

Implications of Federal Privacy Laws on Students' School Health Records

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It's about that time again. Students and teachers will be heading back to school. And so will swine flu, according to public health experts.¹ As the novel strain of flu (H1N1) hit schools this past spring, many districts elected to cancel classes and shut down in order to prevent the virus from spreading among students. However, Houston, Texas, schools will not employ the same tactic this time around.

"School closure is an ineffective strategy," said Dr. David Persse, public health authority for the city of Houston.² "It appears that the virus spreads so quickly and effectively among kids that by the time you close the schools it's too late." The revamped plan is to rely heavily on parents to keep children home when flu symptoms appear. Regardless, if predictions hold true, there will be plenty of students being seen by a school nurse for flu-like symptoms, swine or otherwise, this fall. That means documenting those visits in the students' record and maintaining the security and privacy of those records as well.

This article briefly reviews the Family Educational Rights and Privacy Act (FERPA)³ and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)⁴—two federal laws that greatly impact disclosure or non-disclosure of students' health records information.

FERPA

The Family Educational Rights and Privacy Act (FERPA), protects the privacy of students' "education records," which may include records from a student health clinic or notes of discussions between students and faculty members.⁵ It also outlines procedures for disclosure or non-disclosure of a student's personal information. The law generally applies to most public elementary or secondary schools, and most private and public post-secondary institutions, which receive funds under any program administered by the U.S. Department of Education (DOE).⁶ Religious schools typically do not receive federal funding assistance and thus, are not subject to FERPA.⁷ Unless federal funds are distributed directly to a private school, they are also not subject to the law's provisions.⁸

¹ Donald G. McNeil, Jr., *Swine Flu Expected to Return With Opening of School*, N.Y. TIMES, July 18, 2009, <http://www.nytimes.com/2009/07/18/health/18flu.html?scp=3&sq=swine%20flu%20school&st=cse> (federal health officials predict the swine flu will hit schools as they open, rather than in October or November).

² Cindy George, *Schools Revamp Swine Flu Plans for Fall*, HOUSTON CHRON., Aug. 1, 2009, <http://www.chron.com/dispatch/story.mpl/metropolitan/6557550.html>.

³ 20 U.S.C. § 1232g (West 2009).

⁴ 42 U.S.C. § 1301 *et seq.* (West 2009).

⁵ 20 U.S.C. § 1232g (2008); 34 C.F.R. pt. 99 (2009).

⁶ 34 C.F.R. § 99.1 (2009).

⁷ *Id.*

⁸ 34 C.F.R. § 99.1(b) (2009).

(a) *Terms Defined*

FERPA defines the term “education record” 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.⁹ It does not include certain records of the institution’s law enforcement unit or records created after a student is no longer in attendance at the institution.¹⁰ It also does not protect observations made by instructors or security videos.¹¹

Personally identifiable information within an education record, “includes, but is not limited to” the following:

- the student’s name;
- the names of parents or other family members;
- address;
- a personal identifier such as a social security number or student number;
- other identifiers such as date of birth, place of birth, and mother’s maiden name;
- other “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person...to identify the student”; or
- information requested by a person who the educational agency or institution believes knows the identity of the student to whom the record relates.¹²

At the elementary or secondary level, a student’s health records, including immunizations, as well as records maintained by a school nurse are considered “education records” and thus subject to FERPA.¹³ Additionally, schools that maintain information on special education students, including records on services provided under the Individuals with Disabilities Education Act (IDEA), are “education records” under FERPA.¹⁴

(b) *Inspection and Disclosure of Records*

FERPA allows parents certain rights regarding their child’s education records including the right to inspect and review the records and to request that a school correct information

⁹ 34 C.F.R. § 99.3 (2009); 20 U.S.C. § 1232g(d) (West 2009).

¹⁰ *Id.*

¹¹ U.S. Dep’t of Education, *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*, (Oct. 2007), available at <http://www.ed.gov/policy/gen/guid/fpco/brochures/elsec.html>.

¹² 34 C.F.R. § 99.3 (2009); 20 U.S.C. § 1232g (West 2009).

¹³ See U.S. Dep’t of Health & Human Servs., and U.S. Dep’t of Education, *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*, (Nov. 2008), available at www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf.

¹⁴ *Id.*

believed to be misleading or inaccurate.¹⁵ However, if the record contains information on more than one student, the parent may not have access to information concerning the other child.¹⁶

Under most circumstances, an educational agency or institution must obtain written consent from a student's parents prior to disclosing information in an educational record.¹⁷ In the request, an educational institution must identify the specific records to be disclosed, the purpose for the disclosure, and to whom the records will be disclosed.¹⁸ A parent has a right to receive a copy of the disclosed information upon request.¹⁹ There are times, however, where no parental consent is required.

An institution may disclose, without consent, a student's "directory information" which includes a student's name, address, photograph, email address, telephone number, date and place of birth, honors and awards, and dates of attendance; however, school officials must inform parents about directory information and allow for a reasonable amount of time for parents to request that the school not disclose such information.²⁰ Ideally, this option is given to the parents prior to the start of each school year so that a personal decision can be made before the student begins classes.

More importantly, a student's personally identifiable information from an education record may be distributed under several specific circumstances, including:

1. to other school officials within the same institution with legitimate educational interest;
2. to another school to which the student is transferring – for purposes related to the transfer;
3. to specified educational or other officials for audit or evaluation purposes;
4. to appropriate parties in connection with financial aid to a student;
5. organizations conducting studies to administer predictive tests or improve instruction under specific guidelines;
6. accrediting organizations;
7. to comply with a judicial or court order;
8. to health or safety officials in case of emergencies; and
9. state and local authorities, within a juvenile justice system, pursuant to a specific State law.²¹

Although there are several conditions that apply to disclosure of a student's information during times of health and safety emergencies, those conditions are worded quite broadly. For example, a student's education record may be disclosed "to appropriate parties" if

¹⁵ 34 C.F.R. §§ 99.10 and 99.20 (2009) (if a school refuses to correct something in the student's record, the parent, or eligible student, is entitled to a formal hearing).

¹⁶ 34 C.F.R. § 99.12(a) (2009).

¹⁷ 34 C.F.R. § 99.30 (2009).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 34 C.F.R. § 99.37 (2009) (directory information does not include a student's social security number).

²¹ 34 C.F.R. § 99.31 (2009).

knowledge of the information is “necessary to protect the health or safety of the student or other individuals.”²² In making that determination, an educational agency or institution may:

...take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.²³

The language in the preceding paragraph was initially intended to address those times when immediate safety concerns were present, such as school shootings or other violent acts. However, it is possible that a pandemic flu outbreak could meet the disclosure conditions set forth in FERPA to allow dissemination of a student’s information to certain public health officials.

HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), is perhaps best known for its impact on privacy issues. The HIPAA Privacy Rule requires covered entities to protect an individual’s health records and other identifiable health information by requiring appropriate privacy safeguards and to have a policy regarding the uses and disclosures of such information. The rule also allows patients access to examine and obtain a copy of health record information and to request corrections be made. State laws may provide greater protections than those in HIPAA, but are preempted if they fail to meet HIPAA’s basic level of protection.

(a) Terms Defined

In general, HIPAA applies to “covered entities” including health plans, health care clearinghouses, and health care providers that transmit health information in electronic form.²⁴ Health care clearinghouses generally include billing services, re-pricing companies, and community health management information systems. “Health care providers” include institutional providers of medical services, such as hospitals, as well as physicians, dentists, and other practitioners – including school nurses.²⁵

²² 34 C.F.R. § 99.36 (2009).

²³ *Id.* at § 99.36(c).

²⁴ 45 C.F.R. § 160.103 (2009).

²⁵ Jill Moore and Aimee Wall, Univ. of North Carolina Sch. Of Gov’t, *Applicability of HIPAA to Health Information in Schools*, Jan. 2003, available at <http://www.sog.unc.edu/programs/medicalprivacy/pdfs/schools.pdf>. (There is a two-part test to determine whether an entity is a covered health care provider: (1) any person who in the normal course of business, furnishes, bills, or is paid for health care, i.e. preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, service, assessment, or procedure with respect to the physical and mental condition or a person’s functional status, and (2) whether an entity

The HIPAA Privacy Rule requires covered entities to protect the privacy of an individual's "protected health information," or PHI, held or transmitted by a covered entity or its business associate in any form – whether electronic, paper, or oral. Health information that neither contains an individual's identifying information nor provides enough information from which a patient could be identified is not protected.²⁶ However, any other information that identifies an individual, his or her past, present or future physical or mental health is protected.²⁷

(b) *Allowable Disclosures*

If a facility or institution is deemed to be a covered entity, the basic rule is that it may not disclose an individual's PHI without written authorization or unless an exception is met.²⁸ Allowable disclosures of PHI by covered entities include those made:

- to the individual; as needed for treatment, payment, or health care operations, including quality assurance work;
- to update a facility directory regarding a patient's relatives or others involved in the patient's care;
- to aid in public health activities during a serious threat to health or safety;
- to government authorities when abuse or neglect is suspected; for health oversight activities;
- for certain law enforcement purposes or when ordered by a court;
- as needed by funeral homes or for tissue donation; to aid in research; when there is a serious threat to health or safety; or
- for certain essential government functions.²⁹

Intersection of HIPAA and FERPA on Student Health Records

School officials might be somewhat confused on how each of the above laws impacts a student's health records. Luckily, the U.S. Department of Health and Human Services (DHHS) and U.S. Department of Education issued guidance late last year on how the two federal laws work.³⁰

transmits health information in electronic form for administrative or financial purposes including an insurance claim).

²⁶ *Id.*; see also U.S. Dep't of Health & Human Servs., Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, May 2003, available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ U.S. Dep't of Health & Human Servs., Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, May 2003, available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>. (It is important to note that the exceptions listed are an overview and further requirements and information may be found in the HIPAA Privacy Rule, 45 C.F.R. § 160).

³⁰ 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, (Nov. 2008), available at www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf (last visited May 14, 2009).

Specifics regarding the interaction between FERPA and HIPAA cannot be provided in this article due to space limitations. However, the *Joint Guidance* document provides many detailed examples regarding the sometimes confusing relationship between HIPAA and FERPA. Should any education institution have a question not addressed in the document, the U.S. Department of Education maintains an e-mail address for such inquiries. FERPA@ed.gov.

Conclusion

Records that are protected by FERPA are specifically excluded from HIPAA's coverage. When making determinations as to whether personally identifiable information from student health records maintained by an educational institution may be disclosed, school officials at institutions subject to FERPA should refer to FERPA and its requirements.

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