

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 714 (Senators Carozza and Salling)
Education, Health, and Environmental Affairs

Institutions of Higher Education - Student Drug Use - Parent Notification

This bill authorizes an institution of higher education to notify the parent or legal guardian of a student who is addicted to drugs, at risk of a drug overdose, or at risk of death from drug use under specified conditions. An institution of higher education must be immune from civil liability in a tort claim under State law for disclosing information in good faith to a parent or legal guardian under the bill. **The bill takes effect July 1, 2019.**

Fiscal Summary

State Effect: None. The bill codifies current practice and federal law.

Local Effect: None. The bill codifies current practice and federal law.

Small Business Effect: None.

Analysis

Bill Summary: Specifically, in order to notify a parent or legal guardian of a student's drug addiction or risk of overdose or death, one of the following conditions must be met:

- the information that will be used to notify the parent or legal guardian is confidential under a privacy law or policy and may be disclosed in accordance with an exception in the law or policy including that (1) the notification is necessary to protect the health or safety of the student or other individuals under 34 Code of Federal Regulation (CFR) 99.36 and (2) the notification is necessary to avert a serious threat to health or safety under 45 CFR 164.512; or

- the student provides written authorization for the institution to notify the student's parent or legal guardian; or
- the disclosure does not contain information that is subject to any privacy law or policy.

Current Law/Background: At the federal level, the Family Educational Rights and Privacy Act (FERPA) of 1974 governs the privacy of student data. When a school provides health care to students in the normal course of business, such as through its health clinic, it is also a "health care provider" as defined by the Health Insurance Portability and Accountability Act (HIPAA) of 1996. The intersection of these two laws and what information may be disclosed and under what circumstances is often a source of confusion. In general, [according to joint guidance from the U.S. Department of Health and Human Services and U.S. Department of Education](#), FERPA applies to most student records. These records will be either "education records" or "treatment records" under FERPA, both of which are excluded from coverage under the HIPAA Privacy Rule, even if the school is a HIPAA covered entity.

FERPA generally prohibits the disclosure by schools that receive federal education funding of personally identifiable information from a student's education records, unless the educational institution has obtained signed and dated written consent from a parent or eligible student or one of FERPA's exceptions applies. Education records include a range of information about a student.

FERPA's exceptions are not always well understood, which leads to some believing that no information about a student may be disclosed without facing a lawsuit, even in the face of health or safety concerns. However, federal regulations specifically address these circumstances. Specifically, under federal regulation 34 CFR 99.36 an institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

In addition, not all information that comes into the hands of an educator, administrator, or other school staff are "education records" subject to FERPA restrictions. Two particular sources of information are outside FERPA's definition of "educational records": (1) information an educator learns through personal observation, peer reports, or social media; and (2) records of school security personnel, which are governed under a specific exception to FERPA. Therefore this information may be disclosed outside of FERPA.

In addition, at postsecondary institutions, medical and psychological treatment records of eligible students are excluded from the definition of "education records" if they are made, maintained, and used only in connection with treatment of the student and disclosed only

to individuals providing the treatment. These records are generally called “treatment records.”

Under FERPA, “treatment records,” by definition, are not available to anyone other than professionals providing treatment to the student, or to physicians or other appropriate professionals of the student’s choice. However, this does not prevent an educational institution from using or disclosing these records for other purposes or with other parties. If the institution chooses to do so, a disclosure may be made to any party with a prior written consent from the eligible student (see 34 CFR § 99.30) or under any of the disclosures permitted without consent in 34 CFR § 99.31 of FERPA.

HIPAA generally requires covered entities to protect individuals’ health records and other identifiable health information by requiring appropriate safeguards to protect privacy, and setting limits and conditions on the uses and disclosures that may be made of such information without patient authorization.

However, like FERPA, there are exceptions that permit the disclosure of health information. Federal regulation, 45 CFR 164.512, permits an institution to disclose protected health information under certain circumstances if the institution believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Under these provisions, a health care provider may disclose patient information, including information from mental health records, if necessary, to law enforcement, family members of the patient, or any other persons who may reasonably be able to prevent or lessen the risk of harm.

Current Practice by Public Institutions of Higher Education

Towson University reports it currently notifies parents of drug and alcohol violations under the FERPA exceptions. The University of Baltimore (UB) advises that it has many adult students; the average age of its undergraduate students is 28 and the average age for its graduate and law programs is even higher. Thus, in these cases it might make the most sense for the institution to contact spouses, partners, or other emergency contacts. UB reports that FERPA already allows for notification of information related to emergencies.

Tort Claims

In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under the Maryland Tort Claims Act (MTCA), the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “waives

sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” *Lee v. Cline*, 384 Md. 245, 262 (2004).

However, MTCA limits State liability to \$400,000 to a single claimant for injuries arising from a single incident. (Chapter 132 of 2015 increased the liability limit under MTCA from \$200,000 to \$400,000 for causes of action arising on or after October 1, 2015.)

Similarly, the Local Government Tort Claims Act limits the liability of a local government (including community colleges) to \$400,000 per individual claim and \$800,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts) for causes of action arising on or after October 1, 2015.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City Community College; University System of Maryland; Morgan State University; Maryland Independent College and University Association; Department of Legislative Services

Fiscal Note History: First Reader - February 18, 2019
an/rhh

Analysis by: Caroline L. Boice

Direct Inquiries to:
(410) 946-5510
(301) 970-5510