October 2, 2015

To: Kathleen Styles, J.D., Chief Privacy Officer, U.S. Department of Education
kathleen.styles@ed.gov

From: John E. Bonine, Bernard B. Kliks Professor of Law, University of Oregon

Re: Comments on August 18, 2015, draft "Dear Colleague Letter"

Thank you for the opportunity to comment on your August 18, 2015, draft "Dear Colleague Letter" regarding protection of confidential student counseling files. Please let me know if you or your staff would like to discuss any of the points or information in this comment.

I am pleased to inform you that the President of the University of Oregon has adopted today an Interim Policy (subject to public comment and other reviews) that meets and even exceeds the proposals in your draft Dear Colleague Letter. The UO Interim Policy's basic position is this: student therapy and medical files should simply not be available to anyone other than treating or consulting therapists or medical personnel unless by consent or court order, except in cases of malpractice or danger to self or others. On the issues that Oregon's new policy covers, I believe that it deserves the title "best in the nation."

Because your draft Dear Colleague Letter was obviously a result of the events at the University of Oregon, I will begin by discussing events at Oregon. Then I will address the elements of the draft Dear Colleague Letter, including in that analysis comments regarding the new UO Interim Policy. Following that I will discuss policies of various other institutions that are consistent with the Dear Colleague Letter on some important points.

I. Important events involving the University of Oregon

The events at the University of Oregon during 2014 and 2015 were the obvious stimulus for your proposed guidance. As background for my description of Oregon's new Interim Policy and my suggestions for your Dear Colleague Letter, I will summarize those events. I will also bring you up to date on other important Oregon developments – at the University, in the state and national legislature, in the executive branch of state government, and in a regulatory body.

A. The disclosure of confidential files

As you know, in December 2014 the confidential therapy records of a student patient, who was undergoing mental health counseling in a unit of the University of Oregon, were provided to University lawyers without the knowledge or consent of either the student or her treating therapist. The lawyers scanned them into their electronic records system. Reportedly this has not been the only instance of such disclosure to non-treating employees such as lawyers. For example, an article published in May 2015 reported the surprise of another student's private lawyer, who learned that the student's confidential counseling records were in the hands of lawyers hired by the university.[1]

[1] Camilla Mortensen, "Dragged Through the Mud," *Eugene Weekly*, May 28, 2015, *available at* http://www.eugeneweekly.com/20150528/lead-story/dragged-through-mud.

B. Protests against accessing of files

In January 2015, the student patient whose files had been transferred out of the counseling center filed a lawsuit against the University of Oregon on various grounds, including the disclosure of the confidential counseling files.[2] Subsequently, ethical complaints were lodged because of the accessing of files and disclosure outside the counseling center. In February 2015 several employees (professors and students), including myself, wrote to the Interim President, objecting to the transfer of files on ethical grounds, including explicit restrictions on the website of the counseling center. On March 8, I followed this up with a memorandum to the Interim President on the legal issues and asked that the files be returned.

In March 2015 the University of Oregon Senate (a body with representation from faculty, staff, and students) unanimously adopted a motion calling for disclosures to persons outside of counseling centers and clinics to be limited, in non-emergency situations, to those required by court orders. The motion said in part:

> "1.11 Whereas release of information by a clinician should be based only on client consent, other clearly articulated exceptions to confidentiality such as danger to life, or a *court order* . . . .
>
> "2.1 BE IT HEREBY RESOLVED . . . that, *in the absence of a court order*, therapy files should only be accessed with an explicit, written waiver from a student patient or her lawyer . . . ."[3]

Shortly thereafter, after meeting with various persons, the Interim Provost ordered that the files be returned to the counseling center that had disclosed them and deleted from the electronic files of the Office of General Counsel. However, in the meantime, the counseling center director, working with the Office of General Counsel, had replaced the center's explicit restrictions with a new policy that would allow disclosure.[4]

---

[2] The lawsuit was ultimately settled with a university payment of $800,000 and four years of free education. See Richard Read, "Student who sued UO, claiming she was gang-raped by basketball players, settles suit for $800,000," *The Oregonian*, August 4, 2015, *available at* http://www.oregonlive.com/education/index.ssf/2015/08/student_receives_800000_settle.html.

