A Legal Perspective on the Interplay of FERPA and HIPAA in University and College Health Centers

Presenter: Nancy Tribbensee
Senior Vice President and General Counsel
Arizona Board of Regents

Date: Nancy.Tribbensee@azregents.edu
June 3, 2016

“...There is only one thing in the world worse than being talked about, and that is not being talked about.”

Oscar Wilde, The Picture of Dorian Gray
Topics

• Disclaimers
• Student education records
• May vs. Must
• Unintended consequences

Disclaimers

• Not HIPAA compliance
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WHAT IS FERPA?

• Federal spending clause

• “No funds will be made available...” if an institution has a policy or practice of denying the rights provided in the statute.

• Enforced by the Department of Education

WHAT RIGHTS DOES FERPA PROVIDE?

• Gives students these rights with respect to their education records:
  – Right to inspect and review
  – Right to limit certain disclosures
  – Right to challenge information
WHO ARE “STUDENTS”? 

- FERPA – defines “student” as:
  - An individual who is or has been in attendance, and
  - About whom the institution maintains records

WHAT ARE “EDUCATION RECORDS”? 

- Records (paper, electronic, photographs, etc.)
- Maintained by the institution
- Directly related to a student (or student(s))
WHAT ARE “EDUCATION RECORDS”?

• Not limited to academic or “educational” records

• “Education records” may include some records with health information (immunization records, accommodation requests)

DISCLOSURE OF EDUCATION RECORDS

• FERPA does not require student consent for disclosure to:
  – Other school officials with legitimate educational interest
  – Parent(s) if the student is a tax-dependent
  – Health and safety
  – Lawsuit by or against the student
  – Other

• Disclosure may be subject to other laws (e.g., medical confidentiality)
DISCLOSURE OF EDUCATION RECORDS

• Recap: If it’s an education record, then:
  – The student has a right to inspect and review
  – May disclose with the student’s consent
  – Some disclosures permitted without the student’s consent

Records of Student Employees

• What about records relating to employees who are students and students who are employees?
  – Is employment based on the person’s status as a student?
    • If yes, then the records are student records
    • If no, then the records are not student records
FERPA excludes some records from the definition of “education records”:

- Sole possession notes
- Law enforcement records
- Treatment records

IMPORTANT

- By excluding these records from the definition of “education records,” the student does not have a FERPA right to “inspect and review”
- The student may have access rights under other laws
“TREATMENT RECORDS”

- The following records are excluded from the FERPA definition of “education records”:
  - records,
  - made by physician, psychiatrist, psychologist (any recognized professional or paraprofessional),
  - made, maintained and used ONLY in connection with treatment, and
  - either not shared, or shared ONLY with other treatment providers

The exclusion applies only to unshared records:

- If it is “shared” for any non-treatment purpose it is an education record and student has a FERPA right to review

- If it is not “shared” except for treatment, it is not an education record, and student does not have a FERPA right to review (but state law may provide access rights)
What Rules Apply to Sharing “Treatment Records”

- State laws on medical confidentiality
  - Statutes
  - Case law
- Ethical rules

Examples of Sharing

- Billing
- Sharing with the student
- Sharing at the request of the student (e.g., to support an accommodation or request for withdrawal)
- Sharing to fulfill a duty to warn
- Sharing to address a health or safety issue
- Sharing to seek legal advice or support
Underlying rationale

• One of the primary reasons for FERPA was to give students the right to review their own records.
• But, did not want to undermine state laws that govern when a patient can review medical records and when a provider can withhold.

WHAT ABOUT HIPAA?

• HIPAA Privacy Rule
• Governs use of **protected health information (PHI)**:
  – Information transmitted or maintained in any form
  – That relates to past, present or future physical or mental health of an individual, provision of health care, or past, present or future payment for health care, and
  – Identifies or could reasonably be used to identify the individual.
HIPAA and Student Records

• HIPAA expressly excludes student records from the definition of PHI
• PHI excludes individually identifiable health information:
  (i) in education records covered by FERