at <http://answers.hhs.gov/>.

<sup>13</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., *Does the HIPAA Privacy Rule Apply to an Elementary or Secondary School?*, available at [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/513.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/513.html); see also *Joint Guidance*, p. 3.

the student health information it maintains. Thus, according to HHS, in most cases a school is not a HIPAA covered entity, either because it does not engage in HIPAA covered transactions or because it only maintains student health information in education records under FERPA (which do not constitute PHI).<sup>14</sup>

HHS also addressed the scenario of a university-affiliated hospital, stating in part:

[U]niversity hospitals generally do not provide health care services to students on behalf of the educational institution. Rather, these hospitals provide such services without regard to the person's status as a student and not on behalf of a university. Thus, assuming the hospital is a HIPAA covered entity, these records [i.e., records related to the clinical treatment of a student at a university hospital] are subject to all of the HIPAA rules, including the HIPAA Privacy Rule.<sup>15</sup>

In contrast, HHS clarified that if a hospital operated a student health clinic on behalf of the university, then those clinic records would not be subject to the HIPAA Privacy Rule but would instead be governed by FERPA.<sup>16</sup> Even if a student health clinic engages in electronic billing for student health services, the records would not be subject to the Privacy Rule if the school maintains health information only in student health records that are "education records" or "treatment records" under FERPA, which do not constitute "protected health information" under the Privacy Rule.<sup>17</sup>

There are other facts to examine in determining whether a school is a HIPAA covered entity. Questions to analyze, for example, include whether a school-employed health care provider is billing electronically for such health care services and whether a health clinic located at a school provides services to all members of the community, including non-students. If a school or health care provider is unsure of its HIPAA status, particularly with regard

to the different patient populations it serves, further analysis by health care counsel is advised.<sup>18</sup>

### *Is the School Handling PHI?*

Assuming a school fits the definition of a HIPAA covered entity, the second question is whether the school is handling PHI. If information that satisfies HIPAA's definition of PHI is not involved, then the Privacy Rule would not apply to that information maintained by the school. Keep in mind that the HIPAA definition of PHI specifically excludes FERPA education records and treatment records. As HHS explained, even if a school constitutes a HIPAA covered entity, "many schools would not be required to comply with the Privacy Rule because the school maintains health information only in student health records that are 'education records' under FERPA and, thus, not 'protected health information' under HIPAA."<sup>19</sup> HHS offered the following example: "if a public high school employs a health care provider that bills Medicaid electronically for services provided to a student . . . , the school is a HIPAA covered entity and would be subject to the HIPAA requirements concerning transactions."<sup>20</sup> However, because the definition of PHI expressly excludes FERPA education records, a school would not be required to comply with the Privacy Rule if the school's health care provider only maintained health information in education records under FERPA.<sup>21</sup>

### **If the School Is Covered By the Privacy Rule And The Information Is PHI, the Privacy Rule Permits Disclosure In An Emergency**

Depending on the facts and circumstances, a number of Privacy Rule provisions could apply to permit a HIPAA covered entity to disclose a student's PHI.

<sup>14</sup> *Id.*

<sup>15</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Does FERPA or HIPAA Apply to Records on Students Who Are Patients at a University Hospital?*, available at [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/519.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/519.html).

<sup>16</sup> *Id.*

<sup>17</sup> See *Joint Guidance*, pp. 3-4.

<sup>18</sup> For example, a postsecondary institution which operates a health clinic open to students, staff and the community may be subject to FERPA regarding health records of its student patients and subject to the Privacy Rule regarding nonstudents' health records. See *Joint Guidance*, p. 7.

<sup>19</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Does the HIPAA Privacy Rule Apply to an Elementary or Secondary School?*, available at [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/513.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/513.html).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.*

Most notably, the Privacy Rule permits PHI to be disclosed in order to avert a serious risk to health or safety; this emergency exception thus permits disclosure of PHI in order to address (and hopefully avoid) that risk.

The Privacy Rule specifically permits a covered entity to disclose PHI to avert a serious risk to health or safety in two different situations. First, if in good faith and consistent with applicable law and ethical standards, a covered entity may use or disclose PHI (including psychotherapy notes) if it believes “the use or disclosure (1) is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and (2) is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.”<sup>22</sup> In January 2013, after the mass shootings in Newtown, Connecticut and Aurora, Colorado, HHS emphasized the following:

A health care provider may disclose patient information, including information from mental health records, if necessary, to law enforcement, family members of the patient, or any other persons who may reasonably be able to prevent or lessen the risk of harm. For example, if a mental health professional has a patient who has made a credible threat to inflict serious and imminent bodily harm on one or more persons, HIPAA permits the mental health professional to alert the police, a parent or other family member, school administrators or campus police, and others who may be able to intervene to avert harm from the threat.<sup>23</sup>

