

The HIPAA Privacy Rule and FERPA: How Do They Work in SBHCs?

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This article is Part 2 of a discussion of the significance of the HIPAA Privacy Rule for school-based health centers. An article in an earlier issue of the newsletter addressed threshold questions such as:

- Who is required to comply with the rule?
- What information is protected?
- When is authorization required to release protected health information?
- When are minors treated as individuals?
- When do parents have access to a minor's protected health information?^{i[1]}

This article addresses the relationship between the HIPAA Privacy Rule^{ii[2]} and the Federal Educational Rights and Privacy Act (FERPA).^{iii[3]} The HIPAA Privacy Rule explicitly exempts from its definition of protected health information any information that is governed by FERPA.^{iv[4]}

In general, under FERPA, parents have access to the education records of their unemancipated minor children and this includes any health information contained in education records.^{v[5]} Also in general, under the HIPAA Privacy Rule, parents have access to "protected health information" for their unemancipated minor children, but may not have access to that information when the information pertains to a service for which minors may give consent or when parents have agreed to confidentiality protections.

The different requirements of FERPA and the HIPAA Privacy Rule raise important questions when health care is delivered in a school-based health clinic or by a school nurse. In any specific situation, determining whether the relevant information and records are covered by FERPA or the HIPAA Privacy Rule requires careful analysis.^{vi[6]}

Most often, information located in the records of a school-based health center, where adolescents often turn with an expectation of confidentiality, would not be part of a student's education record and thus would likely be subject to the HIPAA Privacy Rule rather than FERPA. Nevertheless, school personnel sometimes suggest that SBHC records are not covered by HIPAA at all, but by FERPA as part of the student's education record, and should be available to school administrators and parents. This would rarely be true.

How Do FERPA and HIPAA Treat Education Records?

FERPA gives parents the right to inspect and review the education records of their children.^{vii[7]} FERPA applies to any educational agency or institution receiving federal funding if the educational institution provides educational services and/or instruction to students or is authorized to direct and control public elementary, secondary or post-secondary institutions.^{viii[8]} Education records are those records directly related to the student and maintained by an educational agency or institution or by a party acting for the agency or institution. Education records generally include school health records and medical records that the school collects and maintains.

The HIPAA Privacy Rule expressly excludes from the definition of protected health information the individually identifiable information in education records governed by FERPA.^{ix[9]} However, information and records that a SBHC has about a student often would not be part of the student's education record and would not be subject to this HIPAA Privacy Rule exclusion.

How Do HIPAA and FERPA Affect SBHC Records?

Most SBHCs would qualify as covered entities under the HIPAA Privacy Rule and the protected information they have about students would be subject to the protections of the Rule. The majority of SBHCs are not sponsored by a school district: they are not educational institutions within the meaning of FERPA and their records are not maintained on behalf of an educational institution or agency, so their records are not education records. Thus, as long as SBHC staff are careful not to enter their information into a student's education record, the HIPAA Privacy Rule would usually control access to the protected health information in SBHC records.

However, in some circumstances a SBHC's information may be part of education records that are subject to FERPA. For example, a few SBHCs are sponsored by school districts. It is then necessary to determine if some or all the information it has about students is part of their education record as defined in FERPA. Whether the clinic's records are subject to FERPA is often a contractual matter between the local education agency and the agency which is providing the staffing of allied health professionals. That is, the contract can specify whether the records maintained by the SBHC will be subject to FERPA or not.

How Do HIPAA and FERPA Affect School Nurses' Information?

If the information and records maintained by a school nurse are "education records" or become part of a student's education record, they would be probably be governed by FERPA and the HIPAA Privacy Rule would not apply. In analyzing whether school nurses' records are covered

by HIPAA or FERPA, one important question is whether the school nurse is a covered entity (a “health care provider” who meets certain requirements) under the HIPAA Privacy Rule. If the school nurse’s information and records are not part of a student’s education records, then the HIPAA Privacy Rule would probably control access to the records. Even if the nurse is employed by the school, the content and the purpose of the record would most likely determine which regulation – FERPA or the HIPAA Privacy Rule – would apply.^{x[10]}

How to Make Sense of a Confusing Situation

With so many rules involved, and with some of them appearing to conflict or overlap with one another, how can we make sense of a confusing situation? In trying to understand which rules apply for SBHCs, there are a few basic questions to keep in mind:

- Is the SBHC, its sponsoring organization, or the treating professional at the Center a “covered entity” under the HIPAA Privacy Rule?
- Has any part of the SBHC’s information or records become part of students’ education records that are covered by FERPA?

In trying to understand which rules apply to school nurses’ information and records, there are some similar questions to consider:

- Is the school nurse, the nurse’s employer, or the school a “covered entity” under HIPAA?
- Has the school nurse’s information or records become part of students’ education records that are covered by FERPA?

Although other issues are also very important, such as any contractual provisions that apply to the SBHC or the school nurse’s functions, the answer to these basic questions is a good start to the analysis of whether HIPAA or FERPA apply to a student’s sensitive health information in a SBHC or school setting.

Several websites contain important information interpreting and explaining the HIPAA Privacy Rule:

CDC – information about the HIPAA Privacy Rule and public health <http://www.cdc.gov/privacyrule/>

Health Privacy Project – general information about the HIPAA Privacy Rule
<http://www.healthprivacy.org>

NIH – information about the HIPAA Privacy Rule for researchers <http://privacyruleandresearch.nih.gov/>

OCR – extensive information from the federal agency responsible for implementation of the HIPAA Privacy Rule
<http://www.hhs.gov/ocr/hipaa/>

The Center for Adolescent Health and the Law recently has produced three documents that are relevant to implementation of the HIPAA Privacy Rule:

English A, Kenney, KE. State Minor Consent Laws: A Summary, 2nd Edition. Chapel Hill, NC: Center for Adolescent Health & the Law (2003). Order form available at www.cahl.org.

English A. Confidentiality in Adolescent Health Care: The Role of the HIPAA Privacy Rule. Chapel Hill, NC: Center for Adolescent Health & the Law, forthcoming Summer 2004. Available at www.cahl.org.

English A., Ford CA. The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges. Perspectives on Sexual and Reproductive Health. 2004;36:80-86 (Mar-Apr). Available at <http://www.aqi-usa.org/pubs/journals/3608004.pdf>.

^{i[1]} English A. The HIPAA Privacy Rule: What Does it Mean for SBHCs? *Joining Hands* (Spring 2004).

^{ii[2]} Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Parts 160 and 164. Final Rule, 65 Federal Register 82461 (Dec. 28, 2000); Final Rule, 67 Federal Register 53182 (Aug. 14, 2002).

^{iii[3]} Family Educational Rights and Privacy Act, 20 U.S.C. §§ 1232g; 34 C.F.R. Part 98.

^{iv[4]} 45 C.F.R. § 160.103.

^{v[5]} Cheung O, Clements B, and Pechman E. Protecting the Privacy of Student Records: Guidelines for Education Agencies. Washington, DC: National Center for Education Statistics, Department of Education. Available at <http://nces.ed.gov/pubs97/97527.pdf> (visited May 5, 2004).

^{vi[6]} Moore J and Wall A. Applicability of HIPAA to Health Information in Schools. Chapel Hill, NC: UNC Institute of Government, 2003. Available at www.medicalprivacy.unc.edu/pdfs/schools.pdf (visited May 10, 2004).

^{vii[7]} 20 U.S.C. § 1232g(a)(1)(A).

^{viii[8]} 34 C.F.R. § 99.1.

^{ix[9]} 45 C.F.R. § 160.103.

^{x[10]} Moore and Wall, p. 7.