[3] University of Oregon Senate Motion adopted March 11, 2015, *available at* http://senate.uoregon.edu/content/return-therapy-records-and-clarify-and-strengthen-privacy-and-confidentiality-guarantees.

[4] Richard Read, "UO quietly diminishes privacy protections at student counseling center, despite promises," *The Oregonian*, April 3, 2015, *available at* http://www.oregonlive.com/education/index.ssf/2015/04/uo_quietly_diminishes_privacy.html.

C. Establishment of committee

On March 20 the Interim Provost made this promise to students in a letter:

> "The university promises each student who comes to UO clinics and counseling centers that, consistent with law and ethics codes, in the future no records will be accessed by anyone not involved in their care, unless:
> - the student signs a written release,
> - *a court orders release*,
> - the therapist needs to coordinate treatment with others,
> - the therapist needs to prevent harm to the student or others,
> - the therapist needs to provide anonymous, aggregate information to the Director of Affirmative Action to compile statistics regarding sexual assaults."[5] (**Appendix A**.)

She also announced in her letter that she was forming a committee to draft a confidentiality policy for the University. The Confidentiality Policy Committee consisted of three law professors (including myself), some administrative officials, two professors involved in teaching psychology, and some others. A consultant in confidentiality was added to the committee as well. The committee met numerous times and exchanged numerous emails.

In August the committee sent a recommended consensus policy to the Provost (who had returned to his position when a new President was appointed).[6] The University President has now issued a UO Interim Policy that adopts and strengthens the committee policy.[7]

II. Recommendations and actions from Oregon

In establishing the University of Oregon's *ad hoc* Confidentiality Policy Committee in March 2015, the Interim Provost stated:

> "I am affirming that University of Oregon students will have the same level of strong confidentiality that they have in private, off-campus therapy."[8]

---

[5] Memorandum from Provost Frances Bronet to Campus Community, "UO's Commitment to Confidentiality of Student Counseling Records," a*vailable at* http://media.oregonlive.com/education_impact/other/uo%20memo.pdf (hereinafter, Bronet March 20 Memo) (emphasis added), March 20, 2015. See **Appendix A**.

[6] University of Oregon Confidentiality Policy Committee, "University of Oregon Policy on the Confidentiality of Health Care and Survivors' Services Information" (hereinafter, Proposed UO Committee Policy), August 28, 2015. See **Appendix B-1**.

[7] President Michael Schill, "Policy III.05.02, Confidentiality of Student Health Care and Survivors' Services Information," (hereinafter, "UO Interim Policy"), October 1, 2015, *available at* https://policies.uoregon.edu/III.05.02. See **Appendix B-2.**

[8] Bronet March 20 Memo (**Appendix A**).

On August 28, 2015, after numerous meetings over four months, our committee forwarded to Provost Scott Coltrane a recommendation for a comprehensively reformed policy at the University of Oregon. On October 1, President Michael Schill issued an Interim Policy (**Appendix B-2**.) This section will summarize the UO Interim Policy. It will also describe legislative and regulatory developments in Oregon from the State Legislature, Executive Branch, Oregon's federal legislators, and the Oregon Board of Psychologists Examiners.

Part III of this memorandum will discuss the draft Dear Colleague Letter and how the UO Interim Policy and other developments relate to its provisions. Both this Part II and Part III will also advocate some additions to the Dear Colleague Letter.

A. Description of UO Interim Policy

The University of Oregon has adopted an "Interim Policy" that states explicitly that the University chooses to adopt a "more protective standard" than required under ethics codes and state or federal law.[9] In fact, however, most of the UO Interim Policy tracks the Dear Colleague Letter, as explained later.