Second, the Privacy Rule permits a covered entity to use or disclose a student’s PHI to avert a serious threat to health or safety if the covered entity, in good faith and consistent with applicable law and ethical standards, believes the use or disclosure is “necessary for law enforcement authorities to identify or apprehend an individual (1) because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or (2) where the individual has escaped

from a correctional institution or from lawful custody.”<sup>24</sup> If a covered entity discloses such an individual’s statement as necessary for law enforcement purposes, the covered entity can disclose a limited amount of PHI for identification and location purposes.<sup>25</sup> A use or disclosure of PHI under this provision, however, would not be permitted if the individual’s statement was learned by the covered entity “in the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure” or through the individual’s request to initiate or be referred for such treatment, counseling or therapy.<sup>26</sup>

When disclosing PHI to avert a serious risk to health or safety, HHS has stated it will presume a covered entity has acted in good faith so long as “the belief is based upon the covered entity’s actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.”<sup>27</sup> Thus, whether based on a school’s actual knowledge of a threat or in reliance on credible information, a school which is covered by HIPAA may disclose some PHI of the potential perpetrator in order to avert a serious risk to health or safety.

Other sections of the Privacy Rule would also permit a school covered by HIPAA to disclose at least some limited PHI to law enforcement, such as for purposes of (1) identifying/locating a fugitive or suspect; (2) reporting a crime/criminal conduct on the covered entity’s premises; (3) a health care provider alerting law enforcement to a crime; and (4) as required by law, such as in response to a search warrant or court order.<sup>28</sup> Additionally, if a student is younger than 18 years old, the Privacy Rule would generally permit disclosure of a student’s PHI to the minor’s parent or legal guardian, even in the absence of an emergency situation.<sup>29</sup>

<sup>22</sup> 45 C.F.R. § 164.512(j)(1)(i)(A)–(B); *see also* 45 C.F.R. § 164.508(a)(2)(ii).

<sup>23</sup> LEON RODRIGUEZ, HHS, DIRECTOR OF OFFICE FOR CIVIL RIGHTS, MESSAGE TO OUR NATION’S HEALTH CARE PROVIDERS (Jan. 15, 2013), available at <http://www.hhs.gov/ocr/office/lettertonationhcp.pdf>.

<sup>24</sup> 45 C.F.R. § 164.512(j)(1)(ii)(A)–(B).

<sup>25</sup> 45 C.F.R. § 164.512(j)(3). Among other things, the covered entity may disclose the individual’s name, address, date and place of birth, social security number, and a description of distinguishing physical characteristics, such as height, weight, gender, race, hair and eye color, scars, and tattoos. For a complete list of the limited PHI permitted, *see* 45 C.F.R. § 164.512(f)(2)(i).

<sup>26</sup> 45 C.F.R. § 164.512(j)(2)(i)–(ii).

<sup>27</sup> 45 C.F.R. § 164.512(j)(4).

<sup>28</sup> *See* 45 C.F.R. § 164.512(f); *see also* 45 C.F.R. § 164.512(a).

<sup>29</sup> 45 C.F.R. § 164.502(g) (HIPAA’s personal representative provisions).

Thus, the Privacy Rule permits a school to disclose at least some PHI about a student to others in a number of situations. In particular, a school covered by HIPAA may disclose PHI to a person reasonably able to prevent or lessen the risk to health or safety, such as to law enforcement, the potential perpetrator's parents and/or to the intended victim(s).

### What is FERPA and What Information Does It Cover?

FERPA is a Federal law that addresses the privacy of student's "education records" and "treatment records."<sup>30</sup> If an educational agency or institution receives funds from a program administered by ED, it is subject to FERPA.<sup>31</sup> An educational institution subject to FERPA may not disclose the education records of students, or personally identifiable information from education records, without a parent or eligible student's written consent, unless a FERPA consent exception applies.<sup>32</sup> An eligible student is a student who is at least 18 years old or who attends a postsecondary institution at any age.<sup>33</sup> Similar to HIPAA, some of the confusion surrounding disclosure of a student's information likely arises out of the basic definitions used in FERPA.

Education records are defined broadly under FERPA. "Education records" are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.<sup>34</sup>

Treatment records are records "[m]ade or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; [m]ade or maintained, or used only in connection with treatment of the student; and [d]isclosed only to individuals providing the treatment."<sup>35</sup> At the postsecondary level, medical

and psychological treatment records of eligible students do not constitute "education records."<sup>36</sup> If a school discloses an eligible student's treatment records for any purpose other than treatment, then the records become education records under FERPA. As education records, the records may be disclosed under FERPA's emergency exception.<sup>37</sup>

