

Information Sharing Guide for Institutions of Higher Education

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Purpose

Since the mass casualty event at Virginia Tech in 2007, federal and state governmental agencies and the Virginia legislature have worked to promote campus safety by sharing information about behavior of concern, while respecting appropriately the privacy and disability law rights of students. This information sharing guide is intended to serve as a summary of the current state of the law and promising practices regarding these crucial issues, which can help higher education administrators, campus police and security personnel, threat assessment teams, and community law enforcement agencies identify issues for discussion with their legal counsel when considering how they can most appropriately share and/or exchange student information as necessary to promote campus safety.¹

This guide focuses on the Family Educational Rights and Privacy Act (FERPA), which protects the confidentiality of student education records and the personally identifiable information (PII) contained in student education records, as well as the Virginia higher education student records law.² **FERPA provides students with certain privacy rights, but also gives colleges and universities flexibility to disclose PII, in health and safety emergencies and other specified circumstances, as summarized below and described in more detail in applicable regulations. The purpose of this guide is to highlight questions about how FERPA applies to higher education institutions' disclosures of PII from student education records to school officials, campus police and/or campus public safety, outside law enforcement entities, other higher education institutions, and otherwise.**

¹ This guide is not intended to provide legal advice, and should not be viewed as a substitute for legal advice from legal counsel consulted specifically by colleges, universities, divisions and/or law enforcement entities to provide such advice regarding the legal rules and considerations that apply in particular circumstances. Colleges, universities and law enforcement entities are encouraged in all cases to seek legal advice from their own counsel regarding the types of issues that are highlighted, in introductory, summary form only, in this guide.

This guide focuses on FERPA and Virginia student records privacy law; it does not address federal or state civil rights laws, including laws that prohibit discrimination on the basis of: disability (the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973); race, color, and national origin (Titles IV and VI of the Civil Right Act of 1964); sex (Title IX of the Education Amendments of 1972); and religion (Title IV of the Civil Rights Act of 1964).

² Pertinent Health Insurance Portability and Accountability Act (HIPAA) issues are also summarized briefly below. HIPAA may protect the confidentiality of student medical records at some institutions of higher education in certain circumstances, but, as summarized below, those circumstances are relatively less common because most student education records, including student health center and counseling center records, are covered by FERPA rather than HIPAA.

Understanding and Navigating the Family Educational Rights & Privacy Act (FERPA) – Frequently Asked Questions

A. What are the pertinent student records privacy laws and who do they apply to?

FERPA is a federal law that provides certain privacy, record review and other education record-related rights to students who attend colleges and universities that receive funding under programs administered by the U.S. Department of Education. FERPA provides such rights to parents and students at the K-12 level, but when a student enters a postsecondary institution (regardless of their age), FERPA rights are held exclusively by the student. The citations for the FERPA statute, the FERPA regulations, and the Virginia student records privacy law, are as follows:

Federal Law – FERPA

Statute: 20 U.S.C. § 1232g

Regulations: 34 C.F.R. Part 99

Virginia Law

Virginia Code: Title 23.1, Chapter 4, § 23.1-405. Student records and personal information; social media.

B. What are the rights of students under FERPA?

In general terms, FERPA provides college and university students rights in three areas:

- A right to inspect and review the student’s education records;
- A right to request an amendment to student education records through specified procedures; and
- A right to control the disclosure of education records and PII from those records to the extent provided by FERPA.

For more detailed information, please see 34 C.F.R. § 99.5 (FERPA Regulations, included as Appendix B).

C. What are student “education records”?

FERPA defines Education Records as: records that are (1) directly related to the student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.

In addition to obviously-covered records such as academic records, the broad definition of “education record” **can** include but is not limited to the following examples:

- Personally identifiable information (PII) on students – e.g.: student’s name, parents/family members names; address; social security number and other personal identifiers; indirect identifiers such as date and place of birth and mother’s maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a

person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

- Disciplinary records.
- Any PII “recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”

Covered student education records may include information stored in paper documents, electronically, or in other formats.

FERPA’s protections extend not only to the physical or electronically-stored records themselves, but also to PII included in such records.

NOTE: The general rule is that institutions must obtain prior, written consent of the student to disclose PII, and must make a record of the consent, as well as a record of the disclosure of that information without consent when an exception to the consent requirement applies. See 34 C.F.R. § 99.32 in Appendix B.

