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Fuzzy Understandings of FERPA

A federal report on the Virginia Tech shootings considers the misunderstanding of federal and state privacy laws to be a “substantial obstacle” to the information sharing needed to protect students.

“Throughout our meetings and in every breakout session, we heard differing interpretations and confusion about legal restrictions on the ability to share information about a person who may be a threat to self or to others,” states the Report to the President on Issues Raised by the Virginia Tech Tragedy, released Wednesday and compiled by the U.S. Departments of Education, Health and Human Services and Justice. Fears of violating state privacy laws, statutes designed to prevent discrimination of people with mental illness — and, of course, the federal Health Insurance Portability Accountability Act (HIPAA) Privacy Rule and the Family Educational Rights and Privacy Act (FERPA) — can serve to “chill legitimate information sharing,” the report reads.

“It was almost universally observed that these fears and misunderstandings likely limit the transfer of information in more significant ways than is required by law,” the report says.

“Amen,” Sheldon E. Steinbach, a lawyer in the higher education practice at the Washington firm Dow Lohnes, said Wednesday. “That may actually be an understatement. Excessive paranoia about compliance with FERPA and HIPAA greatly impedes essential communications on campus that would provide for greater safety for students, employees and the entire college community.”

“There was an immediate hue and cry after Virginia Tech to change the privacy laws,” added Jennifer Mathis, deputy legal director for the Judge David L. Bazelon Center for Mental Health Law. “I think that there was a lack of understanding of the [emergency] exceptions that already exist.”

The perceived constraints on information sharing have been major points of concern since the April 16 shootings, with a Virginia panel appointed by Gov. Tim Kaine fixating on the tension between privacy and protection at a day-long meeting at George Mason University Monday.

The federal study, based on feedback from meetings between federal delegations and state, local, mental health, education and law enforcement leaders from across the nation, finds that while participants in the meetings were aware of both HIPAA and FERPA, “there was significant misunderstanding.” For instance, in some discussions, “participants reported circumstances in which they incorrectly believed that they were subject to liability or foreclosed from sharing information under federal law.”

In response, the report recommends that federal agencies develop and widely disseminate additional guidance clarifying how information can legally be shared — including with parents — under HIPAA and FERPA. “In addition, the U.S. Departments of Education and Health and Human Services should consider whether further actions are needed to balance more appropriately the interests of safety, privacy, and treatment implicated by FERPA and HIPAA,” the report states.

The report also summarizes findings in four other areas, stressing for instance the need for states to provide information about relevant mental health history to the National Instant Criminal Background Check System (right now, only 23 states provide information on individuals disqualified from possessing firearms under federal law for mental health reasons). The report subsequently describes a need to improve awareness and communication efforts on campuses; to deal with capacity issues in the mental health system and integrate mental health with primary care to ensure that the people who need help find it; and to ensure emergency preparedness in part by planning, practicing and enhancing the professionalism of campus police forces through joint training with federal, state and local law enforcement.

“We agree with virtually everything that was said in this report,” said Mathis of the Bazelon Center, which advocates for individuals with mental disabilities. In particular, she said the report’s focus on a community-based, coordinated integration of the mental health system — as opposed to, for instance, a focus on involuntary commitment laws — was a meaningful and appropriate response to the lack of coordination displayed in Virginia (as evidenced by a state report released Monday).

“We welcome this report and hope that its recommendations will be adequately funded, especially with regard to making mental health services available, and implemented with the best interests of all stakeholders in mind,” the American Psychiatric Association’s president, Carolyn Robinowitz, and the association’s medical director/CEO James H. Scully Jr., said in a statement.

“We know that most of the adolescents and young adults who have carried out violent attacks in school settings have had long histories of emotional and behavioral problems,” the American Psychiatric Association statement continues. “And we know that many of these troubled youths were not receiving adequate care — and some were not receiving any mental health care — at the time of their violent acts. It is imperative that mental health services be available and accessible to all who need them.”

— Elizabeth Redden