

October 2, 2015

Via [FERPA.Comments@ed.gov](mailto:FERPA.Comments@ed.gov)

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

Re: **Draft Dear Colleague Letter to School Officials at Institutions of Higher Education: Protecting Student Medical Records under the Family Educational Records and Privacy Act (FERPA)**

Dear Ms. Styles:

The National Women's Law Center submits the following comments on the Department's draft Dear Colleague Letter on protecting student medical records under the Family Educational Records and Privacy Act (FERPA). The Center has worked for over 40 years to expand the possibilities for women and their families in the areas of education and employment, family economic security, and health. In particular, since Congress enacted Title IX of the Education Amendments of 1972, the Center has been a leader in ensuring that women and girls have equal educational opportunities.

In the wake of the University of Oregon's disclosure of a rape survivor's medical records,<sup>1</sup> the Center strongly supports guidance to remind educational institutions of their duty to protect the privacy of student medical records. In that case, the university obtained a student's therapy records without her consent to defend itself in a Title IX lawsuit; the school argued that because the student sought treatment at the university's health clinic, her medical records belonged to the school and they did not need her consent to access them.<sup>2</sup> Students should be able to seek medical treatment and counseling as necessary; survivors of sexual assault in particular may need access to mental health services to help them heal from their trauma and continue their education. When student educational records relate to medical treatment, preserving confidentiality and privacy is important to preserve the relationship between doctor and patient. And the fact that a medical professional is employed by a university should not weaken confidentiality between patient and doctor—particularly because that medical professional may be the only one accessible to the student. In fact, when Congress enacted

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<sup>1</sup> Kristian Foden-Vencil, *College Rape Case Shows A Key Limit To Medical Privacy Law*, NATIONAL PUBLIC RADIO (Mar. 9, 2015), <http://www.npr.org/sections/health-shots/2015/03/09/391876192/college-rape-case-shows-a-key-limit-to-medical-privacy-law>.

<sup>2</sup> Jenny Kutner, *University of Oregon uses rape survivor's medical records against her in lawsuit*, SALON (Mar. 10, 2015), [http://www.salon.com/2015/03/10/university\\_of\\_oregon\\_uses\\_rape\\_survivors\\_medical\\_records\\_against\\_her\\_in\\_law\\_suit/](http://www.salon.com/2015/03/10/university_of_oregon_uses_rape_survivors_medical_records_against_her_in_law_suit/).

FERPA, it sought to ensure that the release of student records does not “invade the privacy of students or pose any threat of psychological damage to them.”<sup>3</sup> Congress balanced student privacy in educational records with the need to analyze student records to further legitimate educational interests. However, as the events at the University of Oregon highlight, lack of clarification in FERPA regulations can throw off this balance between legitimate educational goals and student privacy. And when faulty interpretations are applied to student medical records, the result can disrupt the important relationship between patient and doctor, which could discourage survivors from seeking the help they need.

For these reasons, the privacy of student medical records should be protected under FERPA in the same manner that medical records are protected under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.<sup>4</sup> We are pleased that the draft Dear Colleague Letter (“DCL”) generally promotes this interpretation. However, we have further suggestions on how the DCL can be improved to offer more authoritative guidance. Specifically, we recommend the final DCL remove ambiguous language, provide additional examples for all the FERPA exceptions discussed in the DCL, explain what protections apply to student treatment records, and instruct institutions to examine whether their policies conflict with state privilege laws. This letter also responds to questions the Department requested comment on in its Notice, including possible unintended consequences and the burden the DCL would impose on institutions of higher education.

- I. The DCL should limit deference to the school and remove ambiguous phrases from the section on the School Official exception to be more authoritative and persuasively outline the Department’s reasoned interpretation of the law.

The DCL states:

“FERPA allows nonconsensual disclosure of education records, including medical records, to school officials, including . . . legal counsel, provided the institution has determined that those officials have a legitimate educational interest in the records . . . . FERPA vests institutions with significant discretion to make determinations about who is a school official, and what is a legitimate educational interest. The Department has provided guidance that *a school official would have a legitimate educational interest if the official needed to review an education record in order to fulfill his or her professional responsibility*. Thus, the school official exception does not permit school officials to review all records for all students; rather institutions should look to an individual’s function and professional responsibilities to determine whether he or she has a legitimate educational interest.”<sup>5</sup> (emphasis added).