FERPA's definition of what constitutes treatment records (e.g., they can only be used or disclosed for treatment purposes) appears to have resulted in confusion among health care providers who work on school campuses. Specifically, many providers, including mental health providers, mistakenly believe that the FERPA definition of treatment records means such records can only be used for treatment purposes and cannot be used for any other purpose. Indeed, the Joint Guidance reminded providers that "[u]nder FERPA, treatment records, by definition are not available to anyone other than professionals providing treatment to the student, or to physicians or other appropriate professionals of the student's choice."<sup>38</sup> While guidance and advisory letters expressly permit FERPA treatment records to be used for purposes *other than* treatment, confusion arises from how such a disclosure could occur.<sup>39</sup> According to FERPA and the Joint Guidance, if treatment records will be used for other (non-treatment) purposes, then the treatment records convert to education records. As education records, they can be disclosed consistent with FERPA (including for a health and safety emergency).<sup>40</sup> The definition of treatment records, and their conversion to education records, understandably has resulted in a lack of clarity among schools and providers. Either way under FERPA – whether information about a student is an education record or is a treatment record which becomes an education record because it is used for a non-treatment purpose – FERPA permits disclosure of information in an emergency, without the student's or parent's consent.

<sup>30</sup> 20 U.S.C. § 1232g; 34 C.F.R. pt. 99.

<sup>31</sup> 34 C.F.R. § 99.1(d). Private and religious schools, because they do not receive ED funds, are not generally subject to FERPA's requirements. See *Joint Guidance*, p. 1.

<sup>32</sup> 34 C.F.R. § 99.30.

<sup>33</sup> 34 C.F.R. §§ 99.3, 99.5(a).

<sup>34</sup> 34 C.F.R. § 99.3.

<sup>35</sup> 34 C.F.R. § 99.3.

<sup>36</sup> 34 C.F.R. § 99.3; see also *Joint Guidance*, p. 2.

<sup>37</sup> See 34 C.F.R. § 99.31(a)(10); see also *Joint Guidance*, p. 8.

<sup>38</sup> *Joint Guidance*, p. 7.

<sup>39</sup> See 34 C.F.R. § 99.31; see also *Joint Guidance*, p. 7.

<sup>40</sup> *Joint Guidance*, p. 8.

### Whether the School's Information Is Originally an Education Record or a Treatment Record, FERPA Permits Disclosure in an Emergency

In certain situations, FERPA permits a student's information to be disclosed without the consent of the student's parent and, if the student is 18 years or older (or attending a postsecondary institution), without that student's consent. Education records and treatment records may be disclosed 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.<sup>41</sup>

In particular, consent is not required under FERPA for disclosure of information to appropriate parties, including an eligible student's parents, "in connection with a health or safety emergency" under certain conditions.<sup>42</sup> When assessing whether an emergency exists, an educational institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.<sup>43</sup> If an educational institution "determines there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person if knowledge of the information is necessary to protect the health or safety of the student or other individuals."<sup>44</sup> Based on the information available at the time, if there is "a rational basis for the determination, ED will not substitute its judgment" for the educational institution which evaluated the circumstances and made its determination.<sup>45</sup>

FERPA's health and safety exception does not permit disclosures on a "routine, non-emergency basis, such as the routine sharing of student information with the local police department," but FERPA is designed to provide schools with more flexibility and deference, so that a school can make a limited disclosure "as necessary to protect the health or safety of a student or another individual in connection with an emergency."<sup>46</sup> While a school official should be

able to "express in words what leads the official to conclude that a student poses a threat," ED recognizes that an emergency can include "sufficient, cumulative warning signs" which lead an educational institution "to believe that the student may harm himself or others at any moment."<sup>47</sup> According to ED, a threat which is articulable and significant means "a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of bodily harm, to any person, including the student..."<sup>48</sup> As ED recognizes, a school "must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury."<sup>49</sup>

Significantly, FERPA's provisions permit an educational institution to disclose a treatment record for a purpose other than treatment, including in connection with an emergency. Accordingly, FERPA's emergency provision applies whether the information is an education record or a treatment record.

### Where HIPAA and FERPA Overlap

Based on the Privacy Rule and FERPA, both of which have been in place for a number of years, a student's information may be disclosed in an emergency situation, regardless of whether the information is governed by HIPAA or FERPA. Although HIPAA and FERPA definitions may seem complex, there should be no misunderstanding or confusion because a student's information can and should be disclosed in an emergency, for the safety of that student, staff, and other students.

In November 2008 (after the 2007 Virginia Tech shooting), guidance jointly issued by HHS and ED sought to "address apparent confusion on the part of school administrators, health care professionals and others as to how these two laws apply to records maintained on students."<sup>50</sup>

First, the Joint Guidance provided an example of what constitutes an emergency under HIPAA:

[C]onsistent with other law and ethical standards, a mental health provider whose teenage patient has

<sup>41</sup> 34 C.F.R. §§ 99.31(a)(10), 99.36.

<sup>42</sup> 34 C.F.R. § 99.31(a)(10).

<sup>43</sup> 34 C.F.R. § 99.36(c).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 73 Fed. Reg. 74,806, 74,837 (Dec. 9, 2008).

