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Welcome to Today's  
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Webinar



# Title II Update: *Direct Threat Protocol and Policies*

Wednesday, April 25, 2012  
2-3:30 PM ET

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# Presenter

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

# Presenter

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

# Goals

- ▶ Discuss legal, clinical and practical issues of the recent changes to:
  - The higher education opportunities act (Public Law 110-315).
  - Office of Civil Rights, Title IX provisions.
- ▶ Identify and explain key statutes and regulations.
- ▶ Describe key elements of working with students, parents and colleagues on the issues of HEOA.

# Key Statutes

- ▶ FERPA – Family Educational Rights and Privacy Act of 1974.
- ▶ HEOA – Higher Education Opportunity Act.
  - (Dear Colleague Letter)
- ▶ OCR Title 28, Vol1, part 35.– Office of Civil Rights, assessment of threat.
- ▶ ADA – American’s with Disabilities Act

# Outcomes

- ▶ Navigating the minefields of FERPA, HIPPA, HEOA, and ADA 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.

- ▶ Each of the laws and regulations we are going to talk about today have exceptions.
- ▶ None of these regulations were designed with the intention of excluding parents, keeping or allowing dangerous students on campus or hamstringing educators.



# We have these statutes for a reason.

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

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

# Higher Education Opportunity Act (Public Law 110-315)

- ▶ The Higher Education Opportunity Act (Public Law 110-315) (HEOA) was enacted on August 14, 2008, and reauthorizes the Higher Education Act of 1965, as amended (the HEA).
- ▶ Dear Colleague letter created a summary of the 2008 changes and informed institutions that compliance will be monitored.
- ▶ Commonly called Title II, referencing the section of HEOA specific to higher education and quality teaching.

# Drug and Alcohol Prevention

HEOA section 107, HEA sect 120

- ▶ The HEA continues to provide that no institution of higher education is eligible to receive funds or any other form of financial assistance under any Federal program unless the institution certifies to the Secretary that the institution has adopted and has implemented a program to prevent the use of illicit drugs and the abuse of alcohol by students and employees. As a part of this program, an institution must conduct a biennial review of the program.

# Application:

- ▶ How does your campus address alcohol and drug policy violations?
- ▶ Do you offer mandated assessment, counseling and/or restorative justice options?
- ▶ What is the appropriate depth and breath of alcohol and other drug programs on campus to meet this standard?
- ▶ If we acknowledge that a student has an addiction, a documented mental health issues, how do we stay compliant to ADA?

# Biennial Review must include:

- ▶ the number of drug and alcohol-related violations and fatalities that occur on an institution's campus, as defined by section 485(f)(6) of the HEA, or as part of any of the institution's activities and are reported to campus officials; and
- ▶ the number and type of sanctions that are imposed by the institution as a result of drug and alcohol-related violations and fatalities on the institution's campus or as part of any of the institution's activities.

# Missing Student

## HEOA sect 488(g), HEA sect 485(j)

The HEOA adds new subsection (j) to section 485 of the HEA to require that an eligible Title IV institution that provides on-campus housing establish a missing student notification policy for students who reside in on-campus housing that:

- ▶ informs each student that they have the option to identify an individual that the institution can contact no later than 24 hours after the time the student is determine to be missing according to the institution's official notification procedures described below;
- ▶ provides each student a way to register confidential contact information in the event the student is determined to be missing for more than 24 hours;

# Missing Student: con't

HEOA sect 488(g), HEA sect 485(j)

- ▶ advises each student under 18 years of age (who is not emancipated) that the institution must notify a custodial parent or guardian no later than 24 hours after the time the student is determined to be missing according to the institution's official notification procedures;
- ▶ and requires, if campus security or law enforcement personnel has been notified and makes a determination that a student who is the subject of a missing person report has been missing for more than 24 hours and has not returned to campus, the institution to initiate the emergency contact procedures that the student designates.

# Official notification procedures for a missing students:

- ▶ includes procedures for official notification of appropriate individuals at the institution that such student has been missing for more than 24 hours;
  - requires that any official missing person report relating to such student be referred immediately to the institution's police or campus security department; and
  - in instances where, upon investigation of the official report, the police or campus security department determines that the missing **student has been missing for more than 24 hours, the department must contact the individual identified by the student as a contact.** If the missing student is under 18 years of age and not emancipated the institution must immediately contact the **custodial parent or legal guardian of the student** and, in cases where the preceding two scenarios do not apply to a student determined to be a missing person, the institution will inform the appropriate law enforcement agency that the student is missing.

*Section 485(j) of the HEA does not provide a private right of action to any person*



## Disabled Students: HEOA section (709 HEA sections 760–778)

- The HEOA defines the term “comprehensive transition and postsecondary program for students with intellectual disabilities” to mean a degree, certificate, or non-degree program that is designed to support students with intellectual disabilities who are seeking to
- ▶ continue academic, career and technical, and independent living instruction in order to prepare for gainful employment;

## Disabled Students: HEOA section (709 HEA sections 760–778)

Includes an advising and curriculum structure; and requires students with intellectual disabilities to participate on not less than a halftime basis with nondisabled students in:

- (1) regular enrollment in credit-bearing courses,
- (2) auditing or participating in courses for which the student does not receive regular academic credit,
- (3) enrollment in noncredit-bearing, non-degree courses, or
- (4) participation in internships or work-based training.