For more detailed information, please see 34 C.F.R. § 99.3 in Appendix B, and Questions 5, 8, 11 of Appendix A.³

Documents that might otherwise be education records but that are instead specifically excluded from the definition of education records for FERPA purposes include but are not limited to:

- “Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”
- Records of a law enforcement unit of an educational agency or institution subject to the provisions of Section 99.8 of the FERPA regulations. A “law enforcement unit” for FERPA purposes means “any individual, office, department, division, or other component of an educational agency ... such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency ... to— ... Maintain the physical security and safety of the agency ... A component of an educational agency ... does not lose its status as a ‘law enforcement unit’ if it also performs other, non-law enforcement functions for the agency ... including investigation of incidents or conduct that constitutes or leads to disciplinary action or proceedings against the student.” 34 C.F.R. § 99.8.
- “Treatment Records”, that is, “[r]ecords on a student who is ... is attending an institution of postsecondary education, that are:
 - (i) Made 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;
 - (ii) Made, maintained, or used only in connection with treatment of the student; and
 - (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, “treatment” does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution....”

³ Appendix A is a U.S. Department of Education guidance document, *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)* (February 2019). This guidance “is generally focused on health or safety emergencies faced by public elementary and secondary schools” so its examples are tailored to that context, but the information in it “is applicable to all educational agencies and institutions that receive funds under any program administered by the Secretary of the U.S. Department of Education (Department),” which includes colleges and universities, and it is cited here because it was published relatively recently, and it relies upon generally-applicable FERPA regulations in addressing the intersection of emergency situations, law enforcement unit operations, and safety considerations.

References: 34 C.F.R. §§ 99.3, 99.8 in Appendix B, Appendix C, pages 5-6; 20 U.S.C. 1232g(b)(3)b(5); Dear Colleague Letter regarding privacy of student medical records (August 2016). Available at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf. See also 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 (Dec. 2019) at Question 23. Available at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf).

D. What does FERPA protection of a record mean?

FERPA protection means that an individual or entity requesting disclosure of a student education record may only be permitted access to it if:

- The individual or entity has obtained the prior, written consent of the student to access that particular record; or
- Disclosure is permitted under one of the conditions in which prior consent is not required to disclose information. (See *Question F: Under What Conditions is Prior Consent Not Required to Disclose Student Education Record Information?*)

E. What are examples of types of information that are not covered by FERPA (i.e., no student consent is required for release)?

Example 1: Personal Observations and Non-Recorded Statements

- Because FERPA applies to the disclosure of education records and PII from education records maintained by an institution, FERPA does not prohibit a school official from releasing information that was obtained not from a student’s education records, but instead:
 - through that school official’s personal knowledge or observation; or
 - verbally from another person based on the other person’s personal knowledge or observation; or
 - by speaking with a student or other person about their impressions, thoughts or intentions (whether based on their personal knowledge or not), such as a statement by a student indicating an intent to do harm to themselves or someone else.

It should be noted, however, that this general rule does not apply where a school official learns of information about a student through their role in making a determination (e.g., a disciplinary decision) about the student that is maintained in an education record.

Example 2: Video Images Created and Maintained by a Law Enforcement Unit

- Many college and university police and/or public safety departments utilize video recording systems to promote and support campus safety activities. If such systems and the resulting digital or other video files are created and maintained by a campus law enforcement unit (sworn or non-sworn) at least in part for a law enforcement purpose, then they are “law enforcement unit records”, previously as defined, not FERPA-covered records.
- Colleges and universities will likely have internal policies that legitimately restrict the use and distribution of such records, but FERPA would not restrict a campus law enforcement unit’s ability to share such records as deemed appropriate, without a subpoena or other FERPA exception.

- Further, if such records were not created by a law enforcement unit exclusively for a non-law enforcement purpose (i.e., they were created at least in part for a law enforcement purpose), they may be shared by the law enforcement unit with school officials for disciplinary or other purposes at the discretion of the law enforcement unit; such records would be education records covered by FERPA in the hands of such school officials.⁴

For more detailed information, please see Questions 36–37 of Appendix A and Appendix C, page 4.

NOTE: FERPA only governs student education records and information documented in such records, not personal observations or non-recorded conversations, so FERPA does not restrict the ability of college and university officials to share personal observations or non-recorded conversations with third parties.

