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

October 2, 2015

Dear Ms. Styles:

On behalf of the National Association of College and University Attorneys,¹ I write in response to the Department of Education's request for comments on its August 18, 2015 draft Dear Colleague Letter concerning campus attorney access to student medical² records in connection with litigation. As an initial matter, we greatly appreciate your willingness to solicit input on this issue by providing a Dear Colleague Letter in draft form for comments by those affected and appreciate the opportunity to provide input.

We, too, recognize the importance of on-campus medical services for students and agree that students should be able to use these services without fearing that the Family Educational Rights and Privacy Act (FERPA) will permit campus attorneys greater access to their patient records than would be permitted in other contexts. We also believe that the current perception that FERPA creates a "loophole" in this regard is incorrect: FERPA does not, and should not, be construed to give campus attorneys greater access to student medical records than attorneys for off-campus medical providers have to patient records under the Health Insurance Portability and Accountability Act (HIPAA) and state medical confidentiality laws. We support your efforts to clarify that fact in a Dear Colleague Letter, and we generally agree with your description of how and when student medical records may be disclosed in litigation.

We are concerned, however, that the current language of the draft may have the unintended consequence of depriving campus medical providers of the ability to obtain needed legal advice that other medical providers elsewhere are able to obtain under

¹ The National Association of College and University Attorneys (NACUA) seeks to advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve. NACUA's membership includes more than 800 accredited, non-profit, degree-granting institutions, with more than 1800 campuses and more than 4400 attorneys. NACUA and its member volunteers help member attorneys provide high quality and responsive legal services and information to institutions of higher education; deliver services that allow member attorneys to provide effective counsel to colleges and universities; support a learning environment for professional development of its member attorneys; help them to maintain the highest professional and ethical standards; and work to improve the understanding of legal issues and to enhance the role of NACUA and its member attorneys in the higher education community. NACUA does not generally take policy positions or make comments on proposed regulations or guidelines except in rare circumstances with approval by the NACUA Board of Directors after consideration of established factors, as occurred in this instance.

² Throughout this letter I intend the use of "medical" to include physical and mental health.

applicable law. Hindering their access in this way could have serious negative consequences for campus medical providers, their patients, and the broader community. We therefore urge the Department to amend the draft Dear Colleague Letter to clarify that FERPA permits no more *but also no less* sharing of student medical records than would be permitted in other contexts.

Specifically, we are concerned that the current language of the Dear Colleague Letter could:

1. Be misinterpreted to prohibit campus medical providers from consulting their attorneys about important legal issues that arise outside the context of actual, already filed litigation;
2. In the context of litigation, obstruct campus attorneys' ability to put in place litigation holds, which would run afoul of mandatory discovery requirements and potentially subject their institutions to court sanctions for failure to adequately preserve relevant litigation documents; and
3. Hinder the on-campus threat assessment process by preventing attorneys from participating in that process and advising both threat assessment teams and their individual members on confidentiality and other applicable legal issues.

Neither HIPAA nor state medical confidentiality laws interfere with the attorney-client relationship in these ways, and FERPA should not be construed to do so.

Our concerns stem from two fundamental misperceptions about FERPA inherent within the broader public discussion that we fear the draft Dear Colleague Letter does not sufficiently dispel – and that may therefore cause the Dear Colleague Letter itself to be misconstrued. First, the fact that FERPA “allows” sharing of student information among campus employees with a job-related need-to-know has mistakenly been taken to mean both that FERPA “trumps” other applicable restrictions and that campus attorneys are therefore free to “demand” such access regardless of either those other restrictions or their client’s wishes. Neither of these conclusions is accurate. Stated more precisely, FERPA “does not prohibit” such sharing, but (as is noted briefly in the current draft) it may take place *only if it also* is permitted by any other applicable restrictions, including the state medical confidentiality laws by which we and our campus medical providers are bound. Moreover, while it certainly is a legitimate question whether and when campus attorneys have a “legitimate educational interest” in student medical records, FERPA’s focus is not on when campus attorneys are entitled to *receive* that information, but, rather, on when campus medical providers are entitled to *share* it with their attorneys. (Under FERPA, the only person who ever may “demand” access to a student record is the student himself or herself.) If applicable medical confidentiality law would allow medical providers to share information with their attorneys under a given set of facts in other contexts, FERPA should not prohibit them from doing so under that same set of facts in the campus context.