The HEOA defines the term “student with an intellectual disability” to mean a student:

- (1) with mental retardation or a cognitive impairment, characterized by significant limitations in intellectual and cognitive functioning, and adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and
- (2) who is currently, or was formerly, eligible for a free appropriate public education under the Individuals with Disabilities Education Act.

# Application:

- ▶ Recognizing that mental health issues are protected under ADA and can include cognitive, behavioral and emotional symptoms that make education difficult at times:
  - How do we support faculty working with a autism spectrum student?
  - With the changing nature of mental health diseases how do we support and protect the students right?

# Subpart 1--Demonstration Projects to Support Postsecondary Faculty, Staff, and Administrators in Educating Students with Disabilities

The HEOA replaces the existing Demonstration Projects to Ensure Students with Disabilities Receive a Quality Higher Education with a program that is virtually identical to the existing program, except for the addition of the following authorized activities:

- ▶ development of effective transition practices to ensure the successful and smooth transition of students with disabilities from secondary school to postsecondary education;
- ▶ improving the ability of faculty, staff, and administrators to provide distance education programs;
- ▶ provision of information, training, and technical assistance to promote awareness and interest in disability related careers; development of postsecondary-level coursework; and making postsecondary education more accessible through curriculum development.

# Mental Health Disclosure for Student Safety

## HEOA section 801 HEA section 825-26

The HEOA directs the Secretary to continue to provide guidance that clarifies the role of institutions of higher education regarding disclosures of a student's education records in the event that such student demonstrates significant risk of harm to himself or herself or to others.

The HEOA also requires that the guidance clarify that institutions of higher education that in good faith comply with the requirements of this Act and the Family Educational Rights and Privacy Act of 1974 shall not be held liable for that disclosure.

# 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.*

# When threat information is part of an educational record that file 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.

# 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.





# 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.
- Immunizations are a requirement for entering the institution for residential students. This information is part of the educational record and not protected by HIPAA

# 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.”

# 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?*

# 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.

# 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.

# 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*

# OCR 35-139: Direct Threat

(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.

[AG Order No. 3180-2010, 75  
FR 56180, Sept. 15,  
2010]  
Subpart

(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.

# 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 documented disabilities.



# 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 clearly expresses thoughts of suicide.

# 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, he showed a gun to a suitemate and stated that it reminds him to stay calm.

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

# What is the next step:

- ▶ How do you respond to this situation and stay compliant with current laws?
- ▶ Who on campus can/should be involved?
- ▶ What is the best approach?
- ▶ What are the liability issues for the college and the individual staff member(s)?
- ▶ What statutes need to be considered in this case? FERPA, HEOA, ADA, state confidentiality laws?

# Intersection of Academics and student affairs.

- ▶ *A professor calls the Dean of Students office and shares with the Dean that a student may be abusing his partner. What is the next step for the staff member?*
  - *Consider HEOA and mental health statutes.*
- ▶ *A student comes to a student activities staff member (who is teaching a class) and tells them about a friend with a significant alcohol and drug problem who is struggling with course work.*

# What is the next step:

- ▶ Can you contact parents who else on campus needs to be informed?
- ▶ Who on campus can be involved?
- ▶ What is the best approach?
- ▶ What changes would you recommend for policies and procedures to stay compliant.
- ▶ What are the liability issues for the college and the individual staff member?
- ▶ What statutes need to be considered in this case? FERPA, HIPAA, ADA, state confidentiality law?

## *HIPPA and FERPA Guide*

- ▶ [www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferpajointguide.pdf](http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferpajointguide.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)

## *Dear Colleague Letter & HEOA*

- ▶ <http://ifap.ed.gov/dpcletters/attachments/GEN0812FP0810AttachHEOADCL.pdf>

# 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)

# Q/A

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please

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OR

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...and we will be happy to forward it to our panelists!



# Feedback

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[tamie@paper-clip.com](mailto:tamie@paper-clip.com)

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- ▶ Navigating Involuntary Withdrawal Policies – April 19, 2012
- ▶ Serving & Supporting Undocumented Students – April 24, 2012
- ▶ Maximizing Student Retention: Curricular Infusion for Success – April 25, 2012
- ▶ Title II Update: Direct Threat Protocol and Policies – April 25, 2012
- ▶ Student Conduct & Counseling: Confidentiality Issues – April 26, 2012
- ▶ FYE Update 2012 – May 1, 2012
- ▶ Higher Education Compliance Update – May 3, 2012
- ▶ Title IX and Sexual Misconduct on Campus – May 8, 2012
- ▶ Student Mental Health & Technology – May 9, 2012
- ▶ Serving First Generation & Low Income Students – May 10, 2012