

October 2, 2015

Kathleen Styles  
Chief Privacy Officer  
United States Department of Education  
400 Maryland Ave. S.W.  
Washington, DC 20202-4500

Re: Dear Colleague Letter: Protecting Student Medical Records

Dear Ms. Styles,

Thank you for the opportunity to provide input on the Department's Dear Colleague Letter on Protecting Student Medical Records ("DCL"). The Victim Rights Law Center ("VRLC") represents victims of sexual assault in education law cases in Massachusetts and Oregon. Additionally, we provide consultations and trainings to state and national agencies, colleges and universities, and community-based organizations to help them improve their response to sexual violence. As part of this work, we conducted an extensive survey of federal, state, and territorial privacy laws, including evidentiary privilege and health information privacy laws. We are therefore deeply familiar with the complex array of laws that may impact student privacy.

We commend the Department's efforts to provide meaningful guidance on student privacy issues to educational institutions. We also share the Department's concern that lack of privacy may dissuade students from seeking services that are essential to their health and safety. Indeed, in the wake of the privacy breach at the University of Oregon, the media, victim service providers, lawyers, and first responders across the country cautioned that victims should not trust school counseling centers.<sup>1</sup>

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<sup>1</sup> See, e.g., Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 2, 2015); Kristian Foden-Vencil, *College Rape Case Shows a Key Limit to Medical Privacy Law*, NPR (Mar. 9, 2015).



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**LEADING A NEW RESPONSE TO SEXUAL VIOLENCE**

Our comments focus on the following issues: (1) state law compliance; (2) litigation exceptions; (3) notice to students prior to records disclosure; and (4) notice to students prior to providing services.

**I. The guidance should instruct institutions to determine whether their policies comply with state and territorial privacy laws that are more protective than FERPA.**

We urge the Department to provide more guidance to institutions regarding their obligations to analyze the privacy protections afforded by state laws. As noted in the draft DCL, state laws may (and often do) provide more stringent privacy protections for medical and counseling records than FERPA, and FERPA does not preempt these state laws.<sup>2</sup> Yet, many institutions are unaware of the role that state privacy laws play in protecting student records, or that they must comply with the more stringent privacy laws in their jurisdiction. As one education law expert noted, “School[s] ignore their state constitutions, state statutes, and state regulations governing the privacy of student records at their peril.”<sup>3</sup> The draft DCL presents an excellent opportunity to provide additional guidance to institutions regarding the need to assess their privacy obligations under their jurisdiction’s laws.

We appreciate that the draft DCL emphasizes that, except in limited circumstances, institutions should not share student medical or counseling records with their attorneys or the courts. However, the DCL should remind institutions that it is critically important to comply with their jurisdiction’s privacy laws, especially since these laws may already limit disclosure of medical and counseling records. Examples include state and territorial laws regarding health care provider-patient privilege, therapist-patient privilege, confidentiality of medical records, mental health information, and education privacy.<sup>4</sup> For example, Montana’s education privacy laws prohibit universities and colleges from releasing student records without student consent or a court-issued subpoena.<sup>5</sup> In Florida<sup>6</sup> and Indiana,<sup>7</sup> mental health records may not be disclosed in litigation unless the patient consents or the court orders their release.

As these laws illustrate, institutions must consult with legal counsel to determine their jurisdiction’s privacy laws, analyze whether they are more protective than FERPA, and ensure that their policies comply with the laws that are most protective of privacy.<sup>8</sup> The Health Insurance Portability and Accountability Act (HIPAA) may be a helpful analog in explaining this obligation to institutions. HIPAA, like FERPA, does not preempt

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<sup>2</sup> Letter from Kathleen M. Styles, U.S. Dep’t of Ed., to School Officials at Institutions of Higher Education (Aug. 18, 2015) (“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.”); Joint Statement, Buckley/Pell Amendment, 120 Cong. Rec. 39,862–63 (1974) (“It was not intended, in establishing a minimum Federal standard for record confidentiality and access, to preempt the States’ authority in the field.”).

<sup>3</sup> See Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2006).