The grant of “significant” discretion to universities to decide whether it meets this exception undermines the persuasiveness and effectiveness of the DCL as a guidance document. Moreover, whether medical records are admissible varies by jurisdiction; therefore, the DCL

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<sup>3</sup> S. Rep. 93-1026, pt. 1, at 4251 (1974).

<sup>4</sup> 45 C.F.R. §§ 164.501, 154.506 & 164.512(e).

<sup>5</sup> Letter from Kathleen M. Styles, Chief Privacy Officer, U.S. Dep’t of Educ., to School Officials at Institutions of Higher Education, 3 (Aug. 18, 2015) [hereinafter DCL] (emphasis added) (citations omitted) *available at* <http://familypolicy.ed.gov/sites/fpc.ed.gov/files/DCL%20Final%20Signed-508.pdf>.

statements on admissibility<sup>6</sup> are unnecessary and do not provide additional insight as to whether school officials, particularly legal counsel, may access student medical records under FERPA without the student's consent or a court order. We recommend the final DCL omit this language to prevent any suggestion that FERPA can be used to pierce privacy protections afforded to student medical records.

We are further concerned that the phrase "a school official would have a legitimate educational interest if the official needed to review an education record in order to fulfill his or her professional responsibility" can be interpreted to permit disclosure of student medical records in instances that mirror the circumstances of the University of Oregon case. After all, it is the professional responsibility of university in-house counsel to zealously defend the institution against lawsuits, including those in which medical treatment is not the main issue in the suit.<sup>7</sup> This discrepancy may cause further confusion for institutions relying on the DCL to inform when they can and cannot appropriately access student medical records without the student's consent. To avoid this confusion, we recommend deleting "legal counsel" from the list of school officials, the word "significant," and the sentence that begins "The Department has provided guidance..." so that the paragraph reads as follows:

"FERPA allows nonconsensual disclosure of education records, including medical records, to school officials, including professors and administrators, provided the institution has determined that those officials have a legitimate educational interest in the records. FERPA vests institutions with discretion to make determinations about who is a school official, and what is a legitimate educational interest. The school official exception does not permit school officials to review all records for students; rather institutions should look to an individual's function and professional responsibilities to determine whether he or she has a legitimate educational interest in a particular record."

II. The DCL should provide more examples to clarify when it is appropriate to release student medical records without the student's consent pursuant to the FERPA exceptions.

The DCL outlines three exceptions to the FERPA requirement that an institution obtain consent before disclosing educational records: 1) disclosure to a school official for a legitimate educational interest; 2) disclosure to a court during the course of litigation; and 3) disclosure to respond to a health or safety emergency or threat. The DCL also states that when disclosing information from a student medical record under a FERPA exception, the institution must limit disclosure of health information to the minimum necessary to serve the purpose of the exception.<sup>8</sup> The Center agrees that disclosure of student medical records most likely will fall into one of these three exceptions and think it is important that the DCL provide illustrative examples of each exception as well as what minimum disclosure looks like.

Therefore, we recommend the final DCL include illustrative examples for all three exceptions outlined, with an emphasis that information disclosed should be limited to only

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<sup>6</sup> See *id.*, at 4 ("While medical records ultimately may be admissible by a court in a proceeding involving the student").

<sup>7</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.3 (1983).

<sup>8</sup> E.g., DCL *supra* note 5, at 1.

information necessary to achieve the goals of the exception. In considering examples, the final DCL should include both permissible and impermissible uses of the exceptions to give a fuller picture of what are and are not proper interpretations of FERPA.<sup>9</sup> Alternatively, we urge the Department to provide an example that relates to the University of Oregon disclosure.

With regard to the litigation exception, we urge the Department to provide additional examples to illustrate the types of cases that “relate directly to the medical treatment itself or the payment for that treatment.”<sup>10</sup> The guidance should remind institutions to consult state privacy laws to determine the scope of litigation exceptions. For example, in several states, litigation exceptions to privilege and medical records privacy laws are limited to malpractice actions or actions alleging a breach of duty arising out of the physician-patient or therapist-patient relationship.

