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## NCOSEA Voice

### *Learn FERPA; Don't Fear FERPA*

In April 2007, the report of a review panel of the mass shootings at Virginia Tech said that college staff and others interviewed for the report “explained their failures to communicate with one another or with [the student shooter’s] parents by noting their belief that such communications are prohibited by the federal laws governing the privacy of health and education records.... There is widespread confusion about what federal and state privacy laws allow.”

Similarly, a January 2016 report on the Arapahoe, Colorado, High School shooting, said that “the school is concerned about a certain kid, but they are holding back [on sharing information] because of fears.... [S]everal [staff] indicated that they could not discuss a student’s concerning behaviors with other teachers or staff prior to the shooting because AHS administrators had told them that FERPA guidelines prohibited it.”

Knowledge is power. Knowing what the Family Educational Rights and Privacy Act (FERPA) does and does not prohibit can save lives.

FERPA generally prohibits the disclosure of education records or information from such records by a covered school without the written consent of a parent or adult student. An educator’s observations are not “education records.” A teacher would not violate FERPA by telling a fellow teacher, administrator, or others that a student appeared agitated, wore a trench coat, or sketched a swastika on his desk. Neither would naming the student to an outside party violate FERPA, assuming student names were designated as directory information. Likewise, students’ postings on social media are not “education records.”

Like most prohibitive laws and regulations, FERPA is full of exceptions. An important one permits disclosure of personally identifiable information (PII) from an education record in “a health or safety emergency.” FERPA regulations now permit covered schools’ employees and officials to disclose PII—to law enforcement, student peers, and victims, among others—in such situations “when knowledge of the information is necessary to protect the health or safety of the student or other individuals.” Following the Virginia Tech shootings, FERPA regulations were amended to remove language that required strict construction of what constitutes such emergencies. FERPA now provides a “totality of the circumstances” approach, giving deference to educators’ determinations of an “articulable and significant threat.” It is similar to the good-faith rationale that serves as a basis for reports of suspected abuse or neglect to a human services agency.

One should not discount or minimize the importance of FERPA compliance. However, educators should understand the limits of FERPA. There is no private right of action for a FERPA violation: Neither an individual nor an institution can be sued in court for money damages for an alleged unauthorized disclosure. FERPA is enforceable only administratively by the U.S. Department of Education. Also, FERPA prohibits “policy or practice” that is noncompliant. Thus, an isolated incident may prompt a communication from the department’s family policy compliance officer but is unlikely to be deemed a “policy or practice.”<sup>1</sup> ■

<sup>1</sup>See also Colo. Atty. Gen. Op. No. 18-01; Neb. Atty. Gen. Op. No. 18-008.