

## The Impact of FERPA/HIPAA Regulations on Addressing Trainees with Problems of Professional Competence



1

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2

## Presenters

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3

## Goals for This Session

1. Develop and follow programmatic policies and procedures for addressing trainees with problems of professional competence.
2. Identify the impact of FERPA and HIPAA laws on handling trainees with problems of professional competence.
3. Keep programmatic evaluation and remediation policies consistent with requirements of the *Accreditation Guidelines and Principles*.

4

## Introduction

- Problematic Trainees: Small number, significant challenge among communities of interest.
- Assembly Needs Assessment, 06/2006, N = 257
  - Helping the impaired intern
  - Incorporating self-care into training
  - How to assess competencies of trainees
  - Problematic students: Many move forward in training who should not

5

## Common Goals of the Profession

- Preventing psychologists from doing harm
- Protecting the public we serve and promoting public welfare
- Generating trust among consumers that we are addressing their concerns

6

## Definitional Challenges: From Impairment to Professional Competence

- Impairment a catch-all term – implies diagnosis
- Does not differentiate among diminished functioning and competence not yet achieved, creating problem for training programs and assessors
- Overlaps with use of term in American with Disabilities Act (1990)
- Generally accepted new term: Trainees with Problems of Professional Competence (Elman & Forrest, 2007)

7

## A Developmental Perspective Advisory Committee on Colleague Assistance (ACCA) of BPA

- **Continuum** of psychological problems from a developmental perspective: from naïve and unknowing to persistent denial or resistance to acknowledging a problem or willingness to change.
- Stress>Distress>Impairment>  
Improper Behavior> Intervention/ Sanction  
(O'Connor, 2001)

8

## Shift to Competency Language

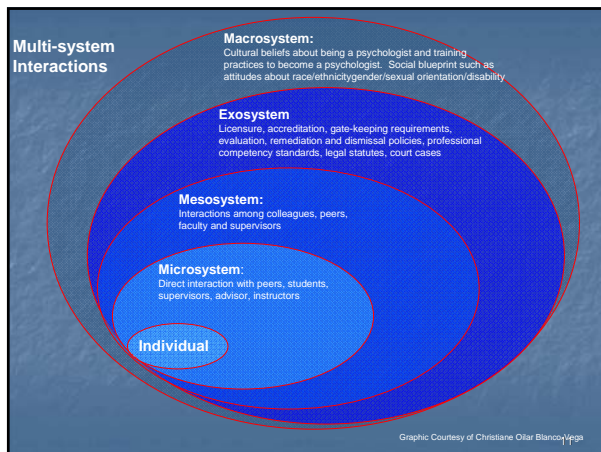
- 2002 National Competencies Conference - focused on identification, training and assessing core competencies in psychology
- All 10 workgroups addressed the issue of trainees making inadequate progress towards developing professional competencies
- Personal psychological healthiness, personal integrity, ethical behavior, interpersonal skills, ability to use supervision reflectively seen as critical components of several competencies
- Practicum Competencies by ADPTC
- Competency Benchmark Project (BEA)
- Competency Assessment Toolkit (in press)

9

## Systemic Connections in Professional Psychology

- Shift from individual case/ one program to a national conversation about shared goals
- Shift from individual programs to recognition of continuum and connections across training and practice, including professional organizations – state and national
- Training programs are, in effect, the prevention program for the field, e.g., learning to have difficult conversations
- Effort to address ecological factors that facilitate or constrain appropriate action

10



## Training as "Gatekeeping"

- Gatekeeping involves:
  - 1) A passage *between*
  - 2) Two or more places *with the*
  - 3) Authority to allow passage, or not, *and the*
  - 4) Responsibility for that decision.

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12

## Commission on Accreditation Guidelines and Principles

### ■ Domain A.6 Eligibility

The program adheres to...formal policies and procedures that govern...student performance evaluation, feedback, advisement, retention and termination decisions....that pertain to faculty and student rights, responsibilities and personal development.

13

## Commission on Accreditation Guidelines and Principles

### ■ Domain E: Student-Faculty Relations

...At the time of admission, the program provides the students with written policies and procedures regarding program and institution requirements and expectations regarding students' performance and continuance in the program, and procedures for the termination of students.

14

## CoA – Domain E, (Cont.d)

- Students receive, at least annually, written feedback on the extent to which they are meeting...requirements and expectations..
- Such feedback should include:
  - ...timely written notification of problems
  - ...guidance re: steps to remediation
  - ...substantive written feedback on success of corrective actions

15

## Ethical Obligation to Address SELF Competence APA Code of Ethics (2002)

### 2.03 Maintaining Competence

2.06 (b) Managing Personal Problems and conflicts by obtaining professional consultation or assistance and/or limiting work related duties

16

## Ethical Obligation to Address COLLEAGUE Competence APA Code of Ethics (2002)

1.04 Informal Resolution of Ethical Violations  
...attempt to resolve an issue by bringing it to the attention of that individual....

1.05 Reporting Ethical Violations  
...if apparent ethical violation has substantially harmed or is likely to harm a person...and is not appropriate for informal resolution.....psychologists take further appropriate action.

17

## Ethical Obligation to Address Competence During Training APA Code of Ethics (2002)

Standard 7.02 states: Psychologists responsible for education and training programs take reasonable steps to ensure that there is a current and accurate description of the program content (including participation in required course- or program-related counseling, psychotherapy, experiential groups, consulting projects, or community service), training goals and objectives, stipends and benefits, and requirements that must be met for satisfactory completion of the program...

18

## Ethical Obligation to Address Competence During Training

- Standard 7.04 states: "psychologists do not require students to disclose personal information...except
- (1) if the program... has clearly identified this requirement in its admissions & program materials
- (2) the information is necessary to evaluate or obtain assistance for students whose personal problems could be reasonably judged to be preventing them from performing their training... activities in a competent manner or posing a threat to the student or others" (APA, 2002, pp. 9-10).

19

## Ethical Obligations to Address Competence During Training

- Standard 7.05 states that when therapy is mandated,
- the student has "the option of selecting the therapy from practitioners unaffiliated with the program,"
- and that "faculty who are or are likely to be responsible for evaluating students' academic performance do not themselves provide that therapy" (APA, 2002, pp. 10).

20

APPIC  
APPLICATION FOR PSYCHOLOGY  
INTERNSHIP (2008) (AAPI)

Section 6: Application Certification

I understand and agree that, as an applicant for the psychology internship program, I have the burden of producing adequate information for proper evaluation of my professional competence, character, ethics, and other qualifications and for resolving any doubts about such qualifications.

21

AAPI Certificate (cont.d)

- I hereby agree that personally identifiable information about me, including but not limited to my academic and professional qualifications, performance, and character, in whatever form maintained, may be provided by my academic program to any internship training site to which I have applied and/or will match. I further agree that, following any internship match, similar information may be provided by the internship site to my graduate program. I understand that such exchange of information shall be limited to my graduate program, any internship site, and/or representatives of APPIC, and such information may not be provided to other parties without my consent. This authorization, which may be revoked at any time, supersedes any prior authorization involving the same subject matter.

22

Role of Diversity

- Intersection with faculty deliberations about trainees with competence problems
- Research shows variation across faculty
- Continuum of faculty conceptualizations from color blind to context/culture attentive
- More variation expressed by faculty who attempted to integrate context-attentive strategies than faculty who ascribed to color-blind approach

(Shen Miller, Forrest & Elman, 2009)

23

The Law of No Surprises

- What is expected of trainees?
- What happens if a trainee falls short of expectations?
- Whether a particular trainee is meeting program expectations
- The status of a trainee in the program vis-à-vis a remediation plan

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24

- Be thoroughly familiar with the process your program has set forth
- Follow your process carefully
- Document that you have followed your process
- Program faculty speak with one, not multiple, voices

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25

## HIPAA AND FERPA: Privacy Alphabet Soup

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26

### Disclaimer:

The following materials are intended to provide general information regarding the provisions of HIPAA and FERPA and their application to trainee situations. This information does not represent legal advice and should not be relied on as such. This presentation is not intended to be a comprehensive statement on the subject but, rather, an overview that provides practical information for the reader. For further information on this subject, it is suggested that participants contact their university or corporate counsel or seek individual legal representation.

27

### Health Insurance Portability and Accountability Act (HIPAA)

- Federal law providing primarily for the portability of insurance.
  - Regulations address the privacy of health information.
- Applies to Health Care Providers and protects health information

28

## Health Insurance Portability and Accountability Act (HIPAA)

- Some functions of educational institutions may be subject to HIPAA privacy requirements
  - Academic Medical Centers
  - Counseling Centers
  - Student Health Centers
- Most academic institutions' functions are NOT covered

29

## FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

- Prevents an educational institution from having a policy or practice of disclosing the education records of students (current or former), or personally identifiable information contained in education records, without the written consent of the student.