Where not derived from education records maintained by the institution and falling instead within the scope of personal observation and knowledge described here, information about the following topics, among others, may be exchanged by college and university and law enforcement personnel:

- Threats of violence
- Harassment, intimidation and/or bullying
- Stalking
- Suicidal gestures or expressions of suicidal ideation
- Threatening behavior

See Appendix C, page 4. Of course, the health or safety emergency exception and other exceptions summarized in this guide may also permit the sharing of information about such issues, even if that information is maintained in education records.

F. Under what conditions is prior consent not required to disclose student education record information?

Notwithstanding the general non-disclosure rule summarized above, FERPA does not require prior student consent before disclosure of student education records, or information from such records, under numerous conditions specified by FERPA. Some notable examples are described here.

- **School Officials with A Legitimate Educational Interest:** Student education records and information from them may be disclosed to and shared with other college and university employees (known as “school officials” for FERPA purposes), who have a legitimate educational interest in receiving the information in order to perform their professional responsibility.

See § 99.31 (a) (1) in Appendix B.

NOTE: A “school official” at a college or university may include but is not limited to a student affairs professional, professor, administrator, clerical support person, campus police or public safety officer, registrar, student accounts professional, college attorney, and other person who needs to receive student education record information in order to do their job.

⁴ Similarly, if video records are created or maintained by a college or university office other than a law enforcement unit office, the records would be covered by FERPA and therefore could be disclosed only with consent or if an exception allowing disclosure applies. For more information on these issues, see U.S. Department of Education’s “FAQs on Photos and Videos under FERPA,” available at: <https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa>.

A contractor, consultant, volunteer or other individual to whom a school has outsourced institutional services or functions may also be considered a school official for purposes of FERPA, provided that such outside individual:

- Performs an institutional service or function for which the college or university would otherwise use employees;
- Is under the direct control of the college or university with respect to the use and maintenance of the education records;
- Is subject to FERPA’s use and re-disclosure requirements set forth in 34 CFR § 99.33(a); and
- Falls within the definition of “school official with a legitimate educational interest” stated in the notice of FERPA rights that the college or university must publish annually.

The focus of the “direct control” criterion is that such outside individual must be under the direct control of the college or university with respect to their handling of education records. The individual receiving the information does not have to be under the control or employment of the college or university for all purposes. If an outside individual meets the criteria specified above and is bound by an agreement between the college or university and the individual and/or the individual’s employer that defines how the individual may and may not access and disclose FERPA-covered education records that would satisfy the direct control requirement for FERPA purposes.

NOTE: As applied to outside law enforcement agencies, the U.S. Department of Education has emphasized that “Nothing in FERPA requires an educational agency or institution to use only employees to staff its law enforcement unit. Local police officers and other law enforcement personnel employed by local or State authorities also may serve as the ‘law enforcement unit’ of an educational agency or institution,” and they may qualify as “school officials with a legitimate educational interest” who can review student education records if the “direct control”, annual notification inclusion and other criteria noted above are satisfied. See Appendix C, pages 5-6. This scenario applies where such officers are performing duties as contracted for with the college or university; if however they wish to obtain access to student education record information in order to perform their outside law enforcement duties, or they wish to provide student education record information to an outside law enforcement agency in their outside law enforcement capacity and not on behalf of the college or university under a FERPA exception, then appropriate arms-length procedures (e.g., subpoena, search warrant, or other court order) should be followed. See Appendix A, Question 24.

For an extensive list of additional persons who may qualify, and other more detailed information, please see Question 13 of Appendix A and Appendix C, pages 5-6.

- **Officials of Other Schools:** If certain notice and procedural requirements are satisfied, FERPA-protected records and information in such records may be disclosed to officials of another educational institution at which the student seeks or intends to enroll.

For more information on the rules that govern the disclosure of education records to other schools, colleges and universities, please see §§ 99.31(a)(2) and 99.34 in Appendix B.

- **Subpoenas and Court Orders:** FERPA-protected records and information in them may be disclosed in order to “comply with a judicial order or lawfully issued subpoena.” The FERPA regulations provide that the institution must make “a reasonable effort to notify the ... student of the order or subpoena in advance of compliance, so that the ... student may seek protective action, unless the disclosure is in compliance with—

- (A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;
- (B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or
- (C) An *ex parte* court order obtained by the United States Attorney General (or designee not lower than an Assistant Attorney General) concerning investigations or prosecutions of [certain domestic and/or international terrorism-related offenses].”

