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Via email: FERPA.Comments@ed.gov

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

Re: Comments on Protecting Student Medical Records

Dear Ms. Styles,

The Law Office of Karen Bower, a civil rights law office which focuses on representing students with mental illness in higher education, and the Jed Foundation, the nation's leading organization working to promote emotional health and prevent suicide among college students, are pleased to submit the following comments on the draft Dear Colleague Letter to School Officials at Institutions of Higher Education dated August 18, 2015 and the proposed guidance on Protecting Student Medical Records.

For more than ten years Karen Bower has represented students with mental illness in federal court and before the Department of Justice and the Department of Education Office for Civil Rights and Office of Family Policy Compliance. Previously, she was a senior staff attorney at the Bazelon Center for Mental Health Law, and was the primary drafter of *Supporting Students – A Model Policy for Colleges and Universities*. She is a member of the Jed Foundation Board of Advisors and is co-author of the "Legal and Ethical Issues in College Mental Health" chapter in Mental Health Care in the College Community, Jerald Kay and Victor Schwartz, Eds. (2010).

Dr. Victor Schwartz is the Medical Director of the Jed Foundation and clinical associate professor of psychiatry at NYU School of Medicine. Dr. Schwartz previously served as Dean of Students for Yeshiva University. He was also director of Yeshiva's Counseling Center. He served as chief psychiatrist and medical director for NYU's University Counseling Service for 14 years and was assistant director of residency training in psychiatry at NYU Medical Center. Dr. Schwartz is a Distinguished Fellow and served as a member of the Presidential Task Force on College Mental Health. He has been a co-chair of the working group on law and college mental health at the American Psychiatric Association and a co-chair of the Committee on the College Student of the Group for the Advancement of Psychiatry.

Overall, we believe that the Department's proposed Dear Colleague Letter provides meaningful guidance on minimizing the unnecessary sharing of student Personally Identifiable Information when there is litigation between the student and institution.

In the education context, privacy is critical. Failure to adequately protect mental health information can result in negative consequences for students, can erode confidence in university health care clinics and counseling centers, and may discourage students from using available services and getting needed treatment. We therefore applaud that portion of the guidance which clarifies 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 to the litigation."

However, throughout the Background section of the guidance, the general reference to "medical records" and the lack of distinction between treatment records and non-treatment medical records is confusing and raises significant concerns that confidential student medical and mental health information will be improperly shared. For example, paragraph 2 on page 2, which states, "Under FERPA, medical records (including counseling records) are generally considered to be education records" is confusing, blurs the distinction between treatment records and education records, and minimizes the state law and professional ethics protections attendant to counseling center records. This lack of clarity suggests that students will not receive the same confidentiality protections afforded to students who seek off-campus medical and mental health care and will discourage students from seeking on-campus medical and mental health treatment.

In light of the importance of safeguarding student privacy and ensuring that medical and mental health information is not improperly disclosed, we recommend that the draft Dear Colleague Letter clarify the distinction between those medical records which are treatment records, and those that are education records, and consistently refer to medical records which are education records as "non-treatment medical records."

FERPA only applies to education records. The definition of education records specifically excludes treatment records. 20 U.S.C. § 1232g(a)(4)(B). FERPA provides, 34 CFR § 99.31(a), that "<u>An educational agency or institution may disclose</u> personally identifiable information from <u>an education record</u> of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions: [16 enumerated exceptions] (emphasis added)." Therefore, by the plain language of the statute, records which meet the definition of treatment records are not education records, are not governed by FERPA, and cannot be disclosed by the institution without consent pursuant to the FERPA enumerated exceptions.

Pursuant to state privacy rules and professional ethics, treatment records cannot be disclosed by treatment providers without consent unless the treating professional believes there is a substantial and imminent risk that his or her failure to disclose information will result in serious physical harm to self or others (ie. The Tarasoff standard). Since most health and counseling center treatment records are not disclosed (by consent or pursuant to Tarasoff), they are generally not education records. The guidance implies otherwise. Furthermore, even when treatment records are disclosed, state law offers protection from re-disclosure.

Given the sensitivity and heightened confidentiality of treatment records, we suggest that the guidance first define treatment records, then emphasize that most medical and mental health records are <u>not</u> education records unless they have been shared by consent or through extraordinary circumstances. We further suggest that the guidance make clear that if students disclose the treatment records for any purpose other than treatment, they will become education records (but will still be regulated by state law relevant to clinical records). Finally, since terms such as "education records, including medical records" are unclear, we suggest that the guidance distinguish those health records which are education records from those that are treatment records by using the term "non-treatment medical records" to refer to education health records.

For example, paragraphs 2 and 3 on page 2 would read as follows (changes in bold):

"Treatment records" are excluded from the definition of "education records" under FERPA. A medical and mental health counseling record is considered to be a "treatment records" if it meets three criteria. A treatment record must be: 1.) Directly related to a student who is eighteen years of age or older, or is attending an institution of postsecondary education; 2.) Made or maintained by a physician , psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional capacity, or assisting in a paraprofessional capacity; and 3.) Made, maintained, or used only in connection with the provision of treatment to the student, and not available to anyone (including the student) other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice . 20 U.S.C. § 1232g(a)(4)(B)(iv).

Under FERPA **non-treatment medical records** (including **non-treatment** counseling records) are generally considered to be education records. **In addition, medical records which a student has previously disclosed to the institution him/herself are education records (e.g. where the student has requested a disability accommodation).**

If **a student** discloses a student's **treatment** record for any purposes other than those specified in item #3 above (**including obtaining a copy him or herself**), the record will no longer fall under the treatment record exception, and will become an education record under FERPA. As an education record, the medical record could also be disclosed under any of FERPA's exceptions to consent (but note that privacy of these records would continue to be governed by local laws addressing privacy of clinical records). As discussed below, the Department believes that these exceptions should be construed in a balanced manner protecting student health, safety, and privacy interests.

Similarly, the first full paragraph on page 3 would read: "When making these decisions involving education records including **non-treatment** student medical records, the Department recommends that institutions 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. Failure to meet those expectations could deter students from taking advantage of critical campus resources, and could undermine the integrity of patient-doctor/provider relationship as well a trust between students and the institution."

The proposed recommendation are consistent with the law, make clear the substantial protections afforded treatment records, and clarify that the FERPA exceptions do not apply to counseling center treatment records in general.

Thank you for the opportunity to comment on this proposed guidance.

Sincerely,

Karen Bower
Law Office of Karen Bower

Victor Schwartz
Medical Director, The JED Foundation