30

## HIPAA/FERPA-The Overlap

- If FERPA ≠ HIPAA
- Student Treatment Records:
  - Student treatment records if available only to the people providing treatment ≠ HIPAA or FERPA
  - Student treatment records used beyond treatment
    - Can only be disclosed according to FERPA
    - Once Disclosed, they are outside the HIPAA exclusion
    - SO, Shared treatment records = FERPA
- Employee Health Information ≠ HIPAA

31

## Trainee Records Under HIPAA/FERPA

- **SO: Most trainee documents are NOT HIPAA protected**
  - Academic programs generally aren't covered entities
  - Even if they are covered entities, student records = FERPA (and student records ≠ HIPAA)
  - Records received *from* a covered entity may be HIPAA protected from that entity, but once they come into the program's academic record of the student, they become only FERPA records.

32

### Trainee records that are, or may be, HIPAA protected:

- Treatment records relating to medical or mental health treatment provided *to* a student by a covered entity
  - Must be an entity *other than* the educational institution
- Records relating to non student individuals treated *by* the trainee.
  - Includes only treatment notes or other data pertaining to the individual patient.
  - Supervision notes of the trainer would be FERPA, not HPPA, but should still de-identify the patient.
  - Treatment records re the patient are under the HIPAA protections at the covered entity treatment location

33

### HIPAA PRIVACY REGULATIONS: Core Requirements

HIPAA Covers Protected Health Information held by a Covered Entity

34

### HIPAA PRIVACY REGULATIONS: Core Requirements, Cont.

- Covered Entity: A health care provider who transmits any health information in electronic form in connection with certain financial and administrative transactions.
- Hybrid entity: a covered entity whose covered functions are not its primary functions

35

- Most colleges and universities can qualify as hybrid entities (If HIPAA covered at all)
- Only the parts of hybrid entities that actually perform covered functions need to comply with the substantive requirements of the privacy rule.
- Be aware of institutional policies and "firewalls" separating covered parts of the institution from those that are not covered.

36

## If HIPAA Covered, What is Protected?

- Protected Health Information (PHI): Information transmitted or maintained *in any form* that
  - relates to the health or health care of an individual (including payment); and
  - identifies the individual.

37

## HIPAA PROTECTIONS

- PHI can only be used or disclosed three ways:
  - For treatment, payment and health care operations.
  - With the individual's authorization
  - Without authorization for certain purposes
    - Legal requirements, law enforcement, public health, abuse reporting, etc.
- Have to disclose of PHI to the individual it relates to upon request
  - Except for psychotherapy notes

38

## HIPAA Take Home

- Most important: Be aware of whether you are providing services in a covered entity.
- HIPAA covers specific health information held by a covered entity—not all medical information.
- Most records concerning trainees will not be covered by HIPAA—they will be covered by FERPA.
- HIPAA is a baseline of privacy, not a ceiling
- State laws, licensing board requirements, and institutional policies all may apply and all may raise more significant risks.

39

## HITECH

- Purpose: Development of national interoperable electronic health records network.
  - Included in stimulus package
- Many different elements:
  - Includes privacy and security protections for electronic records, including protections for mental health records
  - Increased notification of breaches
  - Increased enforcement for HIPAA breaches
    - Criminal penalties can be used against an individual, not just entity
  - Provides funding to help implement HIT in Practices
- Doesn't change HIPAA/FERPA analysis

40

## FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

- Prevents an educational institution from having a policy or practice of disclosing the education records of students (current or former), or personally identifiable information contained in education records, without the written consent of the student.

41

## Educational Institution

- Any institution receiving federal funding
- Includes federal grant money, Pell grants, student loan programs
- Almost all institutions in the US are covered by FERPA

42

## Policy or Practice:

- FERPA covers only the policies or practices of an institution
- An accidental, unique or unusual disclosure is not a "practice" or "policy"

43

## FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

- Prevents an educational institution from having a policy or practice of disclosing the education records of students (current or former), or personally identifiable information contained in education records, without the written consent of the student.