III. The DCL should clarify consent and disclosure requirements for “treatment records.”

FERPA generally defines “treatment records” as records on a student “attending an institution of postsecondary education, which are made or maintained” by a medical professional that are used for the sole purpose of treating the student and are not shared with anyone other than the physician providing treatment.<sup>11</sup> The DCL specifies that treatment records are not covered by FERPA;<sup>12</sup> nor are treatment records governed by HIPAA.<sup>13</sup> Yet, the DCL also says that if an institution discloses a student’s treatment record to a non-medical professional for any reason other than treatment, it becomes an “education record” covered by FERPA and is subject to a number of exceptions from the student consent requirement.<sup>14</sup> This begs the question of what privacy protections, if any, are provided for treatment records. Presumptively, state privilege laws would govern the protections afforded to treatment records; however, lack of guidance makes the accuracy of this presumption unclear. If treatment records are afforded different protections under state privilege laws or another statute, further guidance is necessary to explain what those protections are, as well as when it is appropriate to disclose information from treatment records to non-medical professionals, if at all. Without such guidance, a school would be able to exploit any of the FERPA exceptions to disclose highly personal information about a student’s medical treatment for reasons unrelated to a legitimate educational purpose. Such a practice could put FERPA in conflict with the medical privilege laws of each individual state, which could not have been the intent of Congress when it passed the law.

IV. The DCL should instruct institutions to examine whether their policies comply with state privacy laws that are more protective than FERPA.

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<sup>9</sup> Cf. Samuel R. Bagenstos, *What Went Wrong With Title IX*, WASH. MONTHLY, Sept./Oct. 2015 available at [http://www.washingtonmonthly.com/magazine/septemberoctober\\_2015/features/what\\_went\\_wrong\\_with\\_title\\_ix057187.php?page=all](http://www.washingtonmonthly.com/magazine/septemberoctober_2015/features/what_went_wrong_with_title_ix057187.php?page=all) (arguing that the Department of Education can better advise universities on permissible Title IX sexual assault policies by articulating both “what schools must do [under Title IX, as well as] the limits of their obligations”).

<sup>10</sup> E.g., DCL *supra* note 5, at 5.

<sup>11</sup> 20 U.S.C. § 1232g(a)(4)(B)(iv); see also DCL *supra* note 5, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> DCL *supra* note 5, at 2.

<sup>14</sup> *Id.*

As noted in the draft DCL, FERPA establishes a floor for educational record confidentiality and does not preempt state laws that are more protective of privacy. Many states have laws regarding privilege, medical records, and student records that afford stronger privacy protections than FERPA. The guidance should explicitly remind institutions that in many jurisdictions, state law already requires a court order or student consent before medical or counseling records may be accessed in litigation. The guidance should direct institutions to consult with legal counsel to research their jurisdiction's privacy laws and analyze whether they are more protective than FERPA. This type of analysis is already required of health care providers as part of HIPAA compliance. Institutions should consult with state licensing boards to clarify the ethical confidentiality obligations of licensed professionals. The DCL should also remind institutions to take actions to ensure that students understand privacy limitations before they consent to medical or counseling services.

- V. The DCL would not interfere with institutions' ability to use student medical records for threat assessment teams or create undue burdens for institutions engaged in litigation with students.

Because the purpose of the DCL is to limit the improper use of student medical records for litigation unrelated to treatment received, the DCL does not create unintended consequences related to school safety or other purposes that serve a legitimate educational purpose, nor does it impose an undue burden on institutions. Schools may still access student medical records by obtaining the consent of the student or obtaining a court order. As mentioned above, a student should not forgo patient-doctor confidentiality just because her doctor is employed by a university. Indeed, many students will avoid treatment if they know that their medical records are not provided the same protections available to other patients under HIPAA. For these reasons, the Center believes that student privacy interests should outweigh the minimal inconvenience to a university of having to obtain student consent or a court order to access a student's medical records in the course of litigation unrelated to treatment received.

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Thank you for considering the Center's recommendations for the draft DCL. We would be happy to discuss our comments further or answer any questions you may have. For additional information, please contact me at 202-588-5180 or [fgraves@nwlc.org](mailto:fgraves@nwlc.org).

Sincerely,



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