



NATIONAL NETWORK
TO END DOMESTIC
VIOLENCE

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NNEEDV

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Department of Education
400 Maryland Ave, SW
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October 2, 2015

RE: Dear Colleague Letter: Protecting Student Medical Records

The National Network to End Domestic Violence (NNEEDV) is the nation's leading domestic violence organization working on survivor privacy and confidentiality issues, providing trainings and technical assistance to domestic and sexual violence programs and Department of Justice Office on Violence Against Women's grantees. Though NNEEDV's Technology and Confidentiality Technical Assistance Grant, NNEEDV is specifically tasked with training university and campus grantees on legal requirements and the confidentiality needs of sexual and domestic violence survivors. NNEEDV also represents the 56 state and territorial coalitions against domestic violence and dual sexual assault/domestic violence coalitions, and through them their more than 2,000 member programs, and the millions of victims they serve each year.

Confidentiality Institute is a national training and consulting organization that empowers people to protect privacy for crime victims. The Institute partners with NNEEDV to provide technical assistance to domestic and sexual violence programs across states, territories, and tribal communities. The institute has trained and consulted for countless universities on privacy and confidentiality of survivors of sexual and domestic violence.

For victims of domestic and sexual violence, privacy and confidentiality of their personal information is more than just an expectation; it is a matter of personal safety and security. In the context of an abusive relationship or interaction, the basis of that abuse is often rooted in power and control. When a survivor cannot control who sees or knows what information is shared about her/his abuse, this increases the victim's loss of control, power, and autonomy and could result in further victimization. For students who experience sexual assault within an educational community, a disclosure of their sexual assault can be devastating to future well-being and educational opportunities. Therefore, it is our belief that survivors should have control over information about their victimization and to whom it is shared.

The confidentiality language in both the Violence Against Women Act (VAWA) and the Family Violence Services Prevention Act's (FVPSA) supports this belief, stating that any personally identifying information collected when providing services to victims cannot be shared without the written, informed, and time-limited consent of the victim. The only exceptions are when the information is compelled by a statutory mandate or a court order. Yet, even in the event of these exceptions, the service provider must make reasonable attempts to notify the victim of the disclosure.



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NNEDV and Confidentiality Institute support the Department of Education's (DoE) position that the Family Educational Rights and Privacy Act (FERPA) should be read to protect student medical and counseling records from use or disclosure that is inconsistent with the student's reasonable expectations. If an institution provides medical or counseling services on campus, then the institution has a vested interest in providing the same level of privacy and confidentiality that would be available in off-campus services. When a survivor seeks help, particularly in the counseling or medical context, she/he trusts that what is shared will not be re-disclosed to others within the institution's staff and community, except in limited circumstances that are clearly identified in advance (such as prior notice of rules for disclosing to a threat assessment team). Students do not expect that medical and counseling information will generally be available to the administration or its attorneys.

We urge DoE to clarify in this guidance letter that the privacy protections described apply to on-campus victim advocacy services records, as well as medical, mental health, counseling, and other legally privileged records. The same expectation of privacy and need for confidentiality exists when students who have been assaulted seek services through a campus rape crisis center or a dating violence advocate on campus. Minimizing disclosures of sexual assault and domestic violence victims' information is consistent with the federal confidentiality scheme laid out in VAWA and FVPSA. Additionally, a vast majority of states have made records of and communications with victim advocacy services privileged and protected from disclosure in court, similar to the privilege for medical and counseling records. Because the current language in the guidance letter does not include victim advocacy services records, it could be interpreted that these records are excluded. Failing to clearly call out the need to protect victim advocacy services records could result in confusion, similar to the confusion initially experienced when institutions believed that Title IX prevented them from protecting communications with confidential advocates and victim counselors. That confusion was resolved by DoE's April 2014 FAQ's on Title IX. Similar confusion could be avoided entirely by explicitly addressing the appropriate application of FERPA permissive disclosure rules to on-campus victim advocacy services records.