44

## Education Records:

- Includes: Virtually ALL Records
- Definition: Documents and other materials which
  - contain information directly related to a student, and
  - are maintained by an educational agency or institution or by a person acting for such institution.
  - Examples: class schedules, emails, disciplinary files, letters of recommendation, transcripts, etc.
- Also can include records in disabilities services units, academic counseling centers, student health centers

45

## Education Records

- Do not Include:
  - Directory information
    - (Nothing harmful or invasive: Student directory info, degrees, etc.)
  - law enforcement records created for law enforcement purposes
  - medical records created by a health care provider for treatment purposes.
  - Employment Records
    - Unless being a student is part of the job description or requirements (e.g. GTA's, work-study, etc.)

46

## Educational Records must be written and maintained documents

- FERPA protects **records**, not confidentiality of information in general
  - Personal observations of a student/concerns about a student are not "records"
  - Oral discussions of students' behavior are not "records"

47

## Educational Records must be written and maintained documents

- FERPA is not implicated UNLESS
  - you are sharing something that has been written down and kept as part of a student's record, OR
  - you are sharing something taken directly from a written record
- Information taken from a source other than educational records is not covered by FERPA
  - Even if the educational records might contain the same information

48

## Exceptions to Educational Records:

### ■ Student Treatment Records:

Student records "...which are made or maintained by a physician, psychiatrist, psychologist, or other professional ... and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, ..."

- NOTE: Once such records are shared, even with the students themselves, then they DO become educational records covered by FERPA.
- Under FERPA means must be available to the student

49

## EXCEPTIONS: DISCLOSURE IS ALLOWED WITHOUT CONSENT TO

- Another Educational Agency or Institution in which the student is enrolled or receives services
- Other School Officials: who have a "legitimate educational interest"
- Parents of a dependent student
- Appropriate persons in Emergency Situations

50

## EXCEPTIONS: CONT.

- Accrediting organizations to carry out their accrediting functions.
- In response to a subpoena
- Disciplinary Action: Information regarding any violation of any law or policy of the institution governing the use or possession of alcohol or a controlled substance may be disclosed to parents ... of a student under 21.

51

## Another Educational Agency/ Institution Where Student is Enrolled or Receiving Services

- Covers any institution that receives funds from DOE: pretty much every institution of higher education
- Allows sharing of student records regarding students in joint degree programs, internship programs, or other dual educational arrangements
- Requires notification to student of disclosure
  - Either as part of school's annual notice of practices or at the time of the disclosure

52

### Other School Officials With a Legitimate Educational Interest:

- Can be very broad
- Generally includes people who are:
  - Employed by the university
  - A person or company with whom the university has contracted
  - A member of the board of trustees
  - A student on an official committee
  - Other similar individuals
- Legitimate educational interest:
  - The official needs to see the record in order to fulfill his or her professional responsibilities for the University.

53

### Other School Officials With a Legitimate Educational Interest:

- New Regulations Clarify: A university can outsource the practical training of students, and
- Information may be disclosed to the hospital, clinic or business that does that training as "other school officials"
- Contracts with those entities must reflect that the information is owned by the college/university and subject to FERPA.
- School itself must define list of officials: Check your definitions, get this included

54

### Emergency Situations: RULES

- Articulable and significant threat to the health or safety of the student or others
  - Need to record the "articulable threat"
- Releases should be narrowly tailored
- Appropriate persons: Parties who can address the specific emergency; typically law enforcement officials, public health officials, trained medical personnel
  - New Regulations clarify that parents can be "appropriate persons."

55

### Emergency Situations: Action

- Good Faith Standard
- New regulations: Deference to the institution decision maker
  - Based on the information available at the time of the determination, there must only be a rational basis for the determination
- Disclosures based on reason and rational argument are unlikely to cause problems
- Which case would you rather be defending?

56

## Consent

- Often easiest and safest way to deal with concerns
- Waiver needs to include
  - Records that may be disclosed
  - Purpose for which they be disclosed
  - People or classes of people to whom they may be disclosed
- NOTE: Students may *not* be required to waive their FERPA rights as a condition for acceptance into an educational institution or receipt of educational services.

