DARTMOUTH COLLEGE
Office of the General Counsel

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Kathleen Styles
United States Department of Education
400 Maryland Ave SW
Washington DC 20202-4500

Dear Ms. Styles:

Thank you for the opportunity to submit comments on the August 18, 2015 draft Dear Colleague letter regarding the disclosure of student medical records, including counseling records, to legal counsel. For the reasons set forth below, we suggest that you either decide not to issue the letter or substantially revise it because of our concern about the unintended consequences your letter could create in its current form. In addition, as set forth below, while we are aware of the attention that this issue received following one case, we believe that the outcome you are hoping for – appropriately protecting the privacy of student health records - has been achieved without this guidance.

Dartmouth provides the following comments regarding the Draft Dear Colleague letter:

First, we do not believe that the letter is necessary. In your draft you state:

> When institutions chose to disclose PII from education records, including medical records, without consent, they should always take care to consider the impact of sharing and only disclose the minimum amount of PII necessary for the intended purpose. When making these decisions involving student medical records, the Department recommends that institutions should give great weight to the reasonable expectations of students that the records generally will not be shared, or will be shared only in the rarest of circumstances, and only to further important purposes, such as assuring campus safety.

While your draft suggests it is not the case, we believe that institutions are already conducting themselves in the manner you recommend. While we are aware of one dispute which received attention in the media this year (http://chronicle.com/article/Just-How-Private-Are-College/228229/), we believe that one dispute is not sufficient reason for the Department to issue a letter. At Dartmouth, and we believe at other institutions like Dartmouth, the medical staff and the legal staff operate consistent with the authority provided by FERPA, as well as other legal obligations, such as individual state patient privacy laws and the applicable Code of Professional Responsibility for attorneys. These obligations combine to insure that information that a student shares with a medical professional is not inappropriately disclosed to others, the stated goal for your letter. In a situation where your goal has

already been met, the letter is unnecessary. Moreover, by issuing a letter, you are suggesting that you have reason to believe that institutions are not conducting themselves in the manner you recommend. In the absence of complaints against a wide range of institutions, issuing a letter that makes such a suggestion would be inappropriate.

Second, the letter, as drafted, does not provide more clarity. Specifically, while the draft acknowledges that "[a]ttorneys representing institutions in legal proceedings generally function as school officials under FERPA" your letter does not address what Dartmouth believes are fairly common occurrences on campuses which provide medical services to students. Specifically, there may be situations where an attorney is a "school official" in the absence of "legal proceedings." The occurrences include the need for the medical staff to obtain legal advice and the threat of litigation. These occurrences are routinely and effectively addressed without further guidance from your office. For example, our medical staff may contact us to help them determine whether or not they should support the student's need for accommodation of a disability and the particular accommodation. The medical staff may contact us for advice on compliance with an internal policy or compliance with a legal obligation outside of the "threat assessment category" such as what information they can share with a parent and/or when they have an obligation to make a report to law enforcement or another agency. The medical staff may contact us about negotiating the interests of multiple students in a complex situation. Finally, the medical staff may contact us to help resolve internal conflicts about access to their records. These are situations where attorneys should have access to medical records as "school officials" even in the absence of "legal proceedings." (Indeed, we believe that institutions covered by the HIPAA Privacy Rule allow legal counsel to review confidential medical records to provide advice and/or to resolve disputes in similar circumstances in the absence of "legal proceedings.") By not addressing these occurrences in your letter, you leave open the possibility that students will understand that it would be inappropriate for medical records to be shared with an institution's legal counsel under these circumstances.

Furthermore, the examples set forth above reflect the fact that our medical staff are "clients" of our office. Thus, they are entitled to share medical information with our office so that we can provide legal advice to them and we are bound to keep the information they provide to us confidential. This right exists outside of any rights provided by FERPA. When our clients share information with us in order to obtain our advice, the information and the fact that they are seeking advice is covered by the "attorney-client" privilege and our work for them is governed by the applicable Code of Professional Responsibility. By failing to mention the existence of the attorney/client relationship and the attorney-client privilege in your letter, you suggest to the reader that the Code which guides our conduct does not apply to the relationship between college counsel and our medical staff. It is important that you do not create this incorrect impression.

Finally, your letter fails to recognize that it may be appropriate for legal counsel to have access to medical records prior to the initiation of legal proceedings. In the current legal climate, it is common for a college or university to receive notice of a possible lawsuit prior to the actually initiation of the suit. The notice is typically provided to see if a matter can be resolved prior to litigation. Counsel for a college or university would typically seek to gather the relevant documents controlled by the school in order to evaluate the merit of the claim. As written, your letter suggests that prior to the initiation of a lawsuit, it would be inappropriate for medical information that is relevant to the dispute to be shared

with college or university counsel. If this interpretation were confirmed, it could prevent us from fully evaluating the merit of case at a pre-litigation stage of the process. Moreover, your letter does not define "legal proceedings," but the context suggests that you are focused on litigation in a court-of-law. There are times when issues come up before administrative agencies or are addressed through alternative dispute litigation. Your limited language could be read to mean that it would be inappropriate to access medical records outside of the court-based litigation context. Again, this concern could be avoided entirely be confirming that attorneys performing their duties as counsel to the medical staff are entitled to access records consistent with the Rules of Professional Conduct.

In light of these concerns, we believe that your draft letter should be withdrawn or in the alternative, significantly revised. If it is re-written, we request that it confirm that information, including medical records, can be shared with legal counsel who are advising institutional employees on a legal issue covered by the "attorney-client" relationship. In addition, we request that the letter confirm that there may be circumstances where it is appropriate for medical records to be shared with legal counsel as a "school official" prior to the initiation of legal proceedings. If your letter does not mention these two practical concerns, it will create confusion for institutions and for students.

Conclusion

For the reasons set forth above, we encourage you not to issue the letter or significantly re-write it in the manner outlined above. Please let us know if you have any questions.

Sincerely,

Kevin D. O'Leary

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