UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

June 8, 2015

Honorable Suzanne Bonamici
House of Representatives
Washington, DC 20515-3701

Dear Representative Bonamici:

This is in response to your March 11, 2015, letter, in which you express concern that the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) "appears to permit colleges and universities to access a student's private health records and, under certain circumstances, to release such records as part of her or his education record." You asked several questions about how FERPA protects certain records, including treatment records.

As you know, FERPA is a federal law that protects the privacy of students' education records. Postsecondary institutions subject to FERPA generally must obtain the written consent of eligible students to disclose their education records and personally identifiable information (PII) contained therein. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30(a). An "eligible student" is one who is at least 18 years of age or attends a postsecondary institution. *See* 34 CFR § 99.3. FERPA contains several exceptions to the general consent requirement, including exceptions that allow the disclosure of education records in connection with a health or safety emergency, the disclosure of education records to comply with a lawfully issued subpoena or judicial order, and the disclosure of education records to school officials who have a legitimate educational interest. *See* 34 CFR § 99.31.

The term "education records" is defined under FERPA to mean those records, files, documents, and other materials that: "(1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 ("Education records"). FERPA also excludes specified subsets of records from the definition of "education records," one subset of which is called "treatment records." Treatment records are:

> records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone 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.

See 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 CFR § 99.3, "Education records." Treatment records include health or medical records of eligible students that are maintained by a campus health center or counseling facility if they are made, maintained, and used only in connection with the provision of treatment, and are not made available to anyone other than the treatment provider or a physician or appropriate professional of the student's choice.

Below are the specific questions you ask, along with our responses:

- FERPA regulations govern whether an institution may disclose students' education records without consent (including treatment records that are deemed to be education records), but do any regulations or laws restrict an institution's ability to access and share students' treatment records within the institution?

FERPA allows educational agencies or institutions to disclose PII from an education record without consent under several exceptions, including the school official exception. Under this exception "school officials, including teachers, within the agency or institution" may access PII in education records if the agency or institution determines that those officials have "legitimate educational interests" in the records. *See* 34 CFR § 99.31(a)(1). The Department has interpreted the term "school official" to include a teacher; school principal; president; chancellor; board member; trustee; registrar; counselor; admissions officer; attorney; accountant; human resources professional; information systems specialist; and support or clerical personnel. The Department also has indicated that a school official would have a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

Section 99.7(a)(3)(iii) of the FERPA regulations requires an educational agency or institution to include in its annual notification of rights under FERPA a statement indicating whether it has a policy of disclosing PII under the school official exception, and, if so, to specify its criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. Model annual notifications are available at: http://www2.ed.gov/policy/gen/guid/fpco/index.html.

"Treatment records," by definition, are used only in the provision of treatment to the student and are not available to anyone other than persons providing treatment to the student, or to physicians or other appropriate professionals of the student's choice. If a school discloses an eligible student's treatment records for purposes other than the student's treatment, then the records would not meet the definition of "treatment records" but would be protected as education records, which are subject to all other FERPA protections, including the right of the eligible student to inspect and review the records.

- Does federal regulation or guidance prevent students' treatment records from being shared with other offices of an institution that are not involved in students' treatment?

Each postsecondary institution determines whether to use the "treatment records" exclusion. As explained above, by statutory definition, treatment records can be used only in the provision of treatment to the student and are not available to anyone other than persons providing treatment to the student, or to physicians or other appropriate professionals of the student's choice. However, this statutory definition does not prevent an institution from using treatment records for other purposes or disclosing them to other parties, either with consent or under one of the exceptions to

FERPA's general consent requirement. For example, a university physician or psychiatrist treating a student might determine that treatment records should be disclosed to the student's parents and/or other appropriate parties if the physician believes that the student presents a serious danger to himself or others. This disclosure would be permissible under FERPA because "education records" may be disclosed in connection with a health or safety emergency without the student's consent.

- In addition, is there any guidance, regulation, or law that limits whether an institution may declare that a treatment record is being used for a non-treatment purpose or otherwise deem a treatment record to be an education record?

Following the tragic events at Virginia Tech in 2007, institutions asked for more guidance, particularly on the intersection between FERPA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). In 2008, the Departments of Education and Health and Human Services issued joint guidance explaining the interplay of FERPA and HIPAA: http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf.

The Department, like you, believes student privacy is crucial, particularly for sensitive treatment records. We have had several conversations with your office about these issues, and we look forward to continuing to work with you on these issues. Additionally, we are currently reviewing these issues to determine whether to release additional guidance on this subject. In the meantime, if you have further questions, please contact Lloyd Horwich, Deputy Assistant Secretary (delegated the authority of the Assistant Secretary) in the Office of Legislation and Congressional Affairs at (202) 401-0020. Thank you for your attention to the privacy rights of parents and students.

Sincerely,

Kathleen M. Styles
Chief Privacy Officer