The UO Interim Policy will accomplish the following important things:

- Requirement for court orders for most requests for records
- Keeping disclosures to the minimum necessary
- Exception for malpractice litigation (but requiring a subpoena)
- Sharp limits on access from inside the University
- Hold-in-place policy instead of file transfers
- Centralized control over unit policies
- Providing of full information for clients/patients

In Part III of this memorandum, I will discuss these in the context of the draft Dear Colleague Letter.

B. Other developments in Oregon

In addition to the work of the University of Oregon's Confidentiality Policy Committee in devising a new policy for the University, other bodies have been at work.

- In response to the disclosure of files at the University of Oregon, the State Legislature adopted (and the Governor signed) new legislation. It requires extensive notifications to students if their therapy files are at risk of being disclosed when they visit a campus health or counseling center. (**Appendix C**.)

---

[9] UO Interim Policy, https://policies.uoregon.edu/III.05.02 (**Appendix B-2**). The policy will be subject to public comments and university procedures, as originally promised by Interim Provost Frances Bronet in March.

- In June of this year, the State Legislature also adopted (and the Governor signed) new legislation to block the disclosure of confidential documents involving students and others in the hands of "victim advocates." (**Appendix D**.)
- In September, U.S. Senator Ron Wyden and U.S. Representative Susan Bonamici released draft federal legislation to deal with this issue. (**Appendix E**.)
- On September 25, 2015, the Oregon Board of Psychologist Examiners proposed to levy a fine of $5,000, issue a letter of reprimand, and require additional ethical training, in response to the disclosure of confidential student client files last year. This may be challenged, however, in a contested case (quasi-adjudicatory) hearing.

1. New Oregon legislation

In response to the disclosure of confidential counseling files at the University of Oregon, the Oregon Legislature decided that it needed to adopt changes in the law to protect confidential counseling and other information. Two strong bills emerged from the legislature.

a. Senate Bill 759

In June of this year, the Oregon Legislature unanimously passed, and the Governor signed, a bill to ensure that students receive adequate information about sexual assault, including information on when their privacy will *not* be protected in campus medical and counseling centers. This "truth in counseling" provision would hardly have been needed if confidentiality had been properly protected. The author of the bill, State Senator Sara Gelser, specifically singled out events at the University of Oregon Counseling Center as the reason that the legislature needed to adopt a new law:

> "If I had been walking into a University of Oregon health clinic prior to that story breaking, I would have assumed that I had the same rights as anybody else going to a doctor or going to a therapist."[10]

She said during initial Senate consideration:

> "If students go and seek help, they need to trust their information is confidential . . . and if it's not, they need to be told so upfront so they can decide *whether they can get those resources on their campus or seek a place that is truly confidential*."[11]

---

[10] Kate Ackerman, "University of Oregon Sexual Assault Case Sheds Light on Medical Privacy Limitations," *iHealthBeat,* June 25, 2015, *available at* http://www.ihealthbeat.org/insight/2015/university-of-oregon-sexual-assault-case-sheds-light-on-medical-privacy-limitations.

[11] Joce Johnson, "Senate passes bill on protocol for reports of sexual assault," *Statesman Journal,* April 22, 2015, *available at* http://www.statesmanjournal.com/story/news/education/2015/04/23/senate-passes-bill-protocol-reports-sexual-assault/26212527/.

It is regrettable that the failure of protection of confidentiality at the University of Oregon necessitated the legislature having to warn students that their discussions during mental health counseling might not be protected on campus. Colleges and universities should be among the places where seeking such help "is truly confidential."