<sup>47</sup> *Id.* at 74,838.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Joint Guidance*, p. 1.

made a credible threat to inflict serious and imminent bodily harm on one or more fellow students may alert law enforcement, a parent or other family member, school administrators or campus police, or others the provider believes may be able to prevent or lessen the chance of harm. In such cases, the [HIPAA] covered entity is presumed to have acted in good faith where its belief is based upon the covered entity's actual knowledge (i.e., based on the covered entity's own interaction with the patient) or in reliance on a credible representation by a person with apparent knowledge or authority (i.e., based on a credible report from a family member or other person).<sup>51</sup>

Second, the Joint Guidance confirmed that a HIPAA covered entity may disclose PHI about a troubled teen to the teen's parents or others as permitted by the Privacy Rule, e.g., based on "a good faith belief that (1) the disclosure is necessary to prevent or lessen the threat; and (2) the parent or other person(s) is reasonably able to prevent or lessen the threat."<sup>52</sup>

Additionally, ED has also provided examples of what constitutes an emergency under FERPA:

[T]o be 'in connection with an emergency' means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as *e. coli*. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.<sup>53</sup>

Third, the Joint Guidance confirmed that medical and psychological treatment records of eligible students (students who are 18 years or older or who attend postsecondary institutions at any age) "may

be disclosed for purposes other than the student's treatment, provided the records are disclosed under one of the exceptions to written consent. . ."<sup>54</sup> (One such FERPA exception is for a health and safety emergency.) If a treatment record is disclosed for a purpose other than treatment, then "the records are no longer excluded from the definition of 'education records' and are subject to all other FERPA requirements," including the eligible student's right to inspect and review such treatment records.<sup>55</sup>

Fourth, the Joint Guidance reiterated that existing FERPA language does not prohibit the use of treatment records for non-treatment purposes. While "treatment records, by definition, are not available to anyone other than professionals providing treatment to the student, or to physicians or other appropriate professionals of the student's choice," FERPA "does not prevent an educational institution from using or disclosing these records for other purposes or with other parties," including disclosures permitted under FERPA without consent.<sup>56</sup>

On February 20, 2014, HHS issued guidance regarding sharing of mental health information under the Privacy Rule; the guidance also briefly mentioned FERPA. HHS reiterated that FERPA (not HIPAA) would generally apply to a school's student health information, and it referred readers to the Joint Guidance mentioned above. The 2014 guidance also stated that in the limited instances where HIPAA, rather than FERPA, would apply, information about a student's mental health might be a permitted disclosure under the HIPAA Privacy Rule to personal representatives and/or to prevent or lessen a serious and imminent threat.<sup>57</sup>

<sup>54</sup> *Joint Guidance*, p. 2.

<sup>55</sup> *Joint Guidance*, pp. 2, 7.

<sup>56</sup> *Joint Guidance*, p. 7. For example, FERPA would permit a university physician to disclose an eligible student's treatment records (1) to the student's parents if the eligible student is claimed as a dependent for federal income tax purposes; or (2) to the student's parents or others as appropriate, if the disclosure is related to a health or safety emergency situation.

<sup>57</sup> See HIPAA Privacy Rule and Sharing Information Related to Mental Health, DEP'T OF HEALTH AND HUMAN SERVICES, available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/mhguidance.html>. Note: this guidance also discussed the sharing of mental health concerns, including as disclosures to parents of minors, to personal representatives, and to persons involved in the individual's care or payment related to the care.

<sup>51</sup> *Joint Guidance*, pp. 5, 9 (also noting HIPAA may permit disclosures even if a threat or concern was not "serious and imminent," such as disclosure of a minor student's PHI to the minor's parents or legal guardian under HIPAA's personal representative provisions, which are found at 45 C.F.R. § 164.502(g)).

<sup>52</sup> *Joint Guidance*, p. 6.

<sup>53</sup> 73 Fed. Reg. 74,806, 74,837 (Dec. 9, 2008).



### Case Study: Virginia Tech

In 2007, a Virginia Tech student shot and killed 32 people on the university's campus.<sup>58</sup> Then-Governor Tim Kaine created a blue ribbon Review Panel to assess the events leading up to the shooting.<sup>59</sup> The Review Panel's Report found that confusion existed over what constitutes the "educational records" that FERPA covers and the circumstances under which mental health records may be disclosed under HIPAA. For these reasons, the Virginia Tech shooting provides an instructive case study.

