

The Impact of Federal Privacy Laws on the School-Based Health Center

Research studies have documented that students will forgo health care due to doubts over privacy.^{1,2} When children, especially adolescents, have concerns about the confidentiality of their health issues, they may avoid care, stop seeking care, or be less than forthcoming with clinicians about their health behaviors, symptoms, and concerns.³ From a health care provider's point of view, protecting confidentiality is critical to building trust so that the patient will seek needed care and divulge all necessary information to develop an accurate diagnosis and appropriate treatment options.

Beyond the practical benefits of confidentiality, there are many federal laws that protect an individual's health information. Well known are those that apply to health care providers including the privacy regulations issued under the Health Insurance Portability and Accountability Act (HIPAA), the Title X Family Planning Program of the Public Health Service Act, and the laws governing drug and alcohol treatment. There are also federal laws that obligate educators to protect health information that becomes part of a student's educational record, including the Family Educational Rights and Privacy Act (FERPA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Americans with Disabilities Act. Because school-based health center providers and educators interact frequently, it is important to understand the basic provisions of these laws.

State laws (such as minor consent laws, medical records laws, and other provisions) also regulate the privacy of personal health information. In addition, there may be policies of the school-based health center's medical sponsor and/or the host school district concerning record keeping or release of information. These policies may be designed as guidance in the implementation of federal and state laws, but may also be more stringent than those laws.

The focus of this paper is to examine the intersection of the two major federal privacy laws that regulate the interactions between school-based health center staff and personnel of the host school or school district. These two federal laws are HIPAA and FERPA. This paper provides general information about the scope of these laws and is not intended as legal advice. When developing policies, forms, or procedures for a school-based health center, it is best to consult legal counsel.

The Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act (HIPAA) was enacted by Congress in 1996. Its intent was to ensure continued health insurance coverage to those who change jobs and to establish security and privacy in the exchange of health information. In 2002, final privacy regulations were issued pursuant to HIPAA by the U.S. Department of Health and Human Services (HHS). Implementation and interpretation of these privacy regulations

(referred to throughout this paper as the HIPAA Privacy Rule) are the responsibility of the HHS Office of Civil Rights.

The HIPAA Privacy Rule protects all "individually identifiable health information" held or transmitted by a "covered entity" or its "business associate", in any form or medium, whether electronic, paper, or oral.^{4,5} The HIPAA Privacy Rule calls this information "protected health information" (PHI). PHI includes demographic data that relates to the patient's past, present or future physical or mental health as well as information about any care provided to the patient.⁴ "Covered entities" who are required to comply with the HIPAA Privacy Rule include health care providers (hospitals, clinics, individual practitioners), health plans, and health information clearinghouses.

Generally, authorization from a patient ("the individual") or a patient's personal representative is required for disclosure of PHI. However, PHI can be disclosed to a third party without authorization in specific circumstances. These include sharing of information for the purpose of treatment (providing health care, consultations, coordinating care and making referrals); payment or health care operations; reporting of diseases to public health authorities; reporting of injuries and suspected child abuse; disclosing information in emergencies to lessen or prevent a serious and imminent threat to the health or safety of a person or the public; and for compliance with a court order. Patients are made aware of these instances of potential sharing of information when they acknowledge that they have received and read a copy of the provider's privacy notice.

Under the HIPAA Privacy Rule, a parent is usually the personal representative of a patient who is a minor. Therefore, parents generally have the right to make health care decisions for their minor children. Parents also have the right to view the health records of their minor children, and a parent's authorization is generally required for disclosure of PHI to another person. Under the HIPAA Privacy Rule, however, when a minor legally consents to health care – under state minor consent laws, for example – the minor is considered "the individual" and has access to and control over disclosure of his or her own PHI. There is one exception to this: whether a parent has access to a minor's PHI *when the minor has legally consented to the care* depends on "state or other applicable law,"^{5,6} so if state or other law either requires or prohibits disclosure to parents, that requirement controls. If state or other law permits disclosure or is silent, then the health care provider has discretion whether to give the parent access to the minor's PHI.^{5,6}

In Colorado, it is clear that minors may consent for contraceptive services, sexually transmitted infection services, drug or alcohol treatment, and mental health treatment. It is also clear that there is no requirement to notify parents when minors consent for these services. However, in the case of mental health treatment, Colorado law provides that a professional person providing services to a minor age 15 or older who has given his or her own consent for the services *may*, with or without the minor's consent, advise the parent or legal guardian of the services given or needed.⁷ Therefore, if a parent asks for access to PHI about mental health care for which a minor has legally given consent, the provider may make a determination regarding release based on the particular case.⁸