SB 759 requires that the University must provide:

> "(d) Information about the victim's privacy rights, including but not limited to information about the limitations of privacy that exist if the victim visits a campus health or counseling center. . . ."[12]

The House of Representatives amended the Senate bill during consideration to require that, in addition to this information being given to a student whenever a sexual assault is reported, it must be provided during student orientation each year and on the University's website. Furthermore, such information must "be written in plain language that is easy to understand."[13]

It would be beneficial if the Dear Colleague Letter included similar advice to universities throughout the United States.

b. House Bill 3476

Also in June, the Oregon Legislature passed unanimously, and the Governor signed, legislation known as "House Bill 3476" or "HB 3476." According to the Oregon Department of Justice, with this law "Oregon has one of the strongest confidentiality protections for victims of sexual assault and domestic violence in the country."[14] This legislation provides a legal privilege against disclosure of records in the hands of a trained "victim advocate" in a health center or other setting:

> "(2) Except as provided in subsection (3) of this section, a victim has a *privilege to refuse to disclose and to prevent any other person from disclosing*:
>
> > "(a) Confidential communications made by the victim to a certified advocate in the course of safety planning, counseling, support, or advocacy services.
> > "(b) Records that are created or maintained in the course of providing services regarding the victim."[15]

---

[12] Enrolled Senate Bill 759, Chapter 398, 2015 Laws, *available at* https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/SB759, and **Appendix C**.
[13] Id.
[14] Media release, "[Attorney General] Rosenblum Joins Oregon Governor Brown at the Signing of Campus Sexual Assault Privacy Legislation," June 10, 2015, *available at* http://www.doj.state.or.us/releases/Pages/2015/rel061015.aspx.
[15] Enrolled House Bill 3476, Chapter 265, 2015 Laws, *available at* https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB3476 and **Appendix D**

The new law is explicitly made applicable to higher education in Oregon:

> "(6) This section applies to civil, criminal and administrative proceedings and to institutional disciplinary proceedings at a two-year or four-year post-secondary institution . . . .[16]

Oregon Attorney General Ellen Rosenblum has said that under the new law, "certainly those kinds of communications would not and should not under any circumstances be released."[17] The same should apply to all mental health counselors. Records in the hands of a mental health professional should receive the same protections.

The Dear Colleague Letter could suggest that others adopt similar policies.

2. Wyden/Bonamici draft legislation

U.S. Senator Ron Wyden and U.S. Representative Susan Bonamici have proposed legislation to amend the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, in response to the disclosure of records at the University of Oregon.[18] They seek to make the basic protections in the draft Dear Colleague Letter binding through legislative action.[19]

The proposed legislation would prevent university officials from using FERPA's "legitimate educational interest" provision to achieve access to confidential student counseling or health records unless the institution is "representing an institution in litigation" defending itself against essentially a malpractice or billing claim – or if consent were given, a court order were issued, or an independent individual were to certify that the patient had been informed of his or her right to resist disclosure through the legal system. While these provisions would constitute a definite advance from current law, they do not deal with two additional problems:

(emphasis added). An exception is provided when disclosure is needed for defense in an action brought by the victim against such persons or centers (for example, for malpractice).

[16] Id.

[17] Richard Read, "Gov. Brown signs legislation making conversations between alleged campus sexual assault survivors and victims' advocates confidential," *The Oregonian*, June 11, 2015, *available at* http://www.oregonlive.com/education/index.ssf/2015/06/gov_brown_signs_legislation_ma.html.

[18] Campus Litigation Privacy Act of 2015, *available at* https://bonamici.house.gov/sites/bonamici.house.gov/files/Campus%20Litigation%20Privacy%20Act%20of%202015%20-%20Discussion%20Draft.pdf (**Appendix E**).

[19] Press release, "Wyden, Bonamici Release Draft Bill to Protect Student Privacy," September 17, 2015, *available at* https://bonamici.house.gov/press-release/wyden-bonamici-release-draft-bill-protect-student-privacy.

- a student may feel powerless in the face of his or her university's actions, may be unfamiliar with his or her legal right to resist disclosure, or may have no resources to hire a lawyer;
- the therapist or other provider, even with an independent ethical obligation to resist disclosure on behalf of her or his patient, may lack resources to seek legal advice independent of the advice given by the university's lawyers.

As shown in Part III-E below, the new Interim Policy at the University of Oregon addresses the second of these problems. The Department of Education could address them as well in its Dear Colleague Letter, at least as something for universities to consider.