57

## STUDENTS' RIGHTS UNDER FERPA

- Inspect and review their records
  - Including shared treatment records
- Request an amendment to their records
- Place a note in their education record if amendment denied
- Consent to disclosures
- File a complaint with the DOE

58

## Enforcement:

- Risk is Having Federal Funds Withheld
- Enforced by the Department of Education
  - DOE can investigate and review potential violations
  - If it finds a violation, DOE must recommend a compliance plan and provide reasonable time for the institution to come into compliance
  - *Only* if the institution does not come into compliance can funds be terminated

59

## Reality of Enforcement

- Termination of Funds has never happened
- There is no private right of action under FERPA
- State Laws can be more strict than FERPA
  - Disclosure that does not violate FERPA could still lead to state law defamation or libel claims.
  - State Privacy laws may provide greater protection to students
    - Remember: faculty at public institutions are government actors

60

## FERPA TAKE HOME

- FERPA covers records, not all information
- Student records must be kept confidential except in limited circumstances
- Three major exceptions are:
  - Another academic program student attends
  - Other School Officials (incl. Contractors)
  - Health and Safety emergencies
- Consent is easy and practical
- If in doubt, ask for guidance before disclosing

61

## Implementing Action Plans for Remediation – Within HIPAA & FERPA Guidelines

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62

## Meeting the Spirit of the Guidelines & Principles for Creating an Environment of Trust and Respect with Trainees

- Remediation Suggestions
- Formal Actions
  - Trainees with Competence Problems
  - Guidelines for Supervision & Documentation
  - Training Resources
- Future Directions
- Vignettes

63

## REMEDIATION CONSIDERATIONS *(Lamb et al., 1987)*

- Once problems have been identified, there need to be several meaningful ways to address them
- These need to be clearly stated and presented in a written document and the remediation plan needs to be discussed and agreed upon
- Possible and perhaps concurrent courses of action designed to remediate problems include, but are not limited to, the following:

64

## REMEDIATION CONSIDERATIONS

- Increasing supervision, either with the same or other supervisors
- Changing the format, emphasis, and/or focus of supervision
- Reducing and/or shifting the trainee's workload
- Requiring specific academic coursework
- Providing additional mentoring
- Recommending and/or requiring personal therapy in a way that all parties involved have clarified the manner in which therapy contacts will be used in the evaluation process
- Recommending, when appropriate, a leave of absence and/or a second internship or residency
- Collaborating with the graduate department on the remediation plan in accord with the CCTC Communication Guidelines

65

## REMEDIATION CONSIDERATIONS

When a combination of the above interventions do not, after a reasonable time period, rectify the problem, or when the trainee seems unable or unwilling to alter his/her behavior, the program may need to take more formal action in accord with their due process guidelines

66

## FORMAL ACTIONS (Lamb et al., 1991)

- Probation
  - In writing,
    - Identify specific behaviors or areas of professional functioning of concern
    - Directly relate these behaviors to written evaluations
    - Provide specific ways deficiencies can be remedied
    - Identity specific probationary period
    - Stipulate how functioning will change at site during probation, if applicable
    - Reiterate the availability of due process procedures

67

## FORMAL ACTIONS

- Giving the trainee a limited endorsement, including the specification of those settings in which he/she could function adequately
- Terminating the trainee from the program and communicating this to the appropriate parties
- Recommending and assisting in implementing a career shift for the trainee

\*All of the above steps need to be documented appropriately and implemented in accord with the due process guidelines

68

## TERMINATION

*(Lamb et al., 1991)*

- Steps to take prior to notifying trainee
  - Review agency and institutional implications of the decision
  - Letter sent to trainee and other relevant parties reiteration probationary conditions, trainee's response, and reasons for dismissal
  - How and when the trainee's status will change at the site needs to be determined

69

## TERMINATION

- Steps (cont.)
  - Trainee must be given the opportunity to appeal in accord with due process guidelines
  - Proposed action and corresponding written statement should be reviewed in consultation with relevant internal and external parties
  - Consult with legal counsel at the facility
  - Notify up the chain of command

70

## TERMINATION

- Once these steps have been taken
  - Hold meeting between the trainee and relevant training and site personnel
  - Inform trainee of the decision
  - Provide a written statement
  - Provide statement of revised responsibilities
  - Remind trainee of due process guidelines

71

## Scenarios for FERPA/HIPAA

72

## Student #1

Your psychology trainee has been identified as an individual who the staff are concerned about because of a bit of a characterological issue. The student is argumentative and usually goes his own way, rarely working with others and usually being somewhat condescending to faculty. The faculty have discussed these concerns over the past year and have feedback from fellow students and 1-2 practicum supervisors. The student has been making Bs or As in all his courses including practicum. The student is ready to go out on internship and the training director has called to discuss the student's goals for training and any input the program can offer about the student.

