



National Alliance to  
End Sexual Violence

**NAESV Comments on Department of Education Dear Colleague Letter  
Related to Protecting Students' Medical Records**

*Submitted Electronically*

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[The National Alliance to End Sexual Violence](#) (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. Local rape crisis centers see every day how widespread and devastating sexual assault is and how important privacy and confidentiality are to survivors. According to the Campus Sexual Assault Study, 1 in 5 women in college has been sexually assaulted. The aftermath of rape can hamper both educational attainment and future employment for survivors. College survivors suffer high rates of PTSD, depression, and drug or alcohol abuse, which can hamper both their ability to succeed in school and future employment.

We commend the U.S. Department of Education for issuing a Dear Colleague letter (DCL) to remind institutions of their important obligation to protect students' privacy rights under the Family Educational Rights and Privacy Act (FERPA). We concur with the Department that FERPA requires institutions to ensure strong privacy protections for students' treatment records that allow disclosures of personally identifying information only in the rarest of circumstances. In doing so, institutions must clearly articulate these protections to both students and employees. Failing to do so could deter students—especially sexual assault survivors—from seeking necessary services.

While all students must be able to access the medical, counseling and health services they need and pay for through student health fees, this need is especially critical for the thousands of sexual assault survivors on campuses across the country. Advocates know that survivors are less likely to seek the services and supports they need if they feel their information will be shared, and that failure to seek these important services puts them at greater risk of difficulties in school (delaying schooling or dropping out of school entirely) and in their personal lives. Thus, dependable privacy protections for students' treatment records are in harmony with institutions' responsibility under Title IX to prevent and remedy the effects of hostile environments. Conversely, survivors' mistrust of health resources will undermine campus safety, as those survivors are less likely to seek help and less likely to report the crimes they have experienced.

NAESV suggests further emphasis on HIPAA and FERPA being the "floor" for privacy protections and urges greater instruction for institutions in understand the "ceiling" of protections for their particular jurisdiction. We additionally agree with the Department's emphasis on the exceptions to privacy under FERPA being permissive rather than mandatory and find this sentence on page 3 especially important:

“FERPA's permissive exceptions do not preempt any state laws that may provide more stringent privacy protections for this information.” The DCL should specifically instruct legal counsel at institutions to examine the particular combinations of federal and state privacy laws applicable in their jurisdictions, in addition to FERPA and HIPAA, including, but not limited to, federal confidentiality protections available under the Violence Against Women Act and the Victims of Crime Act; state privilege statutes; and rules and licensing requirements governing communication with medical professionals, mental health professionals, clergy, sexual assault counselors and/or advocates. In a number of states, institutions contract with rape crisis centers to provide supportive services to survivors. These centers would be following the highest state and federal confidentiality protections, and should not be subject to providing campuses with information that would violate these protections in place for survivors. At an institution that contracts with a rape crisis center, counsel should examine how rape crisis center counselors’ confidentiality protections may differ from those of institutional employees.

NAESV believes the “treatment record” exception discussion in the DCL is given too much weight and will lead to confusion. Many of these records would be governed by other, narrower federal or state laws. The discussion in the DCL tends to give the impression that these types of records are less protected.

As currently drafted, NAESV feels there should be more clarity about the specific rare circumstances that might constitute a FERPA exception to “assure campus safety” or to respond to an “articulable and significant threat.” We appreciate that the Department does not want to interfere with well-functioning threat assessment teams and is reticent to limit schools’ discretion to assess campus safety. However, in working with elementary, secondary, and postsecondary schools throughout the country, state sexual assault coalitions and rape crisis centers report significant uncertainty among school officials about when disclosures of sexual violence, dating violence, and stalking constitute sufficient public threat to override students’ wishes for confidentiality. The DCL would be strengthened by additional discussion and examples of when these “public safety” disclosures should be made and, especially in the context of rape and intimate partner violence, how those disclosures should be made so as to minimize the impact to the survivor and minimize the risk of retaliation and further violence by the perpetrator. Regardless of any further discussion of public safety assessments, the DCL should also expressly state that Title IX’s general requirement to respect survivors’ wishes for confidentiality remains unchanged.

Attorneys for institutions engaged in litigation should not assume their interests in obtaining a patient’s treatment records are legitimate educational interests under FERPA solely on the basis of the patient’s status as a student. NAESV strongly concurs with the Department’s emphasis on this point in the DCL. Counsel must obtain a court order or consent to access those records, except in very limited scenarios in which litigation is directly related to the provision of treatment or payment for the treatment. We appreciate the emphasis on the limits of the litigation exception, both in the context of attorneys independently seeking access to the records and for sharing them with a court. However, we believe institutions need more explicit examples about the limits of the litigation exception. For example, if a sexual assault survivor visits a university counseling center for traumatic symptoms resulting from a sexual assault and goes on to sue the university under Title IX, that survivor’s medical records would not be covered by FERPA’s litigation exception, but if the suit alleges that the survivor received poor treatment services at the counseling center and that this treatment resulted in a worsening of traumatic symptoms, this might meet the exception.

Finally, because it is so important that students, and survivors specifically, understand their rights and the limits of their confidentiality and privacy when seeking services, NAESV recommends that the

Department add language to the DCL specifically instructing institutions to provide written notice to students of possible confidentiality exceptions when they seek services. To standardize protections and avoid inadvertent lapses, schools should prepare written, multilingual forms for these notices and for obtaining students' consent to release information. Patients receiving care from HIPAA-covered entities can expect this minimum level of transparency concerning their privacy rights—survivors should not receive less simply because they seek treatment on campus.

Please contact Monika Johnson Hostler, NAESV Board President, at [monika@nccasa.org](mailto:monika@nccasa.org) for further information about these comments.