American Council on Education™
Leadership and Advocacy

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October 2, 2015

Kathleen Styles
Chief Privacy Officer
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-4500

Re: August 18, 2015 Dear Colleague Letter Regarding Student Medical Records

Dear Ms. Styles:

On behalf of the undersigned associations, I write to offer our comments on the Department of Education's August 18, 2015 draft Dear Colleague Letter (or DCL) to institutions of higher education regarding the handling of student medical records. As the representatives of the colleges and universities that will be directly impacted by the proposed guidance, we thank you for seeking input informed by practical experience from our nation's campuses, and we appreciate the opportunity to share the concerns we have with the approach you have offered.

We empathize with your goals in issuing the DCL, and strongly agree with your statement that "protecting students' privacy and ensuring colleges and universities promote a safe and healthy campus for their students has never been more important." It is clearly an appropriate use of a DCL to remind institutions of their obligations under the Family Educational Rights and Privacy Act (FERPA), and to emphasize strict scrutiny of institutions' handling of education records. However, the draft DCL exceeds this reasonable scope, and instead attempts to address a nonexistent "loophole" in FERPA through the inclusion of standards from the Health Insurance Portability and Accountability Act (HIPAA). Our members have serious concerns with this approach.

First and foremost, we believe that the approach taken in the DCL will result in significant confusion in the handling of education records, with negative consequences for students and campuses. Currently, FERPA provides a strong and clear framework to govern non-consensual disclosure of education records (including medical records) and prevent the misuse of those records, and institutions have a fundamentally clear understanding of their obligations in this area. In contrast, incorporating HIPAA standards (as the DCL proposes), would disrupt this understanding and would lead to confusion over what constitutes compliance with the disclosure requirements of HIPAA and FERPA. Most institutions are not familiar with HIPAA, in part because existing law and regulations

directs that FERPA supersede HIPAA in the handling of these records. Neither students nor institutions are well-served by disrupting existing processes.

Furthermore, the confusion resulting from the inclusion of HIPAA standards is likely to handicap the ability of campus officials to effectively serve their institutions. Our members are committed to exercising appropriate care and consideration in the handling of student information, particularly in areas as sensitive as an individual's physical and mental health records. But as you have noted, institutions are also required to balance the privacy rights of individual students against their obligations to the health and safety of their student body as a whole. Within the bounds of both FERPA and applicable state medical confidentiality laws, institutions must sometimes access medical and therapy records as part of their threat assessment and intervention processes. This is a critically important role for campus legal, health and safety professionals. We are seriously concerned that the approach identified in the draft DCL would result in a chilling effect on the disclosure of records in situations of public safety, for fear of falling out of compliance. This puts campus officials in a near-impossible situation, attempting to balance a confusing new compliance requirement with an obligation to the well-being of their students.

Finally, we are greatly concerned that such a substantive change in how education records are handled is being disseminated through a DCL. Considering the sensitivity of the issue, the complexity of the existing legal landscape, and the importance of handling this correctly, it is imperative that any changes to regulation in this area be considered through the standard regulatory process. This approach is especially problematic as the Department lacks statutory authority to regulate HIPAA (which falls under the authority of the Department of Health and Human Services), or to nullify regulations lawfully promulgated by the agency of direct jurisdiction even through a formal rule. Furthermore, nothing in the statutory language allows the Department to regulate the handling of medical records in the manner HIPAA regulates them at non-educational venues.

For all of the reasons identified above, we would strongly encourage you to reconsider the problematic inclusion of HIPAA standards in the DCL, and, if you are contemplating changes such as those outlined in the draft DCL, to do so through a formal regulatory process.

Thank you for the opportunity to comment on the draft DCL, and your continuing focus on student privacy issues. We appreciate your attention to our concerns.

Sincerely,

Molly Corbett Broad
President

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On behalf of:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
NASPA - Student Affairs Administrators in Higher Education
National Association of Independent Colleges and Universities