

Unclear and Present Danger: Enhancing and Applying Current Mental
Health Law to Minors in Schools Exhibiting At Risk Behavior

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Following the attack on Sandy Hook Elementary School in Newtown, Connecticut, the United States was thrust into a debate. That debate centered itself on the issue of gun control. Opinions diverged wildly on how to best protect future victims of gun violence. From confiscating guns outright, to arming teachers; a myriad of options were considered. Amongst the scattered opinions however, a commonality was found in the need for better mental health screening and evaluation. The purpose of a mental health evaluation is to determine whether a potential gun owner should be barred from owning a firearm because of a likelihood that his mental instability will cause the firearm to be used unlawfully and maliciously. Mental health evaluations are an excellent start, however the concept of a proper evaluation must be expanded upon. To best conduct a proper mental health evaluation, imposing mental health screening in primary education by reporting displays of violent or at risk behavior in children is a necessary requirement. Doing so will bolster monitoring of at risk children, increase warning time, and facilitate better planning in case of an attack. However, while imposing mental health screening is a necessary step in curtailing school violence, current privacy laws are inadequate to deal with a proper mental health screening scheme.

This paper will argue the following. An effective mental health screening requires two essential changes. First, a modification of current mental health privacy laws is needed. Second, a mandatory reporting duty should be imposed on teachers and school administrators to report children who display violent or at risk behavior. Both changes are permissible and desirable. This paper will first lay out the need for modifying current privacy laws, and the creation of a mandatory reporting scheme for children displaying at risk behavior in schools. It will then outline what privacy laws and reporting schemes currently exist and the pertinent legal issues of modifying existing privacy laws and imposing a mandatory reporting duty. Lastly, the paper will

establish the benefits of this new mental health reporting scheme, while addressing any possible drawbacks of the scheme.

In Need of Change: Privacy Laws and Mandatory Reporting

A modification of privacy laws and a mandatory reporting duty will better protect schools by providing notice to teachers and administrators of a potentially violent child. It is undeniable that schools are vulnerable to at risk children. Schools are unprotected from a school shooting, and are prime targets for a shooter. While some schools feature security guards and other measures of protection such as metal detectors; students and staff are defenseless. The buildings offer no ballistic protection¹, shootings are relatively infrequent and do not incentivize schools to adjust budgets in favor of increased security², the layout of the school is often well known to the shooter who has usually attended the school and is well versed with the daily activities of students and staff³, and the existing security measures are easily avoided or defeated.⁴ A modification of privacy laws and an early and proactive reporting scheme will not provide guns or armor for schools. However, it will provide one of most important necessities in dealing with at risk behavior, awareness.

Current information privacy laws block information sharing and can make state or school intervention ineffective. In interviews with teachers and administrators of Virginia Tech University, this problem was made abundantly clear. Those who knew Seung-Hui Cho were

¹ Filler, J.. N.p.. Web. 13 May 2013. <<http://www.emergencymgmt.com/emergency-blogs/homeland/school-security-guns-active-shooters-122112.html>>.

² Digest of Education Statistics, . 13 May 2013. <http://nces.ed.gov/programs/digest/d11/tables/dt11_005.asp>.

³ Center for Disease Control, . n. page. <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5702a1.htm>>.

⁴ Ibid.

aware of his withdrawn nature only because of direct contact or word of mouth.⁵ The Executive Report on the Virginia Tech Shooting commissioned by the Governor of Virginia found that Cho's parents had sought mental health care in middle and high school and knew of his disturbing tendencies a decade before the shooting.⁶ However the records of this treatment were not included with his permanent record provided to Virginia Tech due to privacy laws.⁷ Virginia Tech was unable to effectively plan for Cho's antisocial behavior ahead of time. School officials, teachers, and classmates never knew of Cho's at risk behavior unless coming directly into contact with Cho. One administrator describes her frustration with the lack of information surrounding Cho as "...[being] left in the dark, to discover the threatening presence and intimidating demeanor of for myself....I would rather resign than continue to work with him"⁸ Current privacy laws weigh too heavily on personal privacy, and exceptions and modifications must be enacted.