The Review Panel found that some professors and school administrators had observed worrisome conduct by the perpetrator.<sup>60</sup> These individuals may have failed to disclose these observations to others because they believed personal observations and conversations qualified as educational records.<sup>61</sup> A more significant source of confusion involved FERPA's exception of "treatment records" from the definition of "educational records." University mental health professionals who treated the perpetrator were unclear about the scope of this exception. They believed FERPA prevented them from providing bona fide treatment records to off-campus mental health professionals who would also treat the perpetrator or other authorized individuals.<sup>62</sup> The Panel recommended that ED simplify the treatment record exception in hopes that health professionals may begin to share information more freely.<sup>63</sup>

Another source of confusion noted by the panel involved disclosure of FERPA-protected records in emergency situations. The Virginia Tech report found confusion existed regarding FERPA's emergency exception and what would constitute an emergency under FERPA, e.g., when disclosing records would be "necessary to protect the health or safety of the student or other persons."<sup>64</sup>

At the time of the shooting, ED regulations required the scope of FERPA's emergency provision to be "strictly construed."<sup>65</sup> Also, prior to the Virginia Tech shootings, ED's Family Policy Compliance Office (FPCO) had released advisory letters that addressed FERPA's emergency exception.<sup>66</sup>

Unfortunately, FERPA's emergency exception was a source of confusion at Virginia Tech, with the Virginia Tech report later contending ED's strict construction requirement had not been adequately defined either by statutes or case law.<sup>67</sup> According to the Virginia Tech Report, this "strict construction"

<sup>58</sup> See 34 C.F.R. § 99.36(c) (2000).

<sup>66</sup> In 1994, FPCO issued an advisory letter to the superintendent of an Ohio school district where a student had allegedly made suicidal comments, threatened other students, and engaged in unsafe conduct. FPCO determined that "school officials had sufficient reason to believe there was a 'pressing need' for emergency situation which required action." However, the school violated FERPA by disclosing information from the student's records in response to an informal request from the court. See Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Educ. (Sept. 22, 1994) (reproduced in VIRGINIA TECH REVIEW PANEL at app. G14-22). See also Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Educ. (Nov. 29, 2004) (reproduced in VIRGINIA TECH REVIEW PANEL at app. G2-13) (FPCO advisory letter issued to a university regarding state laws requiring reports of certain diseases; FPCO stated it would defer to a state's decision as to what diseases qualified as an inherent emergency and necessitated immediate reporting, but a school's compliance with a state law requiring routine reporting of non-emergency diseases would violate FERPA).

In 2005, FPCO issued a letter to a university president resulting from a dispute between a student and a university employee. After the student allegedly threw an item at the university employee (bruising the employee), the employee proceeded to report the matter to the local police one day after the incident, alleging assault. The student then filed a complaint with FPCO contending the university violated FERPA by the employee accessing the university's computer database to obtain the student's information as part of filing the police report. In addition to analyzing other FERPA provisions, the FPCO found the employee's use of the student's personal information, if it occurred and was based on educational records, would not fall within FERPA's health and safety emergency exception – there was no emergency. FPCO noted the employee did not call 911 on the day of the incident, the university did not attempt to verify whether the employee disclosed information to the police for health and safety reasons, and the university did not document this specific determination. FPCO emphasized that this exception is "temporally limited to the period of the emergency," does not permit a general release of the student's information, and should only apply where a school has determined, "on a case-by-case basis, that a specific situation presents imminent danger or threat to students or other members of the community, or requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals." Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office of the U.S. Dep't of Educ. (Mar. 11, 2005) (emphasis in original).

<sup>67</sup> VIRGINIA TECH REVIEW PANEL at 69.

<sup>58</sup> VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL, INTRODUCTION (2007), available at <http://www.washingtonpost.com/wp-srv/metro/documents/vatechreport.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 66.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 69.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 67.

requirement discouraged disclosure in all but the most obvious cases of imminent and specific threats to health and safety.<sup>68</sup> Furthermore, the panel found that FPCO's advisory letters demonstrated how narrowly ED construed the emergency exception.<sup>69</sup> The panel thus recommended that ED clarify this exception, so as not to "feed the perception that nondisclosure is always a safer choice."<sup>70</sup>

While ED has since eliminated the strict construction requirement, confusion still appears to exist regarding the scope and applicability of FERPA's emergency exception. The Joint Guidance is particularly important given the perceived absence of detailed guidance on this exception arising from case law,<sup>71</sup> from both

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> There is very little case law regarding the scope of FERPA's emergency exception, particularly after Virginia Tech. Two pre-Virginia Tech cases regarding this exception are summarized below.

