

American Association of Collegiate Registrars and Admissions Officers



One Dupont Circle, NW, Suite 520 / Washington, DC 20036-1135
(202) 293-9161 Main / (202) 872-8857 Fax
www.aacrao.org

October 1, 2015

Ms. Kathleen M. Styles
Chief Privacy Officer
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Subject: AACRAO Comments Regarding Guidance on the Disclosure of Student Medical Records, published in the Dear Colleague Letter dated August 18, 2015

Dear Ms. Styles,

On behalf of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), I write to respectfully submit the following comments on the Department's August 18, 2015 Dear Colleague Letter. The draft guidance reviews and clarifies the obligations of institutional school officials under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g and the regulations in 34 C.F.R. Part 99, to protect students' education records from disclosure without consent, and provides guidance more specifically on the disclosure of student medical records.

AACRAO is a nonprofit association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and 40 other countries. The vast majority of our individual members are campus officials with direct responsibility for admissions, recruiting, academic records, and registration functions. Because they serve as custodians of education records for current and former students, our members are particularly knowledgeable about privacy issues in general, and specifically about information security and privacy requirements of Federal and State laws. Compliance with FERPA has long been a primary area of professional jurisdiction for AACRAO members, who are often the leading FERPA experts on their campuses.

Since its original enactment in 1974, and through the numerous amendments, court decisions, and administrative policy revisions that have further refined that original construct over the years, AACRAO has been constructively engaged with the Department to promote FERPA compliance and achieve the right balance between individual educational privacy rights and the rights of third-parties to obtain access to data for appropriate purposes.

AACRAO supports the Department's efforts to remind institutions of their duty to safeguard the management of students' education records and to impose a high standard for release of those records. We agree that disclosure exceptions described in 20 U.S.C. 1232g (b), (i), and (j) and 34 C.F.R. 99.31, as referenced and outlined in the Dear Colleague Letter, serve as a reasonable and responsible guide for institutions. We are, however, concerned that one aspect of the proposed guidance would create unnecessary confusion for well-intentioned school officials and unintended consequences for institutions as well as students.

The letter states that, in cases where litigation occurs between the institution and the student, FERPA's school official exception to consent should be construed to offer protections that are similar to those provided to medical records in the context of litigation between a covered health care provider, such as a hospital, and a patient under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 C.F.R. 164.501, 164.506, and 164.512(e).

While AACRAO favors stricter scrutiny with regards to the disclosure of student records, we are alarmed by the injection of HIPAA standards to records traditionally governed by FERPA. This recommendation conflicts with joint guidance previously issued by the Departments of Education and Health and Human Services that advises institutions to defer to FERPA when student medical records are involved. Further, the HIPAA Privacy Rule, administered by the Department of Health and Human Services, specifically excludes from the definition of protected health information education records and medical treatment records defined under FERPA (34 C.F.R. 99.3). See 45 C.F.R. 160.103. The HIPAA Privacy Rule does not cover such records because Congress, through FERPA, specifically addressed how these records should be protected. We believe that the interpolation of HIPAA standards would create confusion among school officials with little familiarity of the health information privacy law. Institutions would be burdened with providing training and resources for HIPAA compliance despite the fact that the disclosure exceptions under FERPA already provide sufficient safeguards to protect students' privacy rights. In serving as good stewards of educational records, our members are historically conservative in their disclosures of student information. Thus, the draft guidance would impose additional compliance requirements with regard to education records without providing any additional privacy protections to students.

Additionally, in response to the specific question on which the Department of Education seeks comments, AACRAO is concerned that the proposed injection of HIPAA would have a chilling effect on the work of institutions' campus risk assessment teams. School officials could be reluctant to share relevant student education records in the course of considering at-risk students out of fear that those disclosures would place them out of compliance with HIPAA standards. Further, institutions could be reticent to share pertinent information in the case of a campus health and safety emergency. We believe that FERPA's exception to consent for the release of student education records, including medical records, to school officials with a legitimate educational interest, 20 U.S.C. 1232g(b)(1)(A) and 34 C.F.R. 99.31(a)(1)(i)(A), and to appropriate parties if a student poses an articulable and significant threat to self or the health or safety of other individuals, 34 C.F.R. 99.31(a)(10) and 99.36, provides a thoughtful and reasonable standard with which institutions comply. The draft guidance, as currently recommended, would confuse and impede school officials' ability to determine when a disclosure of education records under the school officials or health or safety emergency exceptions would be appropriate.

Finally, AACRAO believes that such a substantial change in the interpretation of FERPA should not be implemented informally through a Dear Colleague Letter. The Department lacks the legal authority to rewrite FERPA without a formal regulatory review process. As a result of the reasons outlined above, we strongly urge the Department to reconsider its proposal to apply HIPAA standards to student education records, and, if the agency intends to move forward with such a change, to do so through the appropriate regulatory processes.

AACRAO would like to thank you for your consideration of our views regarding the draft guidance on the disclosure of student medical records. We appreciate the Department's willingness to work with the higher education community and stand ready to work with you to advance the interests of our nation's students.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Reilly". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Michael Reilly
Executive Director