Similarly, a mandatory reporting duty does not currently exist for children displaying at risk behavior. This is a fundamental problem in a mental health screening scheme. Not only must a mandatory reporting duty be created outright, it must be a legal parallel to current mandatory reporting duties for abused and neglected children. Such a mandatory reporting scheme will increase the amount of available information on students displaying at risk behavior, and will allow us to better define the profile of an at risk child. Currently, an at risk child displays key

⁵ Hauser, Christine. n. page.

<http://www.nytimes.com/2007/04/18/us/18gunman.html?pagewanted=2&bl&_r=3&ei=5087&en=406dda3f52cd0455&ex=1177041600&>.

⁶ Massengrill, C. G. 13 May 2013. <<http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>>.

⁷ Ibid.

⁸ "Killer's Manifesto: You Backed me into a Corner." *CNN*. (2007): n. page. Web. 13 May. 2013. <n. page. .>.

behavior traits that may be recognized by untrained staff.⁹ At risk children generally possess a high intellect and are often excellent students.¹⁰ However, many acquaintances of schools shooters have described shooters as self-righteous, arrogant, and obnoxious.¹¹ They are usually intolerant of other's behavior and experience intense internal frustrations causing them to be shy and withdrawn.¹² At risk children may also be keenly aware of objects of their desire and will be cold and manipulative in fulfilling those desires.¹³ Similarly, many children were bullied or traumatized in early childhood.¹⁴ Lastly, and most complex, at risk children may or may not have a mental health issue. Mental health issues frequently manifest the aforementioned behaviors as a symptom of the mental disorder. A few examples of disorders that may yield at risk behavior are: Asperger's syndrome, Borderline Personality syndrome, Intermittent Explosive Disorder, ADHD, Autism, Social Frustration/Anxiety, and Mutism are among a few of many. What complicates this matter further is that these disorders respond differently and uniquely to different treatments and therapies. While cognitive behavioral therapy may work for one disorder, prescription medication may be the proper treatment for another. Mandatory reporting would expose to the light the complex issues face by at risk children, and would increase available data on what specific symptoms or behaviors an at risk child displays, and what external stimuli may have caused this behavior. This information will allow mental health professionals to more precisely define at risk behavior and address their underlying causes. Specifically, in the instance of Virginia Tech, a collective of school administrators called the Care Team, sought to help Cho however, were not told by any judicial or medical agency that he

⁹ The Secret Service. Washington D. C., 2002. 0. <http://www.secretservice.gov/ntac/ssi_final_report.pdf>.

¹⁰ Massengrill, C. G. 13 May 2013. <<http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>>.

¹¹ Ibid.

¹² Ibid.

¹³ The Secret Service. Washington D. C., 2002. 0. <http://www.secretservice.gov/ntac/ssi_final_report.pdf>.

¹⁴ Ibid.

had been deemed a threat to himself and was medically confined.¹⁵ A mandatory reporting scheme would foster better communication between agencies by compelling the reporting of this at risk behavior to a centralized source, for instance a school or state database.

What is in Place and How May it be Improved?

To examine how a permissible reporting scheme would integrate with existing laws, we must examine the laws that would interact with the scheme.

Privacy Laws

With regard to medical records, the federal Health Insurance and Portability and Accountability Act of 1996, or HIPAA, and regulations by the Secretary of Health and Human Services create federal standards for the release of mental health information between health care providers and third parties. This federal body of laws works in concert with the Illinois Mental Health and Developmental Disabilities Confidentiality Act, “Act.”¹⁶ Together the laws generally require a mental health care recipient’s authorization for disclosure. This is either the parent of a minor child or a recipient over the age of 18. However, both laws allow for an unauthorized disclosure of mental health info in certain limited circumstances.