In *Jain v. State*, a parent whose son committed suicide in his dorm room filed a wrongful death action against a state university, arguing it had misapplied FERPA by failing to inform him of his son's previous suicide attempt at the university. 617 N.W.2d 293 (Iowa 2000). The parent argued that FERPA's provision allowing release of records in an emergency to appropriate persons required the university to release these records to him. The father also contended the university failed to follow its own (unwritten) policy of notifying a student's parent when the student had engaged in self destructive behavior. Ultimately, while not addressing all of the father's contentions for procedural reasons (e.g., the father failed to assert certain arguments at the lower court level), the court expressed doubt that the university's "failure to take advantage of a discretionary exception to [FERPA's] requirements" gave rise to a viable cause of action. *Id.* at 298 (emphasis added). In a later ruling, the U.S. Supreme Court would definitively rule out the possibility of an individual's private cause of action arising from FERPA. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (holding that FERPA's withholding of federal funding for universities that fail to comply with its provisions entails only a public enforcement mechanism). (While the *Jain* case is informative, the detailed facts of the case are tragic and worth a careful read. In summary, the student moved a motorized cycle into his dorm room to inhale the exhaust fumes, and he stated to a dorm coordinator and also mentioned to a roommate that he planned to commit suicide by inhaling the cycle's fumes. The matter was not reported up to the dean, in part because the student purportedly did not consent to the coordinator contacting his parents, because the student promised the coordinator that he would seek counseling after he got more rest, and the roommate thought the student was joking. Three weeks later, the student committed suicide in his dorm room in the same exact manner as he had described. No information regarding the student was communicated to the dean's office until after the student's death; however, under the school's policy, the decision whether to contact a student's parents about a student's behavior would have rested with the dean.)

In *Brown v. City of Oneonta, N.Y. Police Dep't*, 106 F.3d 1125 (2d Cir. 1997), the court held that school officials who created and disclosed a list of certain students to law enforcement were entitled to qualified immunity because

before and after Virginia Tech.<sup>72</sup>

Since the publication of the Joint Guidance, ED has issued other guidance regarding campus safety issues.<sup>73</sup> As ED has noted, "FERPA does not prohibit a school official from disclosing information about a student that is obtained through the school official's personal knowledge or observation and not from the student's education records."<sup>74</sup>

As one commenter has noted, examples of what constitutes an emergency under FERPA "ignore the fact that threats of harm to self or others . . . may be more subtle," and may be difficult to pinpoint as potentially imminent or about to happen "at any moment," as the regulations dictate.<sup>75</sup> As the commenter explained, "[m]ost student perpetrators of homicide never directly threaten the targets of the violence, but many do present less obvious indicators that such indicators

whether the officials could disclose education records under FERPA's health and safety emergency exception was not clear. In *Brown*, a knife attack had occurred off campus, and the list (of certain types of students) was disclosed to law enforcement upon their request, to facilitate a search for the violent perpetrator who may be hiding on campus or who may be a student. (A police dog had tracked the perpetrator from the crime scene to the direction of the campus but then lost the scent; also, the victim offered some general description of the perpetrator.) Law enforcement specifically requested assistance from the school's public safety office. The students whose names and addresses were then compiled and released by school officials brought suit and asserted various claims under state and federal law, including violation of their FERPA rights. Of note, FERPA's regulatory language was different during the time of the disclosure than when the court decision was issued, and the *Brown* case was later abrogated by the *Gonzaga* case regarding the ability of individuals to bring suit for FERPA violations. Still, the *Brown* case is instructive as to how the school demonstrated to the court their motivations for complying with law enforcement's request.

<sup>72</sup> See *supra* note 61 and accompanying text.

<sup>73</sup> See U.S. DEP'T OF EDUC., FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE DISCLOSURE OF STUDENT INFORMATION RELATED TO EMERGENCIES AND DISASTERS (June 2010), available at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf>; see also U.S. DEP'T OF EDUC., ADDRESSING EMERGENCIES ON CAMPUS (June 2011), available at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>.

<sup>74</sup> U.S. DEP'T OF EDUC., ADDRESSING EMERGENCIES ON CAMPUS (June 2011), p. 4, available at <http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf>.

<sup>75</sup> Katrina Chapman, *A Preventable Tragedy at Virginia Tech: Why Confusion over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 363 (2009).

pose a risk to the campus community (ex. suicidal ideation).”<sup>76</sup> Whether such indicators are subtle or specific, though, schools and health care providers should be aware that both HIPAA and FERPA permit disclosure of student information related to an emergency situation.

Unfortunately, the tragedy of school shootings has continued, and a concern remains that information-sharing could be chilled as a result of continuing confusion regarding FERPA and HIPAA. By way of example, in November 2009, an Addendum was issued to the Virginia Tech Review Panel’s report. The Addendum (which was issued *after* the Joint Guidance) stated that FERPA “was drafted to apply to educational, not medical records” and that “although it has a small number of provisions about medical records, FERPA does not authorize the different type of disclosures authorized by HIPAA.”<sup>77</sup> This statement may be technically accurate (because FERPA does not contain all of the disclosure permissions contained in the Privacy Rule), but it is potentially misleading. Both FERPA and HIPAA contain provisions for disclosing information in an emergency situation and, in some situations, to an individual’s parent even in the absence of an emergency. Even so, the Addendum contended that the boundaries of the FERPA and HIPAA exceptions “have not been defined by privacy laws and cases, and these provisions may discourage disclosure in all but the most obvious cases.”<sup>78</sup>

### **Offered Solutions, Separate and Apart From the HIPAA and FERPA Emergency Exceptions**

Going forward, a school might elect to proceed with proactively obtaining an authorization and/or consent, compliant with the Privacy Rule and FERPA, respectively, as discussed below. A disclosure pursuant to such an authorization or consent would be expressly permitted under both the Privacy Rule and FERPA, even if a potential emergency or threat was not imminent.