NOTE: If a law enforcement agency does not want an institution to notify a student about a subpoena that requests disclosure of the student’s FERPA-covered education records, the agency should indicate by specific language in the subpoena that it is issued for a law enforcement purpose, and that the existence or contents of the subpoena or the information furnished in response to it should not be disclosed.

NOTE ALSO: A search warrant should also be considered a “judicial order” for purposes of this FERPA exception. Therefore, if the search warrant does not prohibit disclosure of its existence to the student whose FERPA-covered records it concerns, the institution should, if it can, make a good faith effort to notify the student about the search warrant (recognizing, however, that the student’s options to contest the execution of the search warrant and/or the institution’s ability to notify the student in advance may be limited). If the search warrant does contain language prohibiting disclosure as described above, the student should not be notified about the search warrant.

See § 99.31(a)(9) in Appendix B and Question 32 of Appendix A.

- **Health or Safety Emergencies:** FERPA-protected records and information in them may be disclosed in connection with a health or safety emergency. (See §§ 99.31(a)(10) and 99.36 in Appendix B. The U.S. Department of Education has noted in discussing the application of this exception to the college and university context that:
 - “This exception to FERPA’s general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student’s education records.”
 - “Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed under this FERPA exception.”
 - “Disclosures for health or safety emergency reasons do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities. Rather, disclosures made under the health or safety emergency provision must be ‘in connection with an emergency,’ which means it must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.”
 - “Under this health or safety emergency provision, an educational agency or institution must determine whether to disclose personally identifiable information from education records on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of the student or others. If the school, school district, or postsecondary institution determines that there is an articulable and significant threat to the health or safety of the student or other individuals and that a party needs personally

identifiable information from education records to protect the health or safety of the student or other individuals, it may disclose that information to appropriate parties without consent.” See 34 C.F.R. § 99.36 in Appendix B.

- “The phrase ‘articulable and significant threat’ means that if a school official can explain why, based on all the information then available, the official reasonably believes, for instance, that a student poses a significant threat, such as a threat of substantial bodily harm to any person, including the student, the school official may disclose personally identifiable information from education records without consent to any person whose knowledge of the information will assist in protecting a person from threat.
- [W]ithin a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student’s education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed.” See 34 C.F.R. § 99.32(a)(5) in Appendix B.

The U.S. Department of Education’s regulations provide further that nothing in FERPA or its regulations prevents a college or university from:

- “(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community”;
- (2) Disclosing such appropriate disciplinary information to college or university officials who are school officials with a legitimate educational interest in the behavior of the student; or
- (3) Disclosing such appropriate disciplinary information to officials at other schools, colleges or universities who have been determined to have a legitimate educational interest in the behavior of the student.⁵

See 34 C.F.R. § 99.36 in Appendix B. While it should be clear by now that colleges and universities can share such information internally among school officials with a legitimate educational interest, it bears repeating that under § 99.36(b)(3), FERPA also permits the sharing of such information with officials at **other** schools (e.g., in secondary/post-secondary dual-enrollment scenarios), colleges or universities, where those officials have a legitimate educational interest in the behavior of the student. Colleges and universities should consult with legal counsel as to whether to do so in a particular case.

See generally Appendix C, pages 3-4, and §§ 99.31(a)(10) and 99.36 in Appendix B and Question 32 of Appendix A.

⁵ FERPA also permits an institution of higher education to disclose certain information to a “**victim** of an alleged perpetrator of a crime of violence or a non-forcible sex offense,” consisting of “the final results of [a] disciplinary proceeding conducted by the institution ... with respect to that alleged crime or offense,” and may do so “**regardless of whether the institution concluded a violation was committed.**” See 34 C.F.R. § 99.31(a)(13) in Appendix B (emphasis added). “Final results means a decision or determination” regarding responsibility made by the entity authorized to resolve such disciplinary matters at the institution, and may consist only of the name of the student, the violation committed, and any sanction imposed by the institution against the student.” See 34 C.F.R. § 99.39 in Appendix B. If an institution of higher education determines that a student committed a crime of violence or non-forcible sexual offense in violation of its policies, the institution may disclose final results information as defined in § 99.39 to **anyone**, not just to the victim of the conduct. See 34 C.F.R. § 99.31(a)(14) in Appendix B. If it decides to do so, the institution “may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.” *Id.*

NOTE: The U.S. Department of Education has emphasized that the health or safety emergency standard “is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency’s or institution’s decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed.” Appendix C, page 4. Thus, the Department will not second-guess a college’s or university’s decision to disclose information as appropriate, within the general parameters outlined above.