Both HIPAA and the Act allow for the waiver of a mental healthcare recipient’s privacy interest when the privacy interest is outweighed by certain other interests such as state security. Under HIPAA, a healthcare provider may disclose a recipient’s health care information because

¹⁵ Massengrill, C. G. 13 May 2013. <<http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>>.

¹⁶ 740 ILCS 110

that recipient poses an immediate threat to “the health and safety of individuals and the public.”¹⁷ Providers also are authorized to disclose recipient information when state law requires it.¹⁸ The Act is slightly different. Information may only be disclosed when the facility director of the Secret Service or Illinois State Police determines that disclosure of such information may be necessary to protect the life of, or to prevent the infliction of great bodily harm to, a public official, or a person under the protection of the United States Secret Service.¹⁹ This information is disclosed to the state police or the United States Secret Service, and the only information displayed will be the name, address, and any other information which indicates a person has a history of violence.²⁰ Disclosure may also occur when a person applies for a Firearms Owners Identification Card.²¹ Lastly, a disclosure will occur after a person has been judicially or involuntarily admitted to a mental health facility, and has made an unauthorized exit.²² When the Act conflicts with HIPAA, it is preempted.

With regard to educational records, the federal Family Educational Rights and Privacy Act of 1974, or FERPA, and regulations by the Secretary of Education create federal standards for the release of educational information between educational providers and third parties.²³ Generally, educational records include information such as names, grades, disciplinary actions, or school-created medical files. These files cannot be shared unless authorized by law or with consent of a parent, or if the student is enrolled in college, or is 18 or older, with that student's

¹⁷ 45 C.F.R. § 164.512(j)

¹⁸ 45 C.F.R. § 164.512(a), (c).

¹⁹ 740 ILCS 110/12.

²⁰ Ibid.

²¹ 740 ILCS 110/12(b).

²² 740 ILCS 110/12.2(b)

²³ 20 U.S.C. § 1232

consent.²⁴ While it is generally agreed that personal safety of others in a classroom setting is a high priority, this priority is weighed against another the personal privacy of a health care recipient. Although FERPA allows secondary schools to disclose educational records (including special education records) to a university, federal disability law prohibits universities from making what is known as a ‘pre-admission inquiry’ about an applicant’s disability status.²⁵ After admission, however, universities may make inquiries on a confidential basis as to disabilities that may require accommodation.²⁶ If a student does not voluntarily request this accommodation, the privacy component of FERPA will bar the passage of knowledge from school system to school system. FERPA however, also contains an emergency exception.²⁷ This exception allows for disclosure of educational records to any appropriate person in connection with an emergency “if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”²⁸ The act however, demands that this potentially broad group of “appropriate persons” is narrowly construed.²⁹ This exception is understood to limiting release to circumstances that involve an immediate and specific threat to health or safety.³⁰ If a student displays at risk behavior, this situation may be deemed as an emergency, invoking the exception. The Department of Education's Family Compliance Policy Office (FCPO) outlines the scope of what constitutes an emergency.³¹ When a student makes suicidal comments, engages in unsafe conduct such as playing with knives or lighters, or makes threats against another student, the

²⁴ Ibid.

²⁵ 6 45 C.F.R. § 160.103

²⁶ Ibid.

²⁷ 20 U.S.C. § 1232g(b)(1)(I)

²⁸ Ibid.

²⁹ Letter from LeRoy S. Rooker, Director, Family Compliance Policy Office, U.S. Department of Education, to Superintendent, New Bremen Local Schools, dated September 24, 1994

³⁰ Ibid.

³¹ Ibid.

student's conduct can amount to an emergency.³² However, disclosure is discouraged in all but the most obvious cases however, and no case law has defined the scope of the exception.

A reporting law must be cognizant of these strictures, because they affect the release of information for at risk children. To better serve the goal of school safety, a reporting scheme must broaden the HIPAA and FERPA emergency exceptions.