What information about the student can the doctoral program share with the internship training director?

73

## Remediation Plan

When this information/issue is identified for the student how can the program intervene?

76

## Remediation Plan

- What competencies are involved for this student?

77

## Trainee Remediation Plan

- Date of Remediation Plan Meeting:
- Name of Trainee:
- Primary Supervisor/Advisor:
- Names of All Persons Present at the Meeting:
- All Additional Pertinent Supervisors/Faculty:
- Date for Follow-up Meeting(s):
- Circle all competency domains in which the trainee's performance does not meet the benchmark:
- Foundational Competencies: Professionalism, Reflective Practice/Self-Assessment/Self-care, Scientific Knowledge and Methods, Relationships, Individual and Cultural Diversity, Ethical Legal Standards and Policy, Interdisciplinary Systems

78

## Trainee Remediation Plan (cont.d)

- Functional Competencies: Assessment, Intervention, Consultation, Research/evaluation, Supervision, Teaching, Management-Administration, Advocacy
- Description of the problem(s) in each competency domain circled above:
- Date(s) the problem(s) was brought to the trainee's attention and by whom:
- Steps already taken by the trainee to rectify the problem(s) that was identified:
- Steps already taken by the supervisor(s)/faculty to address the problem(s):

79

### Remediation Plan

Competency Domain/ Essential Components	Problem Behavior	Expectations for Acceptable Performance	Trainee's Responsibilities/ Actions	Supervisor's/ Faculty Responsibilities/ Actions	Timeframe for Acceptable Performance	Assessment Methods	Date of Evaluation	Consequences for Unsuccessful Remediation

80

I, \_\_\_\_\_, have reviewed the above remediation plan with my primary supervisor/advisor, any additional supervisors/faculty, and the director of training. My signature below indicates that I fully understand the above. I agree/disagree with the above decision (please circle one). My comments, if any, are below. *(PLEASE NOTE: If trainee disagrees, comments, including a detailed description of the trainee's rationale for disagreement, are REQUIRED).*

Trainee Name \_\_\_\_\_ Date \_\_\_\_\_ Training Director Date \_\_\_\_\_

Trainee's comments (Feel free to use additional pages):

All supervisors/ faculty with responsibilities or actions described in the above remediation plan agree to participate in the plan as outlined above. Please sign and date below to indicate your agreement with the plan.

81

### Remediation Plan Continued

#### SUMMATIVE EVALUATION OF REMEDIATION PLAN

Follow-up Meeting(s):  
Date (s):  
In Attendance:

Competency Domain/ Essential Components	Expectations for Acceptable Performance	Outcomes Related to Expected Benchmarks (met, not met)	Next Steps (e.g., remediation concluded, remediation continued and plan modified, next stage in Due Process Procedures)	Next Evaluation Date (if needed)

82



### Student #3

The parent of one of your graduate students is concerned about the student's behavior and lack of communication with the parents. You have noticed that the student has changed over the last semester. He is dressing much more slovenly, appears to be unwashed on certain days, and seems depressed. His grades are slipping. Can you disclose this information to the parent? Must you disclose to the parent?

88

### Student #4

You have an intern who seems fed up with his graduate program. He has said nothing specific but has expressed his disappointment that his advisor is rarely available and does not return phone messages or emails and has refused to sign up for Twitter. He has made statements to his fellow interns that some housekeeping needs to be done and he is just the person to do it. His fellow interns have told you that they know he owns a gun, because he is an avid hunter and carries several in his trunk. You know he plans to go visit his home program this week, and other interns have told you that he thinks this would be a good time to get the needed "cleanup" started. You have tried to talk to him about his concerns and plans, but he has refused to discuss it with you. In discussing the situation with other supervisors, one of them mentions that her supervision notes show that he has been making such claims throughout the year in their discussions, but they seem to be getting more frequent.

Are you allowed to disclose this information to the graduate program?

91

### Student #5

Your student has a medical condition that affects her energy level. She has provided you with documentation from her doctor explaining her absences from class and need for extra time on exams. Are you allowed to disclose this information to the internship program to which the student is applying?

94

### QUESTIONS?



97

**THE IMPACT OF FERPA/HIPAA REGULATIONS ON ADDRESSING  
TRAINEES WITH PROBLEMS OF PROFESSIONAL COMPETENCE**

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