A parent’s authority to make health care decisions on behalf of a child typically ends when the child turns 18 years old. Under the Privacy Rule, a student 18 years of age or older would sign a HIPAA authorization form regarding his or her PHI. Under FERPA, a consent would be signed by an eligible student (e.g., a student 18 years or older or a student who attends a postsecondary institution). For a student under 18 years of age, that student’s parent or legal guardian would generally sign the HIPAA authorization or the FERPA consent form.

If the school is a HIPAA covered entity, it could consider instituting an authorization form as part of its required application, admission and/or registration process. The form would contain the required Privacy Rule elements of an authorization form<sup>79</sup> and could permit the school, including its health care providers, to contact the student’s parent/legal guardian (or another adult relative listed by the student or a physician listed by the student), in specified circumstances, such as if the student is seriously injured, is admitted to a hospital, is a victim of a crime, is ordered to receive examination or treatment, or when the school determines that disclosure is necessary or advisable for the student’s or others’ well-being. (Regardless of whether the student signs this authorization, a HIPAA covered entity still could disclose PHI in order to avert a serious risk to health or safety as permitted by the Privacy Rule or in other situations consistent with the Privacy Rule.)

Likewise, if the information maintained by a school would be covered by FERPA, the school could consider instituting a consent form as part of its required application, admission and/or registration process. The consent would contain the elements required by FERPA and, similar to the authorization form suggested above, permit the school to contact the student’s parent/legal guardian, another adult relative listed by the student or a physician listed by the student as further specified in the consent form. (Regardless of whether the student signs this consent, a school covered by FERPA still could disclose a student’s information as necessary to protect the health or safety of the student or others as permitted by FERPA or in other situations consistent with FERPA.)

<sup>76</sup> *Id.* at 378.

<sup>77</sup> VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL, ADDENDUM TO THE REPORT OF THE REVIEW PANEL 66 (2009), available at <http://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf>.

<sup>78</sup> *Id.* at 67.

<sup>79</sup> 45 C.F.R. § 164.508.

### Establish Policies and Provide Training

Even if a school chooses not to introduce a new authorization or consent form, a school should consider establishing policies and procedures now – before an emergency situation arises – and providing education/training to guide the school’s teachers, health care providers, administrators, resource officers and campus police on how a potential risk to health or safety should be addressed. As applicable, the training could address what the Privacy Rule permits, what FERPA permits, and how both laws allow disclosure without student or parent consent in connection with an emergency situation. Such training also could communicate the desired process for a school administrator, teacher, health care provider or other school staff member to share initial concerns about a student’s potential risk to health or safety of himself or others—even if the student is not identified in the early stages of discussion. Likewise, the training could confirm the proper channels of communication within the school for situations short of an emergency, such as disclosures for treatment or educational purposes.

### Determine HIPAA Status And Consider Designation As A HIPAA Hybrid Entity

For purposes of clarity, a school, college or university covered by HIPAA may wish to examine proactively now which of its components (functions) are covered by HIPAA and which are not. In doing so, such a HIPAA covered entity might consider designating itself as a “hybrid entity” under the Privacy Rule.

The Privacy Rule provides a HIPAA covered entity with the option of designating which of its components are covered by HIPAA (also known as “health care components”), e.g., a university hospital or a school’s health clinic, and which are not, e.g., a school’s law enforcement unit.<sup>80</sup> This designation must be documented.<sup>81</sup> The covered entity “must designate and include in its health care component all components that would meet the definition of a covered entity if those components were separate

legal entities.”<sup>82</sup> Keep in mind that a health care component should not disclose PHI to a non-health care component of the covered entity if the Privacy Rule would prohibit such a disclosure if those two components were separate and distinct legal entities.<sup>83</sup>

A hybrid entity designation can provide needed clarity regarding respective obligations of different components of an educational institution. In addition, the hybrid entity designation results in the Privacy Rule applying only to the covered entity’s designated health care components. Thus, through the hybrid entity option, a school could avoid having to comply with most of the Privacy Rule except with respect to its designated health care components. While PHI maintained by the covered entity’s non-health care components would not be subject to the HIPAA Privacy Rule, a hybrid entity still has certain obligations under the Privacy Rule, such as regarding oversight, compliance, policies, and enforcement.<sup>84</sup>

As HHS has confirmed, a postsecondary institution which is a HIPAA covered entity may designate itself as a “hybrid entity” and, in doing so, may have the Privacy Rule apply only to its designated health care components.<sup>85</sup> Such analysis and clear expression now as to a school’s HIPAA status, and as to which components are HIPAA covered and which are not, could provide much needed clarity as to the school’s obligations in the event of a later emergency.