<sup>4</sup> See *id.* (stating that “numerous state laws . . . demand more privacy protection from school districts than federal laws demand”).

<sup>5</sup> Mont. Code Ann. § 20-25-515.

<sup>6</sup> Fla. Stat. § 394.4615.

<sup>7</sup> Ind. Code § 16-39-2-7, 16-39-2-8.

<sup>8</sup> See Daniel Solove & Paul Schwartz, *The Battle for Leadership in Education Privacy Law*, edu.SafeGov.org (Mar. 7, 2014) (“As a general rule, when a state law is inconsistent with FERPA, the law that is more protective of privacy will govern.”).

state laws that are more protective of privacy.<sup>9</sup> Rather, HIPAA sets a minimum privacy threshold. Providers must meet their jurisdiction's privacy laws to the extent they exceed what HIPAA requires. Health care providers, similar to educational institutions, must identify and comply with the laws that provide the strongest privacy protections. Instructing institutions to analyze the privacy protections available under state and federal laws is consistent with the Department's use of HIPAA as a guidepost throughout the draft DCL.

In addition to state, tribal, or territorial privacy laws, institutions should be aware that their jurisdiction's licensing boards may impose additional ethical confidentiality obligations on health care providers and mental health professionals as a condition of maintaining licensure. A professional who is required by an institution to disclose student records in violation of ethical confidentiality obligations could be disciplined or suspended from practice. Accordingly, institutions should consult with state licensing boards to determine the parameters of licensed professionals' confidentiality obligations.

We suggest including the following language in the DCL:

FERPA establishes a minimum federal standard for record confidentiality. Many jurisdictions have laws that afford stronger privacy protections to student records than FERPA, and these laws are not preempted. Examples of these laws include, but are not limited to, mental health professional-patient privilege; health care provider-patient privilege; health information privacy laws; and education privacy laws. Institutions should consult with legal counsel to research their jurisdiction's privacy laws and analyze whether they are more protective of student records than FERPA. For example, a jurisdiction's laws may require patient consent or a court order before counseling and medical records may be accessed in litigation. Before disclosing confidential counseling or medical records to a school's attorney or courts, institutions must examine their jurisdiction's laws to determine whether disclosure is permitted and what procedures must be followed.

A jurisdiction's licensing boards may impose additional ethical duties of confidentiality upon licensed professionals, such as health care and mental health providers. Institutions should ensure that their policies regarding records disclosure are consistent with providers' ethical confidentiality duties.

## **II. The guidance should clarify the scope of the litigation exception.**

Institutions need additional guidance regarding disclosure of student medical or counseling records to the institution's attorneys or courts during litigation. The draft DCL states that institutions may not share medical records as part of litigation "unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment." Our concern is that institutions will broadly interpret the phrase "relates directly to the medical treatment itself" to apply to any lawsuit in which a student-litigant sought on-campus medical or counseling services for her injuries. The DCL should instruct institutions to limit the litigation exception for medical and counseling records to instances in which a student alleges breach of a duty arising out of the health care provider-patient relationship.

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<sup>9</sup> 45 C.F.R. §§ 160.202, 160.203.

Additionally, the DCL should explain that if a jurisdiction's law requires litigants to obtain a subpoena or court order to access counseling or medical records, institutions must follow these procedural requirements, regardless of whether FERPA would allow the institution's attorney to automatically access the records.<sup>10</sup> Institutions cannot use FERPA to circumvent a jurisdiction's procedural requirements.<sup>11</sup>

We suggest including the following language in the DCL to clarify the litigation exception:

As a general rule, institutions that are involved in litigation with a student should not share student medical or counseling records with the institution's attorneys or courts, unless there is a court order or written consent. Institutions may consider whether it is legally and ethically permissible to share student medical or counseling records with their attorneys or courts only when two conditions are met: (1) the litigation relates directly to payment for the medical/mental health treatment or includes a cause of action alleging breach of a duty arising out of the health care provider-patient relationship; and (2) disclosure is expressly permitted by the jurisdiction's laws. Institutions should not access medical and counseling records merely because student-litigants allege pain and suffering or sought counseling or medical treatment for their injuries. Further, if state law requires litigants to obtain a subpoena or court order to access counseling or medical records, institutions must follow these state law procedural requirements before accessing records, regardless of whether FERPA would allow nonconsensual disclosure of records to the institution's attorneys or courts.