For more detailed information, please see Appendix C, pages 3-4 and Questions 25–30 of Appendix A.

- **Directory Information:** Under FERPA, “directory information” may generally be disclosed without consent if certain conditions are met, even though it is personally identifiable (Virginia law, however, imposes certain restrictions as noted below).

See § 99.37 in Appendix B.

FERPA defines directory information as information contained in a student’s record that would not generally be considered harmful or an invasion of privacy if disclosed, such as the following:

- The student’s name
- The student’s address and telephone number⁶
- The student’s date and place of birth
- The student’s major field of study
- Official activities that the student participates in, such as officially recognized sports and other school-related activities
- The student’s dates of attendance at that particular school, including enrollment date and leave date which would also include date of graduation, if applicable
- The weight and height of the student if the student is a member of an athletic team
- Degrees, honors and awards received by the student
- Name and address of most recent educational institution that the student had previously attended
- A photograph of the student

⁶ It should be noted however, that while the *Code of Virginia* likewise permits the disclosure of some FERPA-designated directory information (e.g., a student’s “name, sex, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height as a member of an athletic team, dates of attendance, degrees and awards received, and other similar information,”) if FERPA notice and opt-out procedures are followed, Virginia law also provides: “However, no institution [i.e., college or university] shall disclose the address, telephone number, or email address of a student pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) [FOIA] unless the student has affirmatively consented in writing to such disclosure. Additionally, except as required by state or federal law, no institution shall disclose the address, telephone number, or email address of a student pursuant to 34 C.F.R. § 99.31(a)(11) unless (a) the disclosure is to students enrolled in the institution for educational purposes or institution business and the student has not opted out of such disclosure in accordance with this subsection and institution policy or (b) the student has affirmatively consented in writing to such disclosure except as required by state or federal law. *Code of Virginia* § 23.1-405.C. Thus, a student’s address, telephone number and email address must be treated with additional care notwithstanding that FERPA permits their disclosure if the student does not opt out; instead, they may only be disclosed given the requirements of Virginia law in the circumstances outlined above. This provision of Virginia law only pertains to disclosures of directory information as otherwise permitted by FERPA; it does not affect or limit disclosures made under other FERPA exceptions. *See id.* (“This subsection shall not apply to disclosures, other than disclosures pursuant to 34 C.F.R. § 99.31(a)(11), permitted under FERPA.”).

A college or university may disclose directory information without the student’s written consent to third parties, including law enforcement officials, if it has given public notice to those students of:

- The types of personal information that it has designated as directory information;
- The right of the student to restrict the disclosure of such information;
- The period of time within which a student has to notify the educational agency or institution in writing that they do not want any or all of that information listed as directory information.

If a student follows the institution’s procedures to notify the institution that they do not want any or all of that information listed as directory information, the institution must respect that request and only disclose such information without consent if another FERPA exception allows disclosure.

For more information, please see Questions 7 and 23 of Appendix A and § 99.37 in Appendix B.

- **Law Enforcement Unit Record:** As explained above, records created and maintained by a college’s or university’s sworn or non-sworn law enforcement unit are not student “education records” subject to FERPA, so FERPA does not require prior consent from the student before they are disclosed to third parties. (See Section C of this guide for definition of “education records”).

NOTE: If copies of a law enforcement unit’s records that contain personally identifiable student information are shared with institutional officials outside the law enforcement unit, such copies would become “education records” covered by FERPA in the hands of such non-law enforcement unit officials. A student the copies pertain to would therefore have a right under FERPA to ask such non-law enforcement unit officials to allow them to review such copies, and the officials should otherwise treat the copies as FERPA-covered records. The original records in the files of the law enforcement unit would, however, continue to be exempt from FERPA’s review and general non-disclosure requirements.

For more information, please see Questions 13-15, 18–24 of Appendix A, § 99.8 in Appendix B, and Appendix C, pages 5-7.

