



UNITED STATES DEPARTMENT OF EDUCATION

August 24, 2016

Dear Colleague Letter to School Officials at Institutions of Higher Education

Dear Colleague:

The U.S. Department of Education (the “Department”) issued a draft Dear Colleague Letter in August 2015, soliciting public comment on several issues related to the privacy of student medical records at institutions of higher education (“institutions”). After considering the comments received, the Department is issuing this final letter, which

1. makes relatively minor changes to clarify intent,
2. discusses litigation holds, and
3. indicates that it is a best practice for institutions to notify students of the privacy of their medical records at the time they receive treatment.

ED has determined that this letter is significant guidance.¹ This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Department evaluates whether covered entities are complying with their legal obligations. If you have questions or are interested in commenting on this guidance, please contact ED at ocr@ed.gov or 800-421-3481 (TDD 800-877-8339).

Many institutions offer their students on-campus access to medical services, including mental health services. These services can help comprehensively promote campus safety and health; improve academic achievement; and assist those who experience sexual violence, other violence, or harassment. These benefits cannot be fully realized in an environment where trust between students and the institution is undermined. Students should not be hesitant to use the institution’s medical services out of fear that information they share with a medical professional will be inappropriately disclosed to others. The Department urges that institutions inform students at the time they receive treatment of the privacy protections afforded to their medical records pursuant to Federal and State law as well as institutional policy.

The Department is sending this Dear Colleague Letter to school officials at institutions to remind them of their obligations under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the regulations in 34 CFR Part 99, to protect students’ education records from disclosure without the consent of the student, and to provide guidance more specifically on the disclosure of student medical records. This guidance does not create or confer any rights for or on any person, nor does it impose any requirements or limitations beyond those set forth under applicable law and regulations.

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

¹ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf

between the institution and the student, FERPA’s school official exception to consent 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 the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR §§ 164.501, 164.506, and 164.512(e).

Thus, without a court order or written consent, institutions that are involved in litigation between the institution and the student should not share, without consent, student medical records with the institution’s attorneys or courts unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment, and even then should disclose only those records that are relevant and necessary to the litigation. This approach recognizes students’ reasonable expectations that their conversations with medical professionals are confidential and respects the unique nature of students’ medical records. To provide a clarifying example, if an institution provided counseling services to a student and the student subsequently sued the institution claiming that the services were inadequate, the school’s attorneys should be able to access the student’s treatment records without obtaining a court order or consent. However, if instead the litigation between the institution and the student concerned the student’s eligibility to graduate, the school should not access the student’s treatment records without first obtaining a court order or consent. And under no circumstances should an institution seek to access such records in an effort to intimidate or otherwise retaliate against a student for reporting or litigating claims of discrimination, including but not limited to sexual harassment and assault.

Background

FERPA is a Federal law that protects the privacy interests of parents and students in a student’s “education records.” The law applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of Education. Under FERPA, a parent or eligible student (i.e., a student who has reached 18 years of age or attends a postsecondary institution) generally must provide a signed and dated written consent before the agency or institution discloses personally identifiable information (“PII”) from the student’s education records. 34 CFR § 99.30. FERPA defines “education records” broadly to mean those records that are: (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3. FERPA permits the disclosure of eligible students’ education records without consent only under the limited exceptions described in 20 U.S.C. §§ 1232g(b), (h), (i), and (j) and 34 CFR § 99.31, some of which are discussed further below.

Under FERPA, medical records (including counseling records) are generally considered to be education records. Under a narrow exception in FERPA, however, a medical record is considered a “treatment record” if it meets three criteria. A treatment record must be:

- 1.) Directly related to a student who is eighteen years of age or older, or is attending an institution of postsecondary education;
- 2.) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional capacity, or assisting in a paraprofessional capacity; and

- 3.) Made, maintained, or used only in connection with the provision of treatment to the student, and not available to anyone (including the student) other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice. 20 U.S.C. § 1232g(a)(4)(B)(iv).

If an institution discloses a student’s medical record for any purposes other than those specified in item #3 above (including giving it to the student), the record will no longer fall under the treatment record exception, and will become an education record under FERPA. As an education record, the medical record could also be disclosed under any of FERPA’s exceptions to consent. As discussed below, the Department believes that these exceptions should be construed in a balanced manner protecting student health, safety, and privacy interests.