3. Board of Psychologist Examiners: proposed reprimand, fine, and training

In reaction to the transmittal of files to a non-treating part of the University of Oregon, the Oregon Board of Psychologist Examiners on September 25 proposed that disciplinary action be instituted.[20] The University has indicated that it supports the disciplined individual in requesting a hearing to challenge that disciplinary action, however.[21]

III. Issues in August 18 draft Dear Colleague Letter

The draft Dear Colleague Letter contains important clarifications and interpretations of the obligations of confidentiality that universities have under existing law and regulations. In most instances they are consistent with the University of Oregon's new Interim Policy and with Oregon's new law. In some instances, the UO Interim Policy is stronger and could provide a model for strengthening the Dear Colleague Letter.

A. The importance of court orders

The most important words in the draft Dear Colleague Letter are these:

> *"[W]ithout a court order* or written consent, institutions that are involved in litigation with a student should not share student medical records with the institution's attorneys or courts . . . ."[22]

---

[20] Oregon Board of Psychologist Examiners, "Notice of Proposed Disciplinary Action," September 25, 2015, *available at* http://obpe.alcsoftware.com/licdetail.php?id=1500.
[21] Richard Read, "State board proposes fine, ethics course for University of Oregon psychologist," *The Oregonian*, September 26, 2015, *available at* http://www.oregonlive.com/education/index.ssf/2015/09/state_board_proposes_5000_fine.html.
[22] Draft Dear Colleague Letter, page 1 (emphasis added).

The only exception is when the university is in a dispute over medical treatment or billing.[23]

The UO Interim Policy, which deals only with litigation, would be to the same effect. Except in the case of a legal matter essentially involving claimed malpractice, confidential files would be prohibited from being shared except in response to a court order. Even for malpractice disputes, the University would seek to use a subpoena rather than just acquiring files without notice.[24]

If a party in a dispute with the University issues a subpoena or request and it can be resisted in good faith, it will be. The client/patient (student or otherwise) will be notified of the request and informed of his/her right to seek independent legal advice and representation. Documents will then be released only in response to "an order from a court or tribunal, a stipulated protective order that the client/patient has signed, or a written authorization from the client/patient."[25]

B. Minimum disclosures

In the UO Interim Policy, disclosures "shall be limited to the minimum information necessary."[26] The Dear Colleague Letter similarly states that universities must "disclose only those records that are relevant and necessary."[27] The inclusion of the term "relevant" is a good one, and (arguably) stronger than the phrasing in the UO Interim Policy. The Dear Colleague Letter also says that institutions "only should disclose the minimum amount of PII necessary for the intended purpose."[28] These are crucial provisions to include.

C. Malpractice litigation

In case of a legal dispute regarding the provision of health care and/or survivor's services (for example, a claim of malpractice by a doctor or therapist), the UO Interim Policy would allow the University to access a patient's confidential information for purposes of a legal defense, but contemplates the use of a subpoena even in this instance. The draft Dear Colleague Letter provides that "an institution should use the litigation exception only if the lawsuit relates directly to the medical treatment or the payment for such treatment."[29] The first of these is the malpractice exception, where a student sues the university for improper and harmful medical or mental health treatment. It is good that the Letter is quite explicit about this:

---

[23] Id.
[24] UO Interim Policy, https://policies.uoregon.edu/III.05.02 (**Appendix B-2**).
[25] Id.
[26] Id.
[27] Draft Dear Colleague Letter, page 1.
[28] Id., page 3.
[29] Id., page 5.

> "[A]ttorneys 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 written consent, unless the litigation in question relates directly to the medical treatment itself or the payment for that treatment."[30]

The UO Interim Policy states that the malpractice exception's right of access would apply to both actual and "anticipated" legal actions. This kind of language could invites potential mischief, for "anticipation" has no obvious boundaries, but the requirement for a subpoena,[31] added by the University President to the draft from the Confidential Policy committee, appears to mitigate substantially that risk.

