



THE UNIVERSITY OF TEXAS SYSTEM

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Daniel H. Sharphorn
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September 29, 2015

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

RE: The University of Texas System's Comments on Proposed Dear Colleague Letter to School Officials at Institutions of Higher Education Providing Guidance on Protecting Student Medical Records from Inappropriate Disclosures

Dear Ms. Styles:

The University of Texas System (UT System) consists of 15 public institutions of post-secondary education that provide academic and health care services throughout the State of Texas. Please find below the comments and recommendations of UT System in response to the proposed guidance published by the Department of Education on August 15, 2015 (the "Guidance").

Potential Unintended Consequences: The Guidance Fails to Clearly Distinguish Between the Disclosure of Treatment Records by Health Care Providers and Disclosure of Education Records that Contain Medical Information by School Officials Who Are Not Health Care Providers.

As a matter of initial concern, UT System notes that, as drafted, the Guidance does not clearly differentiate between medical records that meet the definition of Treatment Records, which are not subject to FERPA, and medical records that meet the definition of an Education Record, which are subject to FERPA. We respectfully suggest that this distinction be communicated clearly throughout the Guidance as it is crucial in determining how and when a Treatment Record can be accessed by, or disclosed to, a University Official who is not part of the student's treatment team.

September 29, 2015

Page 2

This distinction must be clearly understood by any University Official who provides legal or other services to an institution's health care providers and clinics. Otherwise, the Guidance could result in the misapplication of FERPA with regard to Treatment Records. This, in turn, would create unintended and inappropriate consequences to students seeking confidential medical and mental health care from University health care providers, as well as to University health care providers who rely upon University attorneys and other University Officials for advice on their responsibilities as both University employees and licensed health care providers.

As the draft Dear Colleague letter states, "treatment records" are exempted from the definition of an "education record" under FERPA:

Education records. (b) The term does not include:

....

- (4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:
 - (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
 - (ii) Made, maintained, or used only in connection with treatment of the student; and
 - (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution.

34 CFR 99.31, Definitions.

Because Treatment Records are, by definition, not "Education Records," FERPA does not apply to these records at all. Even if FERPA did apply to Treatment Records that have not been disclosed by a University health care provider outside of the health care center, FERPA exceptions would permit, but not mandate, use or disclosure of an Education Record. Accordingly, the Department has long recognized that licensed health care providers and other health center employees must comply with applicable state medical and mental health privacy laws, and applicable regulations adopted by the providers' state licensing boards, as to all of their patients' records.¹ The fact that some, or all, of these patients are students enrolled at the University does not affect these individuals' rights to medical confidentiality.

¹ See email dated November 28, 2008 from Ingrid Brault, Management and Program Analyst, Family Policy Compliance Office for the Department:

FERPA would not affect the obligations of a health care provider where a State medical laws are more restrictive because as noted in the guidance, if a school chooses to disclose treatment records it may do so with the student's consent or without the student's consent as long as the disclosure meets the conditions outlined in 34 CFR 99.31 of FERPA. If a State medical law requires written consent to disclose treatment records in a situation that is permissive under FERPA without consent, we would conclude that FERPA does not affect the obligations of the healthcare provider in this regard.

September 29, 2015

Page 3

The Guidance does indicate on page 3 that the “Department also notes that many states have privacy laws that protect the confidentiality of medical and counseling records. FERPA’s permissive exceptions do not preempt any state laws that may provide more stringent privacy protections for this information.”

This is an important point, and we respectfully suggest that it be highlighted in the introductory portion of the Guidance and included in the illustrations provided in the remainder of the Guidance.

For example, on page 4, the Guidance states:

If a campus counselor or mental health professional has concerns about a student’s safety (or the safety of others) due to behavior that is harmful or escalating, he or she may share education records, including medical records, with the threat assessment team under the school official exception.

Technically, this is true, as any records the counselor or other professional has that are properly characterized as Education Records could be shared with under any applicable FERPA exception. However, this passage would be more illuminating if it also explained that any records the counselor created or maintained about the student in the course of providing counseling services to the student would be Treatment Records; and that Treatment Records, unlike Education Records, can only be shared by the counselor with the threat assessment team if permitted by applicable state medical privacy laws.

Additionally, on page 6, in reference to the FERPA Health & Safety exception, the Guidance states that if a counselor’s records about a student are released under the FERPA health & safety exception, the release should be limited to a general summary, rather than the counselor’s session notes. As noted in the Guidance:

under the FERPA Health & Safety Exception, School officials may disclose education records, including medical records, to any person whose knowledge of information from those records will assist in protecting the student or others from the threat. Law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed.

Guidance, page 6.