NNEDV and Confidentiality Institute applauds the clarification that attorneys representing institutions in litigation with students should not be determined to have a legitimate educational interest in accessing medical records without a court order or written consent, unless the litigation directly relates to the medical treatment or payment for treatment. However, NNEDV and Confidentiality Institute are concerned that the draft guidance is not specific enough in helping institutions determine what is a legitimate education interest and defining what kind of professional responsibility would justify reviewing a student's record. The Dear Colleague letter is an opportunity to address the even more invasive, and potentially more pervasive, issue of general counsel offices accessing student medical and counseling records without consent (or even notice) as a routine part of their professional responsibility to advise administrations on operational and compliance issues. Educational institutions have a wide range of business and organizational interests, and it is the professional responsibility of general counsel to advise and inform the institution on all of those interests. The current guidance and lack of specificity around "professional responsibility" would allow a general counsel's office to demand access to medical and counseling records anytime those records might be relevant to an administrative concern.



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Any guidance about general counsel or any school officials' access to records should emphasize students' privacy expectations when seeking medical and counseling services, and incorporate an understanding that, for sexual and domestic violence victims, disclosing personal information could bring further harm to the victim.

NNEDV and Confidentiality Institute further encourages the guidance to include a recommendation that institutions inform students of any disclosure whenever educational or treatment record is shared internally with general counsel or other school officials, whether the purpose of the sharing is to ensure students' health and safety, to fulfill a legitimate educational interest, or to protect their interest in litigation. Notice of disclosure will allow victims of domestic and sexual assault to assess their personal safety strategies in light of who knows what happened and how it could impact their life.

Whether this guidance would create any unintended consequences. For example, would this guidance in any way restrict the work of threat assessment teams, as we believe these teams are often the best method for schools and colleges to assess whether a given student constitutes a threat to him/herself or others?

NNEDV and Confidentiality Institute do not believe that this guidance would restrict the work of threat assessment teams. Additionally, we urge DoE to clarify that institutions should ensure that students have a clear understanding of the role of threat assessment teams, and how information students disclose could be shared. This understanding will inform students of their expectation of privacy when seeking services on campus. The three keys to managing student privacy expectations are transparency, clarity, and restraint. (1) Specifically, schools must be open and transparent with students about potential disclosure to a threat assessment team as an exception to confidentiality *before* the student begins sharing information. (2) To facilitate this transparency with students, staff at the institution must be supported with a clear set of guidelines and procedures for when and how information is shared with the threat assessment team. We believe those guidelines should include notice to the student at the time of disclosure so that he or she can make appropriate safety plans. This notice provision is consistent with VAWA and FVPSA requirement of reasonable notice to persons affected by a mandated disclosure. (3) Finally, the guidelines for both the professional making a disclosure and the threat assessment team receiving information must emphasize restraint so that only the minimum amount of information necessary is disclosed.

Recognizing that getting a court order or consent will create additional burden on institutions, is there a way to mitigate that burden without lessening the protections given to students?

The guidance that a school should obtain consent or a court order before disclosing medical records in support of litigation unrelated to the records imposes only a minimal burden. When an institution is engaged in litigation with a student, the institution already has ready access to the court venue without filing a new matter and has a ready mechanism to communicate with the student about consent through the student's counsel in the litigation. Such an order or request for consent should be a routine matter in the course of managing litigation. In fact, securing a court order or consent benefits the institution by drawing clear boundaries around how much of a student's records can be used, reviewed,



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or disclosed, thus insulating the institution from later claims that its disclosure was too broad and violated FERPA or local privilege laws.

If this guidance is extended outside the postsecondary context to include K-12 and early childhood, what other factors need to be considered? For example, how would this guidance fit within the context of elementary and secondary school counselors, or disputes regarding special education services?

NNEDV and Confidentiality Institute agree that the extension of this guidance to K-12 and early childhood requires consideration of other factors. However, we confine these comments to the campus environment in order to move forward on this urgent issue for assault survivors at the college level. We believe that any future consideration of the appropriate application of this guidance to K-12 and early childhood will require distinctions to be made between the appropriate application for emancipated minors in high school, youth with confidentiality rights under local law, and younger children without the same expectations of privacy when they receive medical, mental health, counselor, or victim services.

Thank you for your time and consideration of this issue. We believe the proposed guidance will offer more privacy protections for students who are survivors of domestic and sexual violence. Please contact safetynet@nnedv.org or alicia@confidentialityinstitute.org if you have any questions.

Respectfully submitted,

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/s/ Kaofeng Lee, National Network to End Domestic Violence

/s/ Cindy Southworth, National Network to End Domestic Violence

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