Second, there also appears to be a misperception among the public that sharing information with an attorney for the purpose of obtaining needed legal advice renders that information free of all confidentiality protections and authorizes the attorney to use and disclose it for any purpose that the attorney deems fit. Rather, when a medical provider consults an attorney, their two respective privileges – physician-patient and attorney-client – “dock” together to provide seamless, continuing protection for the information disclosed. With only limited, rare exceptions that are not relevant here,³ the attorney may use and disclose that information for purposes beyond the consultation *only* if the medical provider *both* would be legally authorized to use and disclose that information for such

³ For example, under the “crime/fraud” exception to the attorney-client privilege, an attorney generally may, and in some cases must, disclose a client’s intention to commit certain serious crimes or frauds.

purposes directly *and* authorizes the attorney to do so.⁴ The attorney has no independent authority to use and disclose such information unilaterally, under FERPA or otherwise.

The draft Dear Colleague Letter unintentionally reinforces – and may be construed by some to codify – these misperceptions when it analyzes the specific, narrow question of use and disclosure under the litigation exception using the “legitimate educational interest” framework of the “school official” exception. HIPAA⁵ – appropriately, and for important reasons – treats its own analogs of these two FERPA exceptions⁶ separately, and they should similarly continue to be treated separately under FERPA. By tying the two together and analyzing them as one, the current language of the draft Dear Colleague Letter could easily be misconstrued to mean that the only time a campus medical provider may consult a campus attorney and disclose patient information is if and when a lawsuit has been filed.

Advice on matters other than pending litigation

There are any number of situations outside the context of already pending litigation in which a campus medical provider – like a medical provider elsewhere – may need to share confidential medical information with an attorney in order to seek advice about the medical provider’s legal rights and responsibilities. Among others, these situations may include questions about:

- *A malpractice claim that is threatened or suspected, but not yet filed.* Prohibiting consultations with an attorney about malpractice issues unless and until a lawsuit has actually been filed could

⁴ HIPAA itself recognizes this distinction between disclosures *to* an attorney for purposes of seeking legal advice and subsequent disclosures *by* an attorney in litigation (or other contexts) and provides that the former may of necessity, and appropriately, be broader than the latter. For example, in an FAQ pertaining to “Judicial and Administrative Proceedings,” the Department of Health and Human Services states that, “[i]n most cases, [a] covered entity will share protected health information for litigation purposes with its lawyer,” rather than attempt to determine what is relevant and what may be disclosed in litigation itself. Nevertheless, the lawyer may not “further use or disclose protected health information in a manner that would violate the HIPAA Privacy Rule if done by the covered entity” directly and “must [therefore] make reasonable efforts to limit the protected health information disclosed [in the conduct of the litigation] to the minimum necessary for the purpose of the disclosure.” Another such FAQ similarly provides, for similar reasons, that a covered entity’s litigation-related disclosures *to* its attorney are not subject to HIPAA’s “accounting” requirement (similar to FERPA’s recordation requirement), but that subsequent disclosures *by* the attorney may be.

⁵ While we discuss HIPAA standards here for purposes of comparison, we believe that importing and incorporating them into FERPA by specific reference would be unnecessary and unwise. Our objection is not because of the substance of HIPAA – we support HIPAA’s general approach and believe that the combination of FERPA and state medical confidentiality laws align with and already provide at least as much protection as HIPAA – but because it confusingly suggests that HIPAA governs student medical records, which in most circumstances it does not. Moreover, we believe that the specific portions of HIPAA discussed in the current draft Dear Colleague Letter do not provide a full picture of what HIPAA, a dense and complex statute, itself allows, and the omission of other HIPAA-allowed uses could wrongly be taken to imply that they are prohibited under FERPA. And, finally, it is highly likely that HIPAA will continue to evolve in the years to come, perhaps in ways that would not be appropriate under FERPA but that will be incorporated into FERPA nevertheless if the two statutes are formally “tied” together. Any discussion of HIPAA in this context should be by analogy rather than by express incorporation.