G. What does Virginia law provide regarding the privacy of college and university student education records?

In addition to the provisions on the privacy of student addresses, telephone numbers and email addresses and other directory information-related issues discussed above, *see Virginia Code § 23.1-405.C*, other subsections of *Virginia Code* section 23.1-405, which is titled “Student records and personal information; social media,” provide that:

- “Each public institution of higher education and private institution of higher education may require any student who attends, or any applicant who has been accepted to and has committed to attend, such institution to provide, to the extent available, from the originating secondary school and, if applicable, any institution of higher education he has attended a complete student record, including any mental health records held by the previous school or institution.
 - Such records shall be kept confidential as required by state and federal law, including the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) (FERPA).” *Virginia Code § 23.1-405.B.*
- “No public institution of higher education shall sell students’ personal information, including names, addresses, phone numbers, and email addresses, to any person. This subsection shall

not apply to transactions involving credit, debit, employment, finance, identity verification, risk assessment, fraud prevention, or other transactions initiated by the student.” *Virginia Code* § 23.1-405.D.

- “No public or private institution of higher education shall require a student to disclose the username or password to any of such student's personal social media accounts. Nothing in this subsection shall prevent a campus police officer appointed under Article 3 (§ 23.1-809 et seq.) of Chapter 8 from performing his official duties.”
 - “Social media account” means a personal account with an electronic medium or service through which users may create, share, or view user-generated content, including, without limitation, videos, photographs, blogs, podcasts, messages, emails, or website profiles or locations. "Social media account" does not include an account (i) opened by a student at the request of a public or private institution of higher education or (ii) provided to a student by a public or private institution of higher education such as the student's email account or other software program owned or operated exclusively by a public or private institution of higher education.

The implications of these provisions for the campus threat assessment process are addressed in sections I through L below.

It is also noteworthy that a section of the *Virginia Code* that establishes standards for the reporting of acts of sexual violence, § 23.1-806, provides that a review committee established pursuant to that section must, upon the determination of the committee, or if the committee cannot reach a consensus, the representative of law enforcement on the review committee, that the disclosure of information about a report of sexual violence, “including personally identifiable information, is necessary to protect the health or safety of the student or other individuals as set forth in 34 C.F.R. § 99.36 [i.e., FERPA’s health or safety exception], the representative of law enforcement on the review committee shall immediately disclose such information to the law-enforcement agency that would be responsible for investigating the alleged act of sexual violence,” for the purposes of a law enforcement investigation, unless such law enforcement agency is located outside the United States. Section 23.1-806 provides further that “[u]pon such disclosure, the Title IX coordinator or his designee shall notify the victim that such disclosure is being made.”

Section 23.1-806 also provides that in cases “in which the alleged act of sexual violence would constitute a felony violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, the representative of law enforcement on the review committee shall inform the other members of the review committee and shall within 24 hours consult with the attorney for the Commonwealth or other prosecutor responsible for prosecuting the alleged act of sexual violence and provide to him the information received by the review committee without disclosing personally identifiable information, unless such information was disclosed pursuant to [the subsection discussed immediately above]. In addition, if such consultation does not occur and any other member of the review committee individually concludes that the alleged act of sexual violence would constitute a felony violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, that member shall within 24 hours consult with the attorney for the Commonwealth or other prosecutor responsible for prosecuting the alleged act of sexual violence and provide to him the information received by the review committee without disclosing personally identifiable information, unless such information was disclosed pursuant to [the subsection discussed immediately above].”

H. How can law enforcement officers gain access to student education records covered by FERPA?

- **Court Order/Subpoena Exception:** A law enforcement officer (LEO) can access FERPA-covered education records or information from such records through a court order, either with or without the need for the college or university to notify the student in advance of compliance, as discussed previously.
- **Health or Safety Emergency Exception:** A LEO can access FERPA-covered education records or information from such records if FERPA’s health or safety emergency exception applies, as discussed previously.
- **LEO Acting as School Official Exception:** If a LEO meets all of the requirements of being a school official discussed above, they can access FERPA-covered education records or information from such records; however, as also discussed above, if they wish to share such information with a third party outside the scope of other college or university “school officials with a legitimate educational interest,” such as an outside law enforcement agency for which they also work, they should use arms-length access procedures (e.g., court order or subpoena) unless another FERPA exception applies that would allow any other college or university official to make such disclosure.