### Consult Health Care Counsel

School administrators and health care providers who become aware of a potential risk to health or safety should consider contacting outside health care counsel for assistance. While it can be common for mental health providers in particular to

<sup>80</sup> See 45 C.F.R. § 164.105(a).

<sup>81</sup> See 45 C.F.R. § 164.105(a)(2)(iii).

<sup>82</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., *Can a Postsecondary Institution Be a “Hybrid Entity” Under the HIPAA Privacy Rule?*, available at [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/522.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/522.html).

<sup>83</sup> See 45 C.F.R. § 164.105(a)(ii)(A).

<sup>84</sup> See 45 C.F.R. § 164.105(a)(2)(iii).

<sup>85</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., *Can a Postsecondary Institution Be a “Hybrid Entity” Under the HIPAA Privacy Rule?*, available at [http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa\\_and\\_hipaa/522.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/ferpa_and_hipaa/522.html). See also *Joint Guidance*, p. 10.

consult with each other or a mentor for advice regarding a particular patient, application of the Privacy Rule and FERPA involves complicated legal issues; contacting experienced legal counsel for advice and guidance should be encouraged. Likewise, school administrators and health care providers should consider contacting health care counsel for assistance in determining what, if any, state laws apply and whether disclosure to a student's parents, other health care providers, or law enforcement is permitted under the Privacy Rule, FERPA and other laws which may apply.<sup>86</sup> Moreover, there may be a number of options available to facilitate coordinating additional evaluation and assistance for the student while better protecting the student body and school staff.

### Other Steps To Take Now

A school's administrators, teachers and health care providers should talk now, before an emergency arises, regarding how a student who is potentially violent or exhibiting disturbing behavior should be addressed; involving legal counsel in these discussions can foster a candid and privileged discussion of issues and concerns—both past and present. The school's campus police and resource officers should be involved in the discussion as appropriate, including how an urgent matter can be communicated regarding a student, the campus or a potential risk to the health and safety of staff and other students. Likewise, initiating a conversation now with local law enforcement can be helpful to facilitate communication and coordination later in the event of an urgent or emergent matter.

If a school is a HIPAA covered entity, it should consider reviewing and updating its Notice of Privacy Practices and HIPAA privacy policies/procedures to reflect uses and disclosures of PHI permitted by HIPAA, particularly for averting a serious threat to health or safety and contacting law enforcement. Whether a school is a HIPAA covered entity or not, it should also consider reviewing and updating its

<sup>86</sup> For example, separate Federal regulations may apply regarding substance abuse records. See 42 C.F.R. pt. 2. Additionally, state laws and regulations should be considered regarding (1) the disclosure of information relating to HIV, AIDS, and other specific health conditions; and (2) a licensing board's stated bases for disciplining a health care provider.

forms and notices communicated to students and parents. For example, a school should review whether such materials contain broad representations—"a student's information will never be shared with anyone else"—which would conflict with its ability to disclose information about students under the Privacy Rule, FERPA, state law and/or a mental health provider's duty to warn.<sup>87</sup>

### Conclusion

There are many issues to address in reducing school violence, and the debate on various initiatives will undoubtedly continue at a state and Federal level. What should not continue, however, is confusion regarding whether the Privacy Rule and FERPA expressly permit disclosure of identifiable student information in connection with a health or safety situation. They do. Both of these Federal laws have been in place for several years, well before the Virginia Tech shooting, and it is time to bring an end to the ambiguity and confusion. It is our sincere hope that this article brings clarity, reduces misperceptions and assists schools in serving and protecting their students and staff.

*As quoted from a school security guard about the shooter at Arapahoe High — "A kid threatening a teacher, caught looking at guns—on the Internet—in the school cafeteria, calling individuals 'Comrade,' drawing questionable symbols on his school work and having uncontrollable anger outbursts should have been investigated and given a plan to help."*<sup>88</sup>

Authors' note: the opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes only. It is not intended to be and should not be relied upon as legal advice.

<sup>87</sup> For example, the *Joint Guidance* specifically recognized that a university may disclose a campus clinic's mental health records of a student in response to a court order, even if the records were maintained as treatment records under FERPA. *Joint Guidance*, p. 8. To the extent the Privacy Rule applies, such a court-ordered disclosure would also be consistent with Privacy Rule provisions permitting a covered entity to disclose PHI as required by law. See 45 C.F.R. § 164.512(a).

<sup>88</sup> See Stephen Rex Brown, *Arapahoe High Administrators Ignored Warning Signs of Disturbed Student*, N.Y. DAILY NEWS (Jan. 17, 2014), available at <http://www.nydailynews.com/news/national/arapahoe-high-administrators-warning-signs-gunman-security-guard-article-1.1583042#ixzz2r9CYb5VG>.