The section should also clarify that some states’ medical confidentiality laws may have health and safety exceptions that are not congruent with the FERPA Health and Safety Exception. In Texas, for example, licensed professional counselors may release

September 29, 2015

Page 4

Treatment Records (including both a counselor's session notes and a medical summary) to medical or law enforcement personnel only if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others, or there is a probability of immediate mental or emotional injury to the patient.² Therefore, we suggest that the Guidance explain that the references in this section will not apply to institutions in states that have medical and mental health confidentiality laws that protect records meeting the definition of Treatment Records.

On page 5, the Guidance recommends that institutions incorporate the HIPAA requirements applicable to a Covered Entity when responding to a subpoena for medical records that meet the definition of Education Records subject to FERPA. These requirements would be inapplicable to Treatment Records in states that have laws that apply specific standards for how medical and mental health professionals must respond to subpoenas for medical records.

UT System respectfully suggests that the third full paragraph on page 1 of the Guidance be amended as follows:

This letter reviews and clarifies the Department's views regarding the protections applicable to student medical records. In particular, this letter clarifies that in cases where litigation occurs between the institution and the student, school officials must understand the distinction between medical records maintained by an institution's health care providers and/or student health clinics (including student counseling centers) -- which are defined as "Treatment Records" -- and medical records maintained by institution officials that are held outside of the institution's student health clinics and that meet the FERPA definition of an Education Record. (See page 3). In the case of Treatment Records, the institution is required to comply with state medical privacy laws and regulations applicable to litigation between a health care provider and a patient. In the case of Education Records, the FERPA school official exceptions to consent will apply but should be construed to offer protections that are similar to those provided to medical records in the context of litigation between a covered health care provider, such as a hospital, and a patient under state medical privacy laws and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 C.F.R. §§ 164.501, 164.506, and 164.512(e).

With regard to litigation involving Treatment Records maintained by an institution's student health clinic FERPA does not affect the obligations of the healthcare provider to comply with applicable state medical confidentiality laws. Therefore, if an institution's health care provider or student health clinic is the subject of litigation, the institution's attorney should advise the provider or clinic about the applicable state medical privacy laws and regulations that govern such records. In addition, the attorneys should ensure that any Treatment Records the attorneys receive from a health care provider or clinic in order to provide representation to the health care

² See Texas Health & Safety Code § 611.004(2).

September 29, 2015

Page 5

provider or clinic are maintained, used and disclosed in accordance with the applicable medical privacy laws, regulations and court rules that would apply to any attorney representing a health care provider or clinic in that jurisdiction. The institution's attorneys may not use those records for any other purpose, including representation of school officials on unrelated claims, unless permitted by the applicable state medical confidentiality laws and regulations or court rules.

With regard to medical records maintained by an institution as Education Records (for example, Treatment Records for which the student has consented to allow the institution's student health clinic to release to a school official outside of the clinic), an institution involved in litigation should comply with FERPA. However, with regard to medical records governed by FERPA, FERPA should be construed to offer protections similar to those provided to medical records in litigation between a covered health care provider, such as a hospital, and a patient under state medical privacy laws and the HIPAA Privacy Rule. Thus, without a court order. . . [continue with the remaining language in the fourth full paragraph on page 1.]

Finally, we suggest that clarification be added throughout the Guidance that records that constitute Treatment Records should be released or shared by licensed health care providers only in accordance with applicable state law, rather than FERPA.

Need to Mitigate the Burden of Obtaining a Court Order or Consent without Limiting the Protections Given to Students

UT System's position is that ensuring that officials at educational institutions subject to FERPA have a clear understanding of the additional protections afforded to Treatment Records under applicable state medical and mental health confidentiality laws, regulations, and court rules will lessen the need for these institutions to interpret FERPA to require court orders and/or student consent when faced with decisions about releasing student medical records, particularly in the course of litigation.

Extension of Guidance to Include Medical Records of K-12 Students

UT System's comments are limited to students enrolled in post-secondary institutions. However, we note that Treatment Records of minor patients are entitled to the same protection as those of adult patients under state medical privacy laws, although the consent requirement for minors is exercised by a parent or guardian, rather than the minor. Therefore, health care professionals and counselors licensed to provide mental health care who work with elementary or secondary students would be subject to the same general requirements as a healthcare professional or counselor employed at a post-secondary institution in the same jurisdiction.

September 29, 2015

Page 6

CONCLUSION

On behalf of UT System, I wish to extend my appreciation to the Department for its concern for the ability of students to seek medical and mental health treatment without sacrificing their rights to confidentiality under state laws, as well as the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Sharphorn', with a long horizontal flourish extending to the right.

Daniel H. Sharphorn

c: Barbara Holthaus, Assistant General Counsel, System Administration Privacy
Officer and Systemwide Privacy Coordinator
William H. Shute, Vice Chancellor for Federal Relations