For more detailed information and the definition of a school official, please see Questions 13, 14, 15, 22, & 24 of Appendix A, and Appendix C, pages 5-9.

I. What is a campus threat assessment and management team?

In general, a campus threat assessment and management (TAM) team is a multi-disciplinary group of individuals who work together to receive reports of behavior by anyone who may pose a risk to campus community members, gather further information to assess the relevant circumstances, make an assessment of whether the circumstances require case management by the TAM team and, if so, implement a case management plan. TAM teams may also make referrals to other teams or individuals on or off campus, as appropriate.

For more information, please see Question 16 of Appendix A and the resources identified there,⁷ Appendix C, pages 11-12, and Virginia Code § 23.1-805.

J. What does Virginia law provide with respect to campus threat assessment teams at public higher education institutions?

Virginia Code § 23.1-805 contains provisions regarding violence prevention committees and threat assessment teams at public (not private) institutions of higher education in Virginia. In pertinent part, § 23.1-805 provides:

- “A. Each public institution of higher education shall establish policies and procedures for the prevention of violence on campus, including assessment of and intervention with individuals whose behavior poses a threat to the safety of the campus community.”

⁷ Specifically, Question 16 in Appendix A cited a booklet issued jointly by the U.S. Department of Education and the U.S. Secret Service in July 2004, entitled, “Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates,” which “includes guidance on the formation of threat assessment teams on pages 37-38.” That booklet and other resources are available at: <http://www.ed.gov/admins/lead/safety/edpicks.jhtml>. Also cited in Question 16 is joint guidance issued in 2013 by the U.S. Department of Education and several federal agencies entitled, “Guide for Developing High Quality School Emergency Operations Plans,” which is available at: http://rems.ed.gov/docs/REMS_K12_Guide_508.pdf.

- “B. The governing board of each public institution of higher education shall determine a violence prevention committee structure on campus composed of individuals charged with education on and prevention of violence on campus. Each violence prevention committee shall include representatives from student affairs, law enforcement, human resources, counseling services, residence life, and other constituencies as needed and shall consult with legal counsel as needed. Each violence prevention committee shall develop a clear statement of mission, membership, and leadership. Such statement shall be published and made available to the campus community.”
- “C. Each violence prevention committee shall (i) provide guidance to students, faculty, and staff regarding recognition of threatening or aberrant behavior that may represent a physical threat to the community; (ii) identify members of the campus community to whom threatening behavior should be reported; (iii) establish policies and procedures that outline circumstances under which all faculty and staff are required to report behavior that may represent a physical threat to the community, provided that such report is consistent with state and federal law; and (iv) establish policies and procedures for (a) the assessment of individuals whose behavior may present a threat, (b) appropriate means of intervention with such individuals, and (c) sufficient means of action, including interim suspension, referrals to community services boards or health care providers for evaluation or treatment, medical separation to resolve potential physical threats, and notification of family members or guardians, or both, unless such notification would prove harmful to the individual in question, consistent with state and federal law.”
- “D. The governing board of each public institution of higher education shall establish a threat assessment team that includes members from law enforcement, mental health professionals, representatives of student affairs and human resources, and, if available, college or university counsel. Each threat assessment team shall implement the assessment, intervention, and action policies set forth by the violence prevention committee pursuant to [the subsection C, quoted immediately above].”
- “E. Each threat assessment team shall establish relationships or utilize existing relationships with mental health agencies and local and state law-enforcement agencies to expedite assessment of and intervention with individuals whose behavior may present a threat to safety. Upon a preliminary determination that an individual poses a threat of violence to self or others or exhibits significantly disruptive behavior or a need for assistance, the threat assessment team may obtain criminal history record information as provided in §§ 19.2-389 and 19.2-389.1 and health records as provided in § 32.1-127.1:03.”
- “F. No member of a threat assessment team shall redisclose any criminal history record information or health information obtained pursuant to this section or otherwise use any record of an individual beyond the purpose for which such disclosure was made to the threat assessment team.”

K. Does FERPA permit institutions of higher education to allow access to education records without prior consent to members of the institution’s threat assessment team?

Yes. As emphasized above, even a multi-disciplinary TAM team may have access to student education records without a student’s prior consent if their role on the TAM team qualifies them as “school officials with a legitimate educational interest” and they fall within the institution’s definition of such in its annual FERPA notification. Of course, other exceptions, such as the health and safety emergency exception, may also apply, but institutions should consider orienting their team operations and annual notification so that the TAM team’s access to education records is generally and primarily permitted under the “school officials” provisions of FERPA.