D. Hold-in-place

When litigation is anticipated, a potential defendant (such as a university) has an obligation to preserve documents that may be relevant to any litigation. Sometimes a university will receive a formal "litigation hold" notice or request from a potential litigant. At other times, it will be aware that litigation may occur and that documents need to be preserved, even without a formal request from a potential litigant. A problem arises, however, where a student plans to sue the university (for matters unrelated to her treatment in a counseling center) and a process to preserve documents could result in the university gaining access to her confidential counseling records.

The draft Dear Colleague Letter does not address this problem. At the University of Oregon an assertion was made that university lawyers must access confidential student files as part of their obligation to preserve documents because of actual or threatened litigation. This potential conflict of obligations (the university's obligation to preserve documents and the obligation of medical and other personnel not to disclose documents, even to the university) has been addressed in the University of Oregon's Interim Policy with a "hold-in-place" policy.

Under the new University of Oregon policy, when litigation is commenced or anticipated, units must "hold-in-place" all potentially relevant records (including those that are confidential), instead of giving them to the university's lawyers. Each unit's procedures to ensure this will have to be approved by the Office of General Counsel under the proposed policy. Furthermore, Information Technology staff will institute an "IT hold."[32]

I suggest that this important policy innovation (which is already in effect in some other universities) be added to the Dear Colleague Letter. Without a "hold-in-place" provision, a university can assert that officials outside its counseling centers are acquiring confidential documents about student clients simply because it needs to preserve information and prevent its destruction.

---

[30] Id., page 4.
[31] UO Interim Policy, https://policies.uoregon.edu/III.05.02 (**Appendix B-2**).
[32] Id.

E. Potential conflicts of interest and independent lawyer funding

It may seem strange that, if the university wants access to confidential client files, it must seek a court order *against itself*. However, it would simply inform the court that university policies or state or federal law leaves the records in the hands of (and under the protection of) the therapist/clinician and custodian of records. The clinician or custodian would be resisting disclosure not as "the university" but as an independent actor protecting her or his own legal and ethical responsibilities. The therapist and custodian of record need simply refuse to provide records and then contest the matter in court. The new UO Interim Policy requires that the University use a court order ordinarily and, even if the claim is for malpractice, to attempt to use a subpoena. This gives the patient/client the ability to go to court to resist that subpoena or to limit it to confidential documents that are truly relevant to the malpractice claim.

A similar situation exists with university law school clinics. If a university wanted to see the confidential client files or attorney work product of any of its legal clinics (for example, a Domestic Violence Clinic), the lawyers in those clinics would be obligated to stand up against the university's lawyers and require them to seek a court order. Each lawyer in a clinic has a separate obligation to comply with the Rules of Professional Conduct. The fact that the clinic is part of a law school does not change that. In fact, the American Bar Association has issued ethics opinions prohibiting university personnel from interfering with the ethical obligations of clinical personnel.[33] In a similar opinion, involving legal aid organizations, the ABA said told the governing boards of such organizations to avoid interfering with case decisions.[34] The same principle applies to other ethical matters.

This is the same situation presented by on-campus health clinics. A therapist or other clinician working in a university health clinic cannot turn over her separate ethical obligations to a supervisor or a university lawyer. Individuals providing medical services in a university have dual roles. Yes, they are university employees. But they are also independent actors who have separate legal and ethical responsibilities –and therefore can have separate legal standing in court. They also may need separate legal counsel, for a university lawyer has little or no obligation to defend the personal professional interests of these clinicians.

There is a problem of funding, however. The University of Oregon's Interim Policy addresses this situation. It states that a health or mental health provider may "request" University funding for independent legal counsel concerning the disclosure of records. Denial of such a request for funding of independent counsel could be appealed to the University President. The same right would be given to the "custodian of record," who may be a different person.[35]

---

[33] For example, ABA Informal Ethics Opinion 1208 prohibited a law school dean from interfering with the decision-making authority of a clinic director. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).
[34] ABA Comm. on Prof'l Ethics, Formal Op. 324 (1970).
[35] UO Interim Policy, https://policies.uoregon.edu/III.05.02 (**Appendix B-2**).