HIPAA does not apply to “education records” or “treatment records” under FERPA, even if these records are held by an institution’s clinic or other health care provider that is a HIPAA covered entity. A HIPAA covered entity is defined at 45 CFR § 160.103 as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a covered transaction. For an explanation of the relationship between FERPA and HIPAA and how these two laws apply to records maintained on students, see “Joint Guidance on the Application of the *Family Educational Rights and Privacy Act (FERPA)* And the *Health Insurance Portability and Accountability Act of 1996 (HIPAA)* To Student Health Records,” November 2008, www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf.

Most disclosures under FERPA are permissive, rather than mandatory, meaning that institutions choose when to share education records, including medical records without consent under the exceptions set forth in 20 U.S.C. §§ 1232g(b)(1)(A)-(I), (K), and (L), (b)(3), (b)(5), (b)(6), (h), and (i). When institutions choose to disclose PII from education records, including medical records, without consent, they should always take care to consider the impact of such sharing, and only should disclose the minimum amount of PII necessary for the intended purpose. When making these decisions involving student medical records, the Department recommends that institutions give great weight to the reasonable expectations of students that the records generally will not be shared, or will be shared only in the rarest of circumstances, and only to further important purposes, such as assuring campus safety. Failure to meet those expectations could deter students from taking advantage of critical campus resources, and could undermine the integrity of the patient-doctor/provider relationship as well as trust between students and the institution. In fact, the Department is confident that many institutions are already taking considerations such as these into account when deciding whether to share medical records for purposes of litigation.

The Department also notes that many states have privacy laws that protect the confidentiality of medical and counseling records. FERPA’s permissive exceptions to the requirement of consent do not preempt any state laws that may provide more stringent privacy protections for this information.

The following paragraphs examine some of the exceptions under which medical records may be disclosed without consent under FERPA.

Exception: School Officials with a Legitimate Educational Interest

FERPA allows the nonconsensual disclosure of education records, including medical records, to school officials, including professors, administrators, and legal counsel, provided the institution has determined that those officials have a legitimate educational interest in the records. 20 U.S.C. § 1232g(b)(1)(A); 34 CFR § 99.31(a)(1)(i). 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. 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 in a particular record. For example, employees in a registrar's office may have a legitimate educational interest in accessing information about which students are entitled to reasonable accommodations for test-taking. Yet, those same employees would most likely not have a legitimate educational interest in accessing other medical records or counseling information for individual students.

Another example of the use of the school official exception to consent is related to disclosure of information to campus threat assessment teams. The Department has long encouraged institutions to implement a threat assessment program that relies on teams, composed of a wide variety of school officials (sometimes including attorneys), to gather information, evaluate facts, and determine whether a health or safety emergency exists. The members of the threat assessment team are typically considered school officials under FERPA, as they assist the institution in gathering information, evaluating facts, and making institutional determinations, such as whether a health or safety emergency exists, and how the institution should respond. 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. If the threat assessment team then determines that an "articulable and significant threat" has developed, the institution may make further necessary disclosures under the health or safety emergency exception discussed below. 34 CFR §§ 99.31(a)(10) and 99.36. Information on establishing a threat assessment program and other helpful resources for emergency situations can be found on the Department's Web site:

www2.ed.gov/admins/lead/safety/edpicks.jhtml?src. The Department wishes to be very clear that today's guidance on the scope of the school official exception in no way diminishes the sharing of records and information allowed under FERPA to prevent or respond to violence on campus.

Attorneys representing institutions in legal proceedings generally function as school officials under FERPA. 34 CFR § 99.31(a)(1)(i). An attorney representing an institution in litigation with a student may want access to education records, including medical records, to prepare his or her case. While a court may ultimately admit medical records in a proceeding between the student and the institution with applicable protective orders, attorneys representing institutions in such litigation generally should not be determined to have a legitimate educational interest in accessing those records, without a court order or the student's written consent, unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment. Thus, FERPA should be applied similarly to those portions of the HIPAA Privacy Rule pertaining to litigation between a covered health care provider, such as a hospital, and a patient. 45 CFR § 164.506a. Under the HIPAA Privacy Rule, a covered health care provider,

such as a hospital, that is not a party to the administrative action or litigation may only use or disclose the minimum necessary protected health information in the course of judicial and administrative proceedings without an individual's authorization, pursuant to either a court order or satisfactory assurances in accordance with 45 CFR § 164.512(e). Satisfactory assurances generally either afford the individual whose records would be disclosed an opportunity to raise objections or involve a qualified protective order under which the parties agree not to reuse or re-disclose the protected health information. A provider that is a party to the judicial or administrative proceeding may use or disclose the minimum necessary protected health information for litigation purposes related to the provider's treatment or payment activities. The Department believes that institutions that are involved in legal proceedings between the institution and the student should apply FERPA in a similar manner. To apply FERPA otherwise could discourage students from seeking viable on-campus medical treatment by affording lower confidentiality protections within campus health centers compared to health facilities off-campus, which may not be financially viable options for some students.

