



October 2, 2015

Kathleen M. Styles
Chief Privacy Officer
United States Department of Education
400 Maryland Avenue, SW
Washington, D.C., 20202

Dear Ms. Styles,

On behalf of the more than 170,000 bipartisan members and supporters, over 1,000 branches, and 800 college and university partners, of the American Association of University Women (AAUW), I would like to thank you for accepting comments regarding the U.S. Department of Education's recent Dear Colleague Letter regarding the Family Educational Rights and Privacy Act (FERPA). AAUW is particularly interested in providing input because of the intersection between education records, treatment records, and the privacy needs of survivors of sexual harassment and violence.

AAUW's own research revealed that nearly two-thirds of college students experience sexual harassment.¹ In addition, a 2007 campus sexual-assault study by the U.S. Department of Justice found that around 28 percent of women are targets of attempted or completed sexual assault while they are college students.² All students, but particularly those impacted by sexual harassment and violence, should have access to medical and counseling care. When that care occurs on-campus it must be provided in a manner that appropriately protects students' privacy. Students will not access the services they need if they fear schools will share personally identifying information and their medical or counseling records. In addition, students and employees must clearly know the very few circumstances where it is appropriate for schools to release medical and counseling records without consent.

AAUW supports the Department for taking additional steps to answer these questions by clarifying schools' existing obligations under FERPA to ensure that student medical and counseling records are not disclosed without consent. While the Department's Dear Colleague Letter (DCL) provides important information and specifics, discussed below, we believe that the Department must more clearly state to schools that FERPA and its regulations do not preempt any state laws that may provide more privacy protections for medical and counseling records. This point, which appears on page 3 of the DCL, should be reiterated to schools to underscore the state privacy protections that impact the professionals they employ as well as the students seeking care.

FERPA's Litigation Exception

We agree with the Department's statement that, "in cases where litigation occurs between institution and students, FERPA's school official exception to consent should be construed to offer protections that are similar to those provided to medical records... under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)." In addition, we appreciate the Department's clarification that, "without a court order or written consent, institutions that are involved in litigation with a student should not share student

medical records with the institution's attorneys or courts unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment, and even then disclose only those records that are relevant and necessary." While the details provided in the DCL related to FERPA's litigation exception are helpful, we urge the Department to provide additional clarity to schools. For example, if a student alleges the medical or counseling services received were inadequate, then the release of relevant records may be appropriate so long as it also complies with state privacy laws. But, if a student alleges a traumatic event and ongoing symptoms resulting from a school's indifference but not from her counseling or medical care, those records may not be covered by the litigation exception and consent or a court order may be necessary.

FERPA's Legitimate Educational Interest Exception

AAUW also supports the Department's clarifying information that FERPA's school official exception does not permit appropriate officials to review all records for all students, and only permits officials to access the information relevant to their educational purpose. As the DCL explains, employees with access to one specific piece of information around accommodations, would not necessarily have a legitimate educational interest in accessing other medical records or counseling information for students.

AAUW also supports the application of reasoning similar to the litigation exception here to the legitimate educational interest exception. Attorneys at colleges and universities do not have a legitimate educational interest in records relating to students engaged in ongoing litigation with schools, unless that litigation regards the medical treatment itself or payment for that treatment. The way in which medical and counseling records are regarded through FERPA's exceptions should be consistent, as clarified in the DCL. Again, this exception to FERPA does not preempt state privacy laws, which schools must consult.

Campus Threat Assessment Teams

The work of campus threat assessment teams to help gather information, evaluate facts, and determine safety issues, is valuable to the wellbeing of the entire school. As the DCL correctly explains, a counselor or medical professional with concerns about a student's behavior can share records with the team under the school official exception. AAUW supports the DCL's explanation that this flexible standard generally, "does not allow for a blanket release of personally identifying information from a student's education records, including medical records." In addition, "in many cases, providing actual records, such as a counselor's session notes, is not necessary... a counselor's summative statement of the relevant and necessary information will suffice." AAUW believes that this information allows schools to utilize threat assessment teams but balance their needs with privacy requirements. However, we urge the Department to provide additional examples, especially related to sexual violence, to illuminate for schools where public safety disclosures are specifically necessary and how they can minimize the release of personally identifying information regarding victims and survivors involved in incidents.

Finally, while the above scenarios most comport with institutions of higher education and their on-campus provision of medical and counseling care to students, AAUW urges the Department to consider that where students under-18 seek care from professionals employed by their school, their medical and counseling records be handled similarly – requiring consent from parents/legal guardians or a court order to be shared. Where assessments, individual education plans, and accommodations based on counseling or medical care are needed, consent should be given for those records to be used and schools should take great care to access only the appropriate information needed for legitimate educational purposes.

Thank you for accepting comments regarding the U.S. Department of Education's recent Dear Colleague Letter regarding the Family Educational Rights and Privacy Act (FERPA). We know that ultimately this information will be most meaningful for students who access medical and counseling care if it is accessible and understandable. Moving forward from expanding on and improving the Dear Colleague Letter, we urge

the Department to work with schools to translate these privacy protections, and exceptions to consent, into disclosures that students understand. We all share the goal of wanting to ensure that students can access the care they need with an expectation of privacy and look forward to working together to achieve that goal.

If you have any questions or need additional information, feel free to contact me at 202/785-7720, or Anne Hedgepeth, government relations manager, at 202/785-7724.

Sincerely,



Lisa M. Maatz
Vice President of Government Relations

¹ AAUW. (2005). Drawing the Line: Sexual Harassment on Campus. history.aauw.org/aauw-research/2006-drawing-the-line

² Christopher P. Krebs, Ph.D. ; Christine H. Lindquist, Ph.D. ; Tara D. Warner, M.A. ; Bonnie S. Fisher, Ph.D. ; Sandra L. Martin, Ph.D. (December 2007). The Campus Sexual Assault (CSA) Study, Final Report. NIJ Grant No. 2004-WG-BX-0010. www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.