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**Legal and Practical Issues  
with Including or Not  
Including Parents in Higher  
Education Settings.**

NYSCHA/NECHA  
Friday, 10/21/2011

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**Key Statutes**

- ▶ FERPA – Family Educational Rights and Privacy Act of 1974.
- ▶ HIPAA – Health Insurance Portability and Accountability Act of 1994.
- ▶ OCR Title 28, Vol1, part 35.– Office of Civil Rights, assessment of threat.
- ▶ ADA – American’s with Disabilities Act

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**Presenters**



Carolyn Reinach Wolf, Esq. is the Senior Partner, Mental Health Law, Hospital Litigation Practice at Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP



MJ Raleigh, Ph.D. is the director of counseling services at St. Mary's College of Maryland. Her doctoral work focused on the interaction between natural environments and mental health. MJ is a therapist specializing in college student development and current ACCA president.

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**Outcomes**

- ▶ Navigating the minefields of FERPA, HIPPA, ADA and state confidential laws can be a daunting task for student affairs administrators, judicial affairs officers, campus BIT members and counseling center staff.
- ▶ This presentation will provide clear and practical advice on how to avoid top ten mistakes when staff and faculty attempt to follow these regulations.
- ▶ The program will help avoid legal missteps and improve communication between departments on campus.

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**Goals**

- ▶ Discuss legal, clinical and practical issues of involving/or not involving parents.
- ▶ Identify and explain key statutes and regulations which govern privileged and confidential communication.
- ▶ Describe key elements of working with upset parents.

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- ▶ Each of the laws and regulations we are going to talk about today have exceptions which allow communication between administrators and parents.
- ▶ None of these regulations were designed with the intention of excluding parents and hamstringing educators.

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**We have these statutes for a reason.**

*There are many exceptions and ways for educators to communicate with parents while respecting the developmental growth of the student.*

*FERPA, HIPAA, ADA and state confidentiality law were designed to protect individual rights and promote safety, within each there are ways to communicate effectively.*

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**What does HIPAA apply to?**

- HIPAA only applies if you are submitting electronic bills for health care to a third party.
- Most schools don't do this.
- Few on campus services do electronic billing to a 3<sup>rd</sup> party such as an insurance company.
- The 3<sup>rd</sup> party, once they receive the information must make sure they comply with HIPAA guidelines.



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**When does FERPA matter?**

*FERPA protects students educational records from third parties. It is designed to help the student maintain privacy.*

*FERPA is not in place to drive a wedge between the student and parent.*

*Key word: "educational records" – this does not apply to medical or mental health records unless.....and it can't be both.*

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**HIPAA**

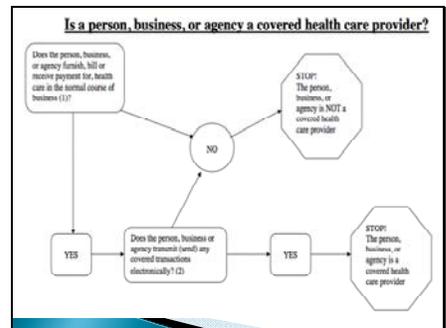
- "College and universities may disclose protected health information that they believe is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone they believe can prevent or lessen the threat (including the target of the threat)."
- "Minimum necessary" use and disclosure.

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**When our information is part of an educational record that must comply with FERPA:**

- ▶ Any information shared at a BIT becomes part of the educational records.
- ▶ Information given to the Dean of Students or other administrators falls under FERPA.
- ▶ Events that involve public safety can be reported through their chain of command and become part of the Ed. Records.

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**FERPA**

- FERPA's health or safety emergency provision permits such disclosures, without the consent of the parent or eligible student, if necessary to protect the health or safety of the student or other individuals. See 34 CFR §§ 99.31(a)(10) and 99.36.
- "articulable and significant threat."

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**Fears around ADA**

- ▶ There can be a temptation to avoid the ADA office with hopes that all the paperwork and hassle can just be dealt with through a one time accommodations "off the record" with a the professor.

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**Crisis allows for disclosure**

*State laws frequently require 'minimal disclosure', transparent and clearly communicated consent is required (aspirational ethic - always get consent)*

**Discussion:**

*When does an incident meet the threshold for disclosure?*

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**Fears around ADA**

- ▶ Once accommodated, required to keep it up
- ▶ No review process or evaluation
- ▶ Creates tension with other professors
- ▶ Outside BIT/TAT reporting
- ▶ Consider "reasonable accommodations"
- ▶ We can be too helpful:
  - companion animals vs. service animals
  - cutting in class
  - delusions

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**American's with Disability Act**

- ▶ Focuses on equal access and diagnosed mental health issues are included.
- ▶ It is not required of any professor to meet ADA accommodations if the instructor believes compliance will compromise the content of the course.
- ▶ ADA reasonable accommodations require scheduled reviews, student needs to be self advocates and voice in the process.