The HIPAA exception must expand the permissible emergency exception from “immediate and specific threat” to “immediate and specific threat, or repeated at risk behavior.” If a child displays at risk behavior more than a certain quantum of times, the likelihood that he may harm another individual rises to the level where the child's privacy interest is outweighed by the need of the state to address and curtail the at risk behavior. The school or state may assert their right to share mental health information with reasonableness, as the repeated instances of behavior are both directly harmful to the classroom environment, and indicate a persistence of at risk behavior. Not only is this behavior facially harmful, but the behavior may amplify over time and lead to drastic consequences. By expanding this definition, there will be increased availability of medical information and communication between school administrators and state officials. Increased information will make identifying the cause of a child's at risk behaviors far more expedient.

Likewise, the FERPA emergency exception should be expanded in a similar fashion. Specifically, a repeated at risk behavior exception should also be included in the statute. This inclusion would lower the standard of when an educational facility may release education information to other parties. The benefit of this language is that it would allow the disclosure of

³² Ibid.

disciplinary actions and any medical documents that originated with the school. These documents provide raw data on the precipitating events that cause at risk behavior, what symptoms manifest, and any reactions the at risk child may have displayed. These documents have medical significance and the legislature should air on the side of disclosure for such important information.

Mandatory Reporting

Mandatory reporting generally a report made to a child services agency by a legally obligated category of persons who suspect a child is neglected or abused. Mandatory reporting is controlled by state law. The reporting duty is imposed on certain individuals who share a relationship with a child. Individuals who may work with children, or interact with children in the course of their activities, such as doctors, teachers, or police officers are better able to notice signs of abuse or neglect on a child.³³ These individuals are required to report suspected child mistreatment when they have a reasonable cause to believe that a child known to them, in their professional or official capacity, may be abused.³⁴ In Illinois, the Abused and Neglected Child Reporting Act of 1975 controls mandatory reporting.³⁵ In brief, school personnel are required to report neglect. This includes all employees including administrators, educational advocates, truant officers, and members of the school board, private school governing bodies, nurses, and social workers.³⁶ Similarly, “any other person” who has reasonable cause to believe that a child

³³ 325 ILCS 5

³⁴ Ibid.

³⁵ Ibid.

³⁶ 325 ILCS 5-4.

is abused or neglected *may* report.³⁷ Any person acting in “good faith” is shielded from individual liability.³⁸

A mandatory reporting duty should be created by state law, mandating all persons employed by a school district to report all instances of at risk behavior to the dean, or principal of a school. Such a report should then be logged in a database that is included in the student’s permanent record, but is exempt from the strict privacy interests found in FERPA and HIPAA. By reporting any and all instances of suspect behavior, a uniform standard of reportable behavior is created: any behavior deemed in good faith to be at risk. Similarly, imposing the duty on all employees will increase the amount of available information on the behavior of the child.

In addition to bolstering availability of information and communication between school administrators, medical service providers, and state officials, a “bonafide good faith” exception should be extended from current mandatory reporting laws to a new at risk behavior reporting law. Just as those who make reports in good faith about neglect are shielded from liability, so too should a teacher or administrator who creates a file for a student that he or she believes displays at risk behavior. In the absence of liability insulating measures, there will be a preference for non-reporting of incidents of at risk behavior, out of fear of liability. Because of the tremendous potential threat to the school staff and children, a fearful bias towards non-reporting will not adequately protect the security of the school. Providing a legal safe haven for teachers and staff will insulate the school, and will serve as an encouraging factor for officials or teachers to make reports, increasing the amount of available information to share.

³⁷ Ibid.

³⁸ 325 ILCS 5-5.