⁶ HIPAA’s provision for “health care operations,” 45 CFR 164.506 and 45 CFR 164.501, generally allows a covered entity to disclose protected health information to its personnel and business associates on a job-related need-to-know basis (including for “legal services”), much like FERPA’s “school official” exception. HIPAA’s provision for “judicial and administrative proceedings,” 45 CFR 164.512(e), operates similarly to FERPA’s “litigation” exception.

jeopardize the medical provider's legal position and impede efforts to mediate or otherwise resolve a potential claim prior to litigation.⁷

- *A payment claim that the medical provider wishes to assert, but has not yet filed.* While such claims rarely arise on campuses, which generally do not charge for the medical care provided to their students, the language of the draft Dear Colleague Letter could be construed to mean that a campus medical provider would have to file the payment claim directly before discussing it with an attorney.
- *The scope of applicable medical confidentiality laws with respect to a particular case.* Just as not all communications with an attorney are protected by the attorney-client privilege, not all interactions with a medical provider are subject to medical confidentiality laws, and a medical provider may need legal assistance to make what can be a difficult determination. For example, the statement of a patient with a communicable disease about his or her interactions with others may allow – or even require – the provider to disclose that information to others, but the provider may be unsure of what to do without advice from legal counsel.
- *The scope of a patient's own access to particular records.* Most states allow medical providers to withhold access to patient records if such access could be harmful to the patient's health, but the dividing line is not always clear, and the provider may appropriately wish to consult with an attorney about the issue.
- *The applicability of a child abuse or similar disclosure requirement.* Nearly all states require medical providers (and certain others) who become aware of suspected child, elder, or disabled abuse to make a report notwithstanding otherwise applicable privileges, and impose penalties for failure to do so.⁸ When this duty to report is triggered, however, is not always clear. For example, a campus counselor may have a question about the duty to report when a student patient discloses abuse that occurred many years ago and there is no further contact between the alleged abuser and victim. In such an instance, the counselor should be permitted to share information about the student with campus attorneys in order to obtain advice.
- *Parental involvement in the treatment of a minor.* A significant number of college and university students are minors. Whether a medical provider may treat a minor without a parent's permission and when a medical provider may, must, or may not notify a parent of a minor's medical condition are questions that are particularly fraught with legal implications and judgments that are particularly difficult to make without the advice of an attorney with access to the relevant facts.
- *Advice in a specific circumstance about a counselor's duty to warn of potential harm to others.* A majority of states recognize a mandatory duty to warn a potential victim when a mental health provider determines that a patient presents a serious danger of violence to another. Again, however, whether, when, and to what extent this duty arises is often a difficult legal question involving close examination of the specific facts. Campus counselors should be permitted to share relevant information from a student's counseling records with campus attorneys to seek advice.

⁷ As described in another HIPAA FAQ, HIPAA allows covered entities to report "adverse events" to their malpractice insurance carriers in order to obtain coverage. Such reports are commonly made by the covered entities' attorneys and generally must be made as soon as the covered entity is aware of the potential for a claim, regardless of whether a lawsuit has been filed.

⁸ See, e.g., *Penalties for Failure to Report and False Reporting of Child Abuse and Neglect: Summary of State Laws*, U.S. Dept. of Health and Human Services, Administration for Children and Families (Dec. 2009).

These kinds of consultations are critical for campus medical providers to ensure that they understand and comply with their legal responsibilities. They cannot obtain the advice they need, however, unless they can give their campus attorneys some understanding of the facts of the situation. Non-campus medical professionals are free to share such information and seek such advice under both HIPAA and state medical confidentiality laws, and FERPA should not be construed to prohibit campus medical professionals from doing the same. We urge the Department to make this important point clear and explicit in the final Dear Colleague Letter, lest the opposite be read into it by implication.