For more detailed information, please see Question 17 of Appendix A, and Appendix C, pages 11-12.

L. How does FERPA apply to the Virginia college and university threat assessment process?

Several FERPA information-sharing issues are implicated by the provisions of *Virginia Code* § 23.1-805, the most pertinent of which are:

- First, the requirement in subsection C that public institutions must create a system that encourages the reporting of concerning behavior to TAM team members and/or other designated individuals, can only be effectuated well in cases involving students if the institution's annual FERPA notification defines "school official with a legitimate educational interest" broadly enough to encompass all TAM team members and such designated report recipients, and if TAM team members and the colleagues from whom they will seek student education record information understand that such information can be shared with TAM team members as necessary to enable them to perform their responsibilities on behalf of the TAM team. In other words, in order to conduct threat assessment and management effectively in accordance with this statutory mandate, public institutions should take full advantage of the opportunities for information-sharing that are provided by FERPA, as outlined previously in sections E through H.
- Second, subsection D's reference to the creation of a multi-disciplinary team similarly implicates the need to ensure that TAM team members fall within the annual FERPA notification's definition of "school official with a legitimate educational interest" so that they can appropriately collaborate and share information as necessary within the TAM team in order to assess pertinent information gathered. Subsection D's reference to "intervention" and "action" policies also implicates the health or safety exception and other exceptions discussed previously in sections E through H, to the extent that student education record information needs to be disclosed to third parties as part of a case management/intervention plan.
- Third, subsection E's requirement that TAM teams "establish relationships or utilize existing relationships with mental health agencies and local and state law-enforcement agencies to expedite assessment of and intervention with individuals whose behavior may present a threat to safety" implicates the discussion above about the sharing of student education record information with outside law enforcement under the health or safety emergency, subpoena and other exceptions, and the discussion above about the sharing of law enforcement unit records that fall outside FERPA with anyone, including outside law enforcement and mental health providers (subject to consultation with legal counsel as appropriate).

Also, as previously noted, *Virginia Code* § 23.1-405 provides that public and private institutions of higher education may require any student who attends, or any applicant who has been accepted to and has committed to attend, the institution to provide a complete student record to the extent available, including any mental health records, held by a previous secondary or post-secondary institution. As phrased, this allows institutions to impose a requirement on students who are attending or seeking admission; it does not require prior institutions to provide such information, and whether prior institutions decide to do so will likely be a question that such prior institutions will want to consider with their legal counsel. Nonetheless, it should be emphasized again in this context that FERPA does not provide a barrier to such information-sharing, because FERPA permits educational institutions to share a student's education records with other educational institutions at which the student seeks or intends to enroll. See 34 C.F.R. § 99.34 in Appendix B and discussion above. Student education record information can be a valuable source of information for a TAM team, so teams will want to keep these provisions of federal and Virginia law in mind if they decide to seek such records.

Finally, *Virginia Code* § 23.1-405 provides that institutions of higher education may not require students to disclose their personal social media usernames or passwords to the institution. Social media are, obviously, a rich source of information for TAM teams, so teams will have to recognize this limitation and consider lawful ways to access at least publicly-available social media through other means.

Summation

Under FERPA and Virginia law, college and university personnel have the discretion to share information, including student education record information, within and between institutions and with law enforcement and others under conditions summarized above and detailed in appendices A, B and C, while appropriately respecting the privacy rights of students. It is hoped that this guide will promote conversations between these constituencies, and between these constituencies and their legal counsel, so that they can efficiently and effectively share information where necessary to promote safety and security on campuses throughout the Commonwealth of Virginia.

Appendices

Appendix A

[School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act \(FERPA\) developed by U.S. Department of Education-established Privacy Technical Assistance Center \(PTAC\)](#)

Available at:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs.pdf

Appendix B

[Family Educational Rights and Privacy Act Regulations](#), 34 C.F.R. Part 99

Available at:

<https://www2.ed.gov/policy/gen/guid/fpco/pdf/2012-final-regs.pdf>

Appendix C

[Addressing Emergencies on Campus](#) (U.S. Department of Education, June 2011)

Available at:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/emergency-guidance.pdf