It would be helpful if the Dear Colleague Letter also addressed this problem of lack of independent legal advice and funding for it.

F. Review of unit policies:

Under the draft policy proposed by the University of Oregon's Confidential Policy Committee, each unit in a university that has clients/patients would have been required to have a unit policy that is approved by a Confidentiality Standards Advisory Committee appointed by the University President.[36] The UO Interim Policy requires unit policies,[37] but the question of a review committee will be addressed separately.

The Dear Colleague Letter would benefit from encouraging such policies at other universities, for implementation at the unit level is where the rubber hits the road.

G. Information for clients/patients:

Under the University of Oregon's Interim Policy, each client/patient must be given a document with relevant policies, including a link to the University's overall policy.[38] That also is a salutary step that the Dear Colleague Letter might address.

H. More protective standards and links to existing state law requirements

Some states already have laws that are more protective than federal law or guidance, as the draft Dear Colleague Letter points out. The University of Oregon's Interim Policy goes even further. It states that the University chooses to uphold a "more protective standard" than even may be required under state and federal laws, and professional codes of ethics.[39]

The Dear Colleague Letter could recommend that universities adopt explicit policies (as the University of Oregon is doing) and that such policies contain explicit links to any state laws that impose strong protections on confidentiality. It could also explicitly mention that each university has the right and ability to go beyond such laws in protecting student medical and mental health confidentiality.

IV. Strong policies of various universities, ethical bodies, and state laws

Several ethical codes, universities (such as Dartmouth, Houston, Miami, and Syracuse), and state laws (for example, in Colorado, the District of Columbia, and New Hampshire) require court orders prior to sharing outside a health or counseling center.

---

[36] Proposed UO Committee Policy (**Appendix B-1**).
[37] UO Interim Policy, https://policies.uoregon.edu/III.05.02 (**Appendix B-2**).
[38] Id.
[39] Id.

A. Ethical code

Apart from the general duties expressed in many ethical codes, some of them have explicit provisions that are aligned with aspects of the draft Dear Colleague Letter. One example is that ethical code of the National Board for Certified Counselors (NBCC), which requires a court or government agency order before a counselor can agree to release of confidential files – and that the counselor even request withdrawal of court orders.

> "1. NCCs [National Certified Counselors], recognizing the potential for harm, *shall not share information* that is obtained through the counseling process without specific written consent by the client or legal guardian *except* to prevent clear, imminent danger to the client or others or when required to do so by a *court order*.
>
> "12. NCCs who provide *clinical supervision* services shall keep accurate records of supervision goals and progress and consider all information gained in supervision as confidential *except* to prevent clear, imminent danger to the client or others or when legally required to do so by *a court or government agency order*.
>
> "57. In the event that the client seeks to prevent the release, the [counselor] shall *request that a court withdraw any order* to release confidential information due to the potential harm to the client or the counseling relationship."[40]

B. Universities

Some universities have policies or practices that are already aligned with aspects of the draft Dear Colleague Letter – for example, explicitly requiring court orders before confidential information will be released beyond those involved in treatment or consultation with student patients.

1. University of Washington – court order required

Except in a case of therapist's malpractice, the University of Washington will not share records outside the UW Counseling Center without consent except under "court order" or when state law requires reporting of danger or neglect of a child, dependent adult, or developmentally disabled person.[41]

2. Syracuse University – court order required; access by others in University prohibited

> "Counseling Center services are *completely confidential, except* in cases where there is a *court order* requiring the release of information or there is imminent danger to

[40] http://www.nbcc.org/assets/ethics/nbcc-codeofethics.pdf (emphasis added).
[41] https://www.washington.edu/counseling/about/confidentiality/.

self or others. . . . *No one in the University has access* to a student's Counseling Center record unless the student gives permission for that access."[42]

3. University of Houston – signed court order required

"Authorization to Release of Medical Records

"All information is considered confidential and will not be released without the patient's written consent or a *signed court order*."[43]