Litigation Holds

Within the context of litigation, we believe it also important to note specifically that FERPA – like HIPAA⁹ – does not excuse compliance with applicable litigation hold requirements. There currently is no discussion of the litigation hold issue in the draft Dear Colleague Letter, and, given the litigation focus of that letter, the absence of such a discussion could be taken to imply that FERPA prohibits compliance with litigation hold requirements. This implication could have disastrous consequences for institutions in the form of court-imposed sanctions for failure to preserve documents adequately.

Parties to litigation are required to preserve relevant evidence. This duty is triggered well in advance of the actual filing of a complaint, and arises as soon as a party “reasonably anticipates” litigation.¹⁰ Moreover, in such instances, discovery rules impose specific duties on counsel to implement and actively monitor compliance with litigation holds.¹¹ FERPA should not be interpreted to prohibit higher education institutions and their attorneys from fulfilling these duties by, for example, preventing attorneys from segregating and preserving relevant student medical records.

We urge you to amend the draft Dear Colleague Letter to clarify that FERPA does not restrict campus attorneys’ ability to put in place litigation holds even if that means attorneys play a role in segregating and preserving the chain of custody of the relevant documents. As described above, that role can and should be differentiated from the question of whether, when, and how campus attorneys may make further uses or disclosures of the segregated information.

In this latter respect, we believe that the draft Dear Colleague Letter accurately and appropriately describes both the law and common practice. Student medical information should not be – and generally is not – disclosed in litigation unless it is (a) relevant to a malpractice action filed by the student or to a payment action filed by the institution, (b) in response to a lawfully issued subpoena or court order, or (c) authorized by student consent. And, in all cases, the principle of “minimum necessary” should be – and generally is – followed. It is crucial, however, that any additional guidance to clarify the current understandings about access to student medical records should not, through silence or ambiguity, limit the broader attorney-client relationship.

Service on and to threat assessment teams

Finally, these same considerations could negatively impact the important work of campus threat assessment teams. Campus attorneys sometimes serve as members of those teams, and they often advise the teams on general legal requirements and their individual members on their respective

⁹ 45 CFR 164.506, 45 CFR 164.512.

¹⁰ See, e.g., *In re Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 313-14 (S.D.N.Y. 2013).

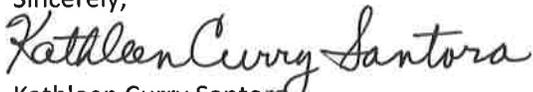
¹¹ See, e.g., *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

confidentiality requirements – including FERPA. Although the draft Dear Colleague Letter states that it “in no way diminishes the sharing of records and information allowed under FERPA” as part of that process, its silence on the specific role of attorneys in that process could, again, be construed by some to prohibit their involvement, to the detriment both of the process and of our campus communities. We urge the Department to clarify that such attorney involvement is both permitted by FERPA and appropriate.

Let us reiterate our strong agreement with the principle that FERPA should *not* be construed to give college and university counsel greater access to student medical records than other medical providers’ counsel would have in other contexts. We write only to note that, as currently drafted, the Dear Colleague Letter may result in the unintended consequences of giving campus medical providers *less* access to legal counsel on important issues than providers in other settings enjoy, preventing higher education institutions from fulfilling discovery obligations, and impairing the important work of campus threat assessment teams.

In closing, we want to thank you again for providing the opportunity for the public to submit comments on your draft; having a full range of input can only make the final product stronger. We look forward to continuing dialogue and opportunities for input on these important topics.

Sincerely,

A handwritten signature in black ink that reads "Kathleen Curry Santora". The signature is written in a cursive style with a large initial 'K' and 'S'.

Kathleen Curry Santora

President and Chief Executive Officer

National Association of College and University Attorneys