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**OCR 35-139: Direct Threat**

<p>(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.</p>	<p>(b) In determining whether an individual poses a direct threat to health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.</p>
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[AG Order No. 3180-2010, 75 FR 56180, Sept. 15, 2010]  
**Subpart**

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**Removed 'harm to self' from the OCR Direct Threat regulations.**

- ▶ What does this mean for our decisions to disclose and our involuntarily medical leave process?
- ▶ How does this shape when we call parents/family?
- ▶ In cases of eating disorders or suicidal gesturing when they refuse to take a voluntary leave how/when do we invoke an involuntary leave?
- ▶ Current understanding is that this opinion only applies to ADA, self disclosed disabilities.

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**What is the next step:**

- ▶ Can you contact parents?
- ▶ Who on campus can be involved?
- ▶ What is the best approach?
- ▶ What are the liability issues for the college and the provider?
- ▶ What statutes need to be considered in this case? FERPA, HIPAA, ADA, state confidentiality laws?

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**Case Study: Bruce**

Bruce is a diagnosed autism spectrum 19 year old sophomore, GPA 1.9, significant stutter, second year living on campus. Since returning to campus for the fall semester self-harm behaviors have escalated including punching face and head, pulling out hair, gorging at eyes and audibly repeating self hate and punishment focused speech. Bruce reports sleeping less than 3 hours a night and staying up all night to 'study' but not completing class work due to ruminating thoughts on his failures, need for punishment, why prison would be a better place for him, and thoughts of suicide.

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**Intersection of Academics and the provider.**

- ▶ *A professor shares with a campus nurse that a student may be at risk for suicide. The nurse doesn't report this to anyone because of confidentiality.*
- ▶ *A student comes to a counselor who is teaching a class and tells them about a suicidal friend.*

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**Bruce con't**

Recent reports from professors indicate that he is hitting and talking to himself in class when stressed. Roommates and suitemates report increasing agitation, walking in to bathrooms inappropriately, lying to individuals that he shares residential spaces. However - every reporter clearly states that they do not feel he is a threat to them or anyone other than himself.

Academic advisor is in contact with parents, RA's have filed a series of reports on his odd residence behaviors.

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**What is appropriate release?**

*A student requests their record from counseling. The center copies his entire chart and gives it to him.*

*Right or Wrong?*

*A judge issues a subpoena for a student's file. The center releases only a summary.*

*Right or Wrong?*

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**ACA Ethics that guide mental health providers.**

- Minimal disclosure*
- Beneficence*
- Non-Maleficence*
- Justice*
- Autonomy*

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**HIPPA and FERPA Guide**

- ▶ [www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferrpajointguide.pdf](http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferrpajointguide.pdf)  
**HIPPA Primer for University Administrator**
- ▶ [www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/contentdisplay.cfm&CONTENTID=8499](http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/contentdisplay.cfm&CONTENTID=8499)
- FERPA NACUA Guide**
- ▶ [www.nacua.org/documents/ferpa1.pdf](http://www.nacua.org/documents/ferpa1.pdf)

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**Robbie: Bullying**

*Robbie is a 20 year old senior majoring in mathematics with a 3.8 current GPA. Robby is 'out' campus, is the president of the school GLBTQ student group, parents are the chairpersons of the local PFLAG group and family members participate in several college community level awareness events. After being 'out' on campus for almost 3 years Robbie suddenly has now been called names, had graffiti left on a bedroom door, has started to receive threatening emails and Robbie's car has been vandalized in the parking lot. Robbie has stopped sleeping, grades are beginning to slip, has stopped dating, spends large amounts of time alone, reported increased depression and suicidal feelings to an out LGBTQ professor on campus. Parents are now calling the Dean of Students concerned that Robbie's is quiet, seems depressed, is not going out on campus and these sudden changes are worrying them*

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**Questions?**

Thank you for your participation. Feel free to contact us at: MJRaleigh: [mraleigh@smcm.edu](mailto:mraleigh@smcm.edu) and Carolyn Wolf: [cwolf@abramslaw.com](mailto:cwolf@abramslaw.com)

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**What is the next step:**

- ▶ Can you (the primary provider) contact parents?
- ▶ Who on campus can be involved?
- ▶ What is the best approach?
- ▶ What are the liability issues for the college and the provider?
- ▶ What statutes need to be considered in this case? FERPA, HIPAA, ADA, state confidentiality law?