### **III. Institutions should provide students with notice and an opportunity to be heard before records are disclosed without their consent.**

The DCL should instruct institutions to provide students with notice and an opportunity to be heard before records are disclosed without their consent. FERPA regulations already require institutions to make reasonable efforts to notify students before releasing personally identifiable information in response to a subpoena or court order, so that students may seek protective action.<sup>12</sup> The DCL should expand upon this notice requirement by instructing institutions to provide prior notification to students any time their records will be disclosed without consent, including in litigation.

We suggest including the following language in the DCL:

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<sup>10</sup> See Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, PERSPECTIVES (Am. Ass'n of State Colleges & Universities, Washington, D.C.), Winter 2008 ("FERPA provides the basic requirements for disclosure of health care records at campus health care clinics, and state law cannot require disclosure that is not authorized by FERPA. However, if FERPA authorizes disclosure, a campus health clinic would then have to look to state law to determine whether it could disclose records, including state laws on confidentiality of medical records.").

<sup>11</sup> See John Rubin, *Subpoenas and School Records: A School Employee's Guide*, SCHOOL LAW BULL. (UNC School of Government, Chapel Hill, N.C.), Spring 1999 ("FERPA establishes the minimum protection for student records. Particular information within student records may be protected by other laws, which may impose greater or at least different restrictions on disclosure. For example, under state law, information obtained by a school counselor in providing counseling services to a student is privileged. A subpoena alone is not sufficient to authorize release of this information. A judge must find that disclosure is necessary to a proper administration of justice and must order that the information be disclosed.").

<sup>12</sup> 34 C.F.R. § 99.31(a)(9)(ii).

In instances where personally identifiable information must be released pursuant to a lawfully issued subpoena or court order, FERPA regulations require institutions to make reasonable efforts to notify students before releasing the information. 34 C.F.R. § 99.31(a)(9)(ii). Institutions should consider building upon these protections by providing students notice and an opportunity to be heard in any case in which their counseling or medical records will be disclosed without their consent, including in cases where institutions plan to disclose these records to their attorneys as part of litigation. Institutions also should determine whether such notice is required by their jurisdiction's laws.

**IV. As part of informed consent to services, institutions should notify students of the circumstances in which records may be disclosed without their permission.**

An explanation of confidentiality and its limitations is a critical component of informed consent to medical and mental health services. Students (and sexual assault survivors in particular) cannot make informed choices regarding whether to access services unless they understand the circumstances in which confidential information may be released without their consent. The DCL should remind institutions that FERPA regulations require annual notices informing students of their rights to consent to disclosures of personally identifiable information.<sup>13</sup> The DCL should urge institutions to expand upon these protections by routinely providing written notice to students of confidentiality limitations before they consent to counseling or medical services.

We suggest including the following language in the DCL:

Institutions should ensure that students understand the circumstances in which their medical and counseling records may be disclosed without their consent. FERPA regulations require institutions to issue annual notices informing students of their rights to consent to disclosures of personally identifiable information. 34 C.F.R. § 99.7(a)(2)(iii). Institutions should routinely notify students of their confidentiality rights and limitations before they consent to counseling or medical services. Institutions should develop a written notice that explains in plain language when students' medical and counseling records may be disclosed without their permission. Providers should explain the notice orally to students as part of the informed consent process before they receive counseling or medical services.

Because we have represented campus sexual assault survivors for over a decade, we know firsthand how important it is for students to have access to confidential services. Please let us know if we can provide additional information as the Department moves forward in finalizing this guidance.

Respectfully,



Stacy Malone, Executive Director  
Victim Rights Law Center

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<sup>13</sup> 34 C.F.R. § 99.7(a)(2)(iii).