4. University of Miami – court order required

"Information about students or their treatment *cannot be disclosed to others* without their written consent, *except* for cases of imminent danger to themself or others, reports of child/elder/disabled abuse, *or a court order*."[44]

5. Dartmouth University – follows New Hampshire law requiring court order

"Privileged communication between a client and a mental health professional may be abrogated by *court order in limited circumstances*."[45]

C. State laws

1. State of Colorado Mental Health Practice Act - for malpractice, not when merely "anticipated"

"12-43-218. Disclosure of confidential communications.

"(1) A licensee, school psychologist, registrant, certificate holder, or unlicensed psychotherapist *shall not disclose*, without the consent of the client, any confidential communications made by the client, or advice given thereon, in the course of professional employment . . . .

"(2) Subsection (1) of this section shall not apply when: (a) A client . . . *file[s] suit or a complaint* against a licensee, school psychologist, registrant, certificate holder, or unlicensed psychotherapist on any cause of action arising out of or connected with

---

[42] http://counselingcenter.syr.edu/students/confidentiality.html (emphasis added).

[43] http://www.uh.edu/caps/resources/forms/authorization_to_release_of_medical_records.html (emphasis added).

[44] http://www.miami.edu/sa/index.php/counseling_center (emphasis added).

[45] http://www.dartmouth.edu/~chd/confidentiality/ (emphasis added).

the *care or treatment of such client* by the licensee, school psychologist, registrant, certificate holder, or unlicensed psychotherapist . . . ."[46]

2. New Hampshire – equivalent to attorney-client privilege; court order required

"RSA 330-A:32 Privileged Communications

"The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the *same basis as those provided by law between attorney and client*, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, *unless* such disclosure is required by a *court order."*[47]

3. District of Columbia Mental Health Information Act – no disclosure to employer; criminal penalties

"§ 7–1201.02. Disclosures prohibited; exceptions.
"(a) Except as specifically authorized by subchapter II, III, or IV of this chapter, *no mental health professional, mental health facility*, data collector or employee or agent of a mental health professional, mental health facility or data collector *shall disclose* or permit the disclosure of mental health information *to any person, including an employer*."

"§ 7–1207.02. Criminal penalties.
"(a) Except for violations of subchapter V of this chapter, any person who willfully violates the provisions of this chapter shall be guilty of a misdemeanor and such violator shall be fined not more than $1,000 or imprisoned for not more than 60 days, or both."[48]

V. Conclusion

One might ask: if the University of Oregon's new policy is so good, why would I take several days to write 17 pages that ask you to adopt a strong Dear Colleague Letter? The answers are two-fold.

- First, there is no assurance that the final University of Oregon policy will be as strong as the Interim Policy.

---

[46] http://sehd.ucdenver.edu/cpce-internships/files/2010/08/Statute.pdf (emphasis added).
[47] http://www.dhhs.nh.gov/hie/documents/laws.pdf (emphasis added).
[48] http://doh.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/MENTAL%20HEALTH%20INFORMATION.pdf (emphasis added). See more readable version at http://dccode.org/simple/Title-7/Chapter-12/.

- Second, protecting the confidential records of student patients at campus medical centers is equally important at every college and university.

Providing ironclad guarantees of confidentiality is crucial to the therapy and recovery of American students, and nowhere more so that when a student has been raped or otherwise assaulted.

Your Dear Colleague Letter will make a difference and help ensure, along with the efforts being made at the University of Oregon under new leadership, that what happened here a year ago does not occur again.

Thank you.

Appendix A, Interim Provost Bronet's March 20 Memorandum
Appendix B-1, proposed University of Oregon Policy on Confidentiality
Appendix B-2, University of Oregon Interim Policy on Confidentiality
Appendix C, Oregon Senate Bill 759
Appendix D, Oregon House Bill 3476
Appendix E, draft Campus Litigation Privacy Act of 2015 (Wyden, Bonamici)