Finally, the HIPAA Privacy Rule discusses whether “incidental disclosures” of protected health information violate HIPAA. An example of an incidental disclosure is when a third party overhears a clinician reviewing a patient’s case. It has been decided that if “reasonable safeguards” have been implemented to reduce the likelihood of inappropriate sharing of PHI, then no violation has occurred.⁹

The Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) was enacted by Congress in 1974 and has been amended nine times.¹⁰ The intent of the law is to protect the privacy of parents and students by controlling access to, and release of, information held in students’ “educational records.” The term “educational record” is broadly defined as information which is directly related to a student and is maintained by a public school, educational agency, or any person acting on behalf of a public school or agency.¹¹ These records include student health records and records maintained on special education students in accordance with the Individuals with Disabilities Education Act or Section 504 of the Americans with Disabilities Act.¹¹ Unlike HIPAA, FERPA applies only to official student information and does not cover casual communication or personal notes.

FERPA applies to all educational agencies and institutions which receive money from any program administered by the U.S. Department of Education. This includes virtually every public school, public school district and all state Departments of Education. Most private and religious schools are exempt from FERPA because they do not receive U.S. Department of Education funding. State education record laws may still apply to nonpublic schools and provide privacy protection.

The main provisions of FERPA are: 1) a parent, legal guardian, or eligible student has the right to inspect and review the student’s educational records and seek to have them amended in certain circumstances; 2) a student’s educational records cannot be released to any party without a parent’s, legal guardian’s or eligible student’s written consent, but 3) a student’s educational records can be released to school personnel who have a “legitimate educational interest”, without parental or student consent and 4) records can be released in an emergency when the information is necessary to protect the health or safety of the student or others and also when requested during an investigation of an act of terrorism. An eligible student is a student who is at least 18 years of age. School districts must establish policies to determine “legitimate educational interest” to prevent the casual exchange of student information.

The Intersection of HIPAA and FERPA and School-Based Health Centers

A school-based health center (SBHC) is a health care facility located in a school or on school grounds and operated through a partnership between a school district and a licensed health care provider. Given this, SBHC personnel need to know whether the records of patients seen in the SBHC are considered educational records governed by FERPA, or health records governed

by HIPAA, or both. The answer to this question is determined by who “owns” the records. In most cases, the SBHC is operated under a binding contract which specifies that the school district owns the facility in which the SBHC operates, but the health care provider owns the medical practice and the records. When the health care provider owns the records, the records are generally subject to HIPAA.

If, alternatively, a school district directly employs a health care provider to operate the SBHC, the records belong to the district and are governed by FERPA. This is not unlike the situation with school nurses. School nurses are employed by the school district and any records developed by the school nurse are part of the educational record and fall under the purview of FERPA. FERPA does not allow schools to protect student health information differently from academic information, making it available to parents and legal guardians regardless of state minor consent laws, and to school personnel with a “legitimate educational interest”.

While FERPA permits disclosure of educational records, including health information contained in them, to parents and persons with a legitimate educational interest, it does not allow release to outside parties without parental consent, or consent of a student who is age 18 or older. This creates barriers to the exchange of health information between the school and the SBHC. For example, a school nurse cannot release information contained in the educational record, such as a student’s health history, an individualized health care plan, medications administered during school hours, or recommendations related to screenings, to a SBHC provider unless parental consent is obtained. For this reason, at the beginning of each school year, SBHCs generally ask parents to sign a form allowing the school to release health information contained in the educational record to the SBHC and also allowing the SBHC to release health information to the student’s primary care physician, to specialists or community-based programs to coordinate care or to effect a referral, and to public or private third party payers for billing purposes. Finally, the SBHC should require the parent to acknowledge that he/she has received, read and understood the SBHC’s statement of HIPAA privacy protections and rights. Several samples of consent forms used by Colorado SBHCs are posted on the CASBHC website at www.casbhc.org.

To conclude, provider-patient confidentiality is paramount in the SBHC to ensure that students seek care and that providers have sufficient information from the patient for proper diagnosis and treatment. Providers, parents and patients should all have a clear understanding about whether health information acquired by a SBHC is covered by FERPA or HIPAA, and accordingly, who may have access to it. The important differences in the two laws related to access to health information are outlined below:

Issue	FERPA	HIPAA
Parental access to information	Parents have the right to access their child’s health information maintained by the school in the child’s educational record unless the child is an “eligible student” age 18 or older.	Parents have the right to access their minor child’s PHI maintained by a health care provider in the child’s medical record, except for information pertaining to services covered by Colorado’s minor

Issue	FERPA	HIPAA
		consent laws. Information about mental health treatment to which a minor has consented is generally confidential, but in some circumstances may be disclosed to parents based on the discretion of the health care provider. Once the child turns 18 years of age, consent of the child is required for parental access to PHI.
Access to protected health information by other persons (not the patient or parent)	Health information can be released to school personnel without parental consent when a legitimate educational interest exists	A minor child's PHI cannot be released without parental consent except when necessary to coordinate treatment, meet legal or billing requirements, avoid harm to the patient or others, insure public health, and a few other specific circumstances.