In situations where a student's medical records are likely to be relevant to a reasonably anticipated, threatened, or pending lawsuit, an institution and its counsel may have a legal duty to preserve the student's medical records pursuant to what is called a "litigation hold" or a "legal hold." The Department does not intend for this Dear Colleague Letter to be read as overriding any legal obligations with regard to litigation holds that an institution and its legal counsel may have under applicable State or Federal law. That said, institutions should establish policies and procedures concerning litigation holds, particularly as they relate to the preservation of student medical records. An institution or its counsel normally should instruct the treatment provider to preserve the student's medical records but may electronically capture or take physical custody when they determine that they need to do so to meet their legal obligations to preserve such evidence. In this instance, as described above, under FERPA the institution and its counsel should not otherwise access, use, or disclose these medical records as part of the litigation without a court order, a subpoena, or the student's written consent, unless the lawsuit in question relates directly to the student's medical treatment or the payment for that treatment.

Exception: Disclosure to a Court without Court Order or Subpoena

An institution that is involved in litigation between the institution and the student may want to disclose the student's education records, including medical records, to a court. The FERPA regulations generally do not require consent (or a court order or subpoena) before an institution may disclose to a court those records that are "relevant for the educational agency or institution to" proceed with a legal action against the student or defend itself from a legal action by the student. 34 CFR § 99.31(a)(9)(iii). These regulations reflect the practical consideration that an institution should not normally be required to subpoena or obtain a court order to produce records it already possesses in these instances. When medical records or counseling records are involved, however, this general rule should be read in light of the special sensitivity of those types of records and the importance of students being able to obtain timely on-campus medical treatment. Again, the Department believes the standard articulated in HIPAA, which is further explained in the following U.S. Department of Health and Human Services Frequently Asked Questions, strikes the right balance:

www.hhs.gov/ocr/privacy/hipaa/faq/judicial_and_administrative_proceedings/704.html.

As with the legitimate educational interest determination, an institution should use the litigation exception to disclose student medical records to a court only if the lawsuit relates directly to the medical treatment or the payment for such treatment. The Department believes most institutions are already treating student medical records as sensitive and limiting disclosure accordingly and urges all institutions to do the same.

When using the litigation exception, institutions should also take care when disclosing a student's medical records to a court to limit disclosures to only those records that are, in fact, relevant and necessary to the litigation (i.e., the medical treatment or payment for such treatment).

Exception: Health or Safety Emergency

Students' health and safety are of the utmost importance and must remain a high priority for institutions. FERPA does not require the student's consent before an institution may disclose the student's education records, including medical records, to appropriate parties if that student poses an articulable and significant threat to self or the health or safety of other individuals. 34 CFR §§ 99.31(a)(10) and 99.36. This is a flexible standard under which the Department generally defers to school officials so that they might bring appropriate resources to bear on the situation. In applying this standard, a school official should be able to explain his or her reasonable belief, based on all the available information, as to why a given student poses an "articulable and significant threat." Under this exception to consent, the institution is responsible for determining whether to disclose PII from education records, including medical records on a case-by-case basis, taking into account the totality of the circumstances. 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, attorneys representing the institution, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed.

This exception to consent generally does not allow for a blanket release of PII from a student's education records, including medical records. Even where sharing PII from a student's education records is essential to protect the health and safety of the student or others, school officials must take care to disclose only the information from education records, including medical records, that is necessary to protect the student or others. The information that may be disclosed is limited to that which is necessary to protect the health or safety of the student or other individuals. 34 CFR § 99.36(a). In many cases, providing actual records, such as a counselor's session notes, is not necessary or critical in determining a health and safety emergency or to protect the student or others. In most cases, a counselor's summative statement of the relevant and necessary information from those records will suffice.

Conclusion

The Department is committed to ensuring that institutions provide a campus environment where students feel safe to seek medical services from college and university clinics, including counseling and mental health services. We believe that students have a reasonable expectation that institutions will maintain the confidentiality of their conversations with health care

professionals, and we commend the many institutions that have made thoughtful and sensitive decisions that respect the private nature of students' medical records.

General questions about FERPA should be directed to the Family Policy Compliance Office, at 202-260-3887 or through the "Contact Us" tab at familypolicy.ed.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen M. Styles", written over a horizontal line.

Kathleen M. Styles
Chief Privacy Officer