The Benefits of this Scheme will Outweigh the Drawbacks

Problems may exist in such a mental health screening scheme; however they are still outweighed by the benefits the scheme will provide. The problems center on privacy issues and the ineffectiveness of the scheme at stopping violent outbursts. In terms of privacy, a greater amount of information and transparency would aid tracking people in our mental health system. However it may infringe unnecessarily on the privacy of the person receiving the care. This could have the effect of promoting an unconstitutional exercise against an individual. However, with the modification to HIPAA and FERPA's emergency exception, this reporting scheme will likely pass constitutional muster, and not overly infringe on a person's privacy. While it is undeniable that mental health patients have an interest in privacy, those who repeat threatening behavior with or without treatment have an increased likelihood of continuing the at risk behavior. Constitutional privacy in the context of mental health and educational reporting is a balancing test between the privacy right of the individual and the state's interest in security. Providing for reporting where there is repeated instances of at risk behavior allows for a plethora of evidence weighing in favor of school security. This evidence will allow the state to demonstrate a provable and reasonable case in favor releasing information that could aid in the diagnosis, treatment, and prevention of a child displaying at risk behavior.

Similarly, this programs efficacy in preventing violence may be questionable. One large challenge to implementing this scheme is the cause of the at risk behavior. A host of triggers may cause at risk behavior and they are generally incredibly varied. While a teacher may report this behavior, they are not qualified medical professionals and cannot diagnose what medical problems a child may have, and cannot address the root of the symptoms. Therefore, while there

may be an increased amount of information, that information may not be qualitative reliable information, in the absence of a formal medical evaluation. This is a valid concern. However, the goal of these measures is not to transform teachers into psychotherapists. The goal of this scheme is to get information from teachers to psychotherapists and vice versa. Medical health professionals will be able to examine the raw data that is generated by the school. The ability of psychotherapists to analyze the at risk behavior at its onset is the true goal of the scheme, and modifying privacy laws and encouraging reporting will ensure that this behavior is unadulterated by undue delay or redaction when examined by a medical professional. Most importantly, creating a paper trail will create a long-term monitoring document. This document will allow staff and doctors to examine the evolution of symptoms, spot trends in behavior, and better create an effective treatment plan, greatly contributing to repairing the mental health of the child.

Another possible problem with this scheme is it does not far enough to solve the problems causing the at risk behavior. While reporting and sharing of information is generally beneficial, it simply addresses the symptoms through planning, instead of addressing the cause through treatment. It does not actually increase the safety of any students or teachers. This however, is untrue. By exposing records to qualified medical professionals, a better understanding of the precise problems is created. This will allow for more concise and effective planning by better understanding the precise nature of the problem and what specific plan will be most effective to address the problem. This measure will have the effect of increasing school safety. Treatment is the eventual goal and such a reporting scheme is still desirable because it is complementary to a direct safety-focused treatment method already existing in Illinois legislature. Immediate school safety is better left in the realm of current involuntary commitment law. In Illinois, there are mental health facilities, private therapists, and school psychologists that

can often provide adequate care to all but the most severe at risk children. Parents may commit their child, and over the age of 18 a student may be committed by court order if he is reasonably expected to engage in dangerous conduct or unable to understand his need for treatment and would suffer mental or emotional deterioration to a point reasonably initiating dangerous conduct.³⁹ The focus of the reporting scheme is fostering an environment of reporting and awareness so that school facilities can be best informed about how to address the individualized needs of the student, and what individualized dangers he may present, not to involuntarily commit any child displaying the at risk behavior. By providing for increased awareness of at risk children and their behavior, the administrators can make a more informed decision into whether a child has the possibility of dangerous conduct. If they do, their decision to take a further measure is categorically more-well informed than before the reporting scheme. Schools should be provided with straightforward and understandable policy direction by the attorney general that instruct schools on the methods of redress available in case of dangerous students, and plainly define what dangerous conduct includes and when a child may be at risk.

Conclusion

In sum, the current privacy laws and lack of a reporting duty prevent the spread of valuable mental health information and create a bias towards non-reporting. Children displaying at risk behaviors may be a ticking time bomb, and while it is not possible to quickly and expediently solve the underlying issues that cause this behavior, providing adequate notice only bolsters opportunities for treatment. A loosening of current educational and medical privacy laws and imposing a liability free reporting duty can only serve to aid a child displaying at risk behavior.

³⁹ 405 ILCS 5/1-119(3).