Those working in SBHCs should be especially aware of the possibility of incidental disclosures because of their small facilities. Clearly, conducting interviews with students in an open cubicle where conversations can be easily overheard will not qualify as a “reasonable safeguard” as required under HIPAA.¹² Similar considerations for discretion or restriction of access must be taken into account for written and electronic notes or files.

Although HIPAA does allow limited disclosure of PHI for coordination of care between providers, questions concerning the appropriateness of communicating about a patient can arise, especially when providing integrated care. In the SBHC, for example, a pediatric nurse practitioner employed by one covered entity may work alongside a behavioral health specialist employed by a different covered entity. In this case, the SBHC should obtain a release signed by a parent or legal guardian so that information critical to patient care can be exchanged between the two providers.

To make integrated care easier and more efficient, SBHCs can create a structure called an Organized Health Care Arrangement (OHCA) under HIPAA.¹³ In order to qualify as an OHCA, the SBHC must be:

1. “A clinically integrated care setting in which individuals typically receive health care from more than one health care provider; and
2. “An organized system of health care in which more than one covered entity participates, and in which the participating covered entities (a) hold themselves out to the public as participating in a joint arrangement; and (b) participate in joint activities that include at least one of the following:¹⁴ utilization review, quality assessment and improvement activities, or payment activities.”¹⁵

Salud Family Health Centers in northern Colorado operate as an OHCA. Their presentation to the public as an OHCA is seen, in part, through a joint notice of privacy practices. Viewing Salud's privacy notice may be helpful to better understand how OHCA's might be organized. The privacy notice can be found at: www.saludclinic.org/policy2.html.

Because health information maintained by a SBHC can be subject to HIPAA or FERPA depending upon how the SBHC is legally structured, it is important for both school administrators and health care providers to thoroughly understand both federal laws as well as their relationship to state minor consent laws. In addition to the important confidentiality protections contained in both federal and state laws, all personnel should understand the exceptions which prevail in situations such as emergencies, threats of harm to self or others, and suspected child abuse. It is recommended that SBHCs review their operating documents (including any memoranda of understanding between the school district and medical providers) to insure that ownership of PHI is explicit. SBHCs should also periodically review their patient registration materials to make sure the Notice of Privacy Policy is current and clear, and consent forms are appropriate given the controlling law. Finally, it is critical that SBHCs provide training to both SBHC personnel and educators working in the school to ensure all parties understand the "ground rules" for communicating with each other for the benefit of students.

Useful Websites for Further Information and Examples

- Additional information on HIPAA may be found at the website of the US Office of Civil Rights at: www.hhs.gov/ocr/hipaa
- Additional information on FERPA may be found at the website of the US Dept. of Education at: www.ed.gov/policy/gen/guid/fpco/ferpa/index
- FAQs on the HIPAA-FERPA intersection compiled by both the U.S. DHHS and the U.S. DOE at: www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf
- For general information about the HIPAA Privacy Rule, go to: www.healthprivacy.org.
- For information about the HIPAA Privacy Rule and public health, go to: www.cdc.gov/privacyrule/
- For an overview of patient rights and responsibilities under HIPAA, go to: hcpf.cdhs.state.co.us/HCPF/HIPAA/hipPrivacy.asp
- For a concise privacy notice, a statement of patient rights and responsibilities, go to: hcpf.cdhs.state.co.us/HCPF/HIPAA/UpdatedHIPAANotice0208.pdf
- For a copy of the University of Colorado Health Sciences Center's HIPAA Policy, go to: www.uchsc.edu/hipaa/internal/docs/3.1.pdf
- For summaries of the Protection of Pupil Rights Amendment (PPRA), go to: www.ed.gov/policy/gen/guid/fpco/ppra/index.html, or www.ed.gov/policy/gen/guid/fpco/ppra/modelnotification.html

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- (10) U.S. Department of Education. Legislative History of Major FERPA Provisions. URL = <http://www.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html>
- (11) U.S. Department of Health and Human Services and U.S. Department 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. URL = <http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>
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Contributors to this paper:

Deborah K. Costin
Executive Director
Colorado Association for School-Based Health Care

Todd Soderberg
Deputy Director
Colorado Association for School-Based Health Care

Abigail English, JD
Director
Center for Adolescent Health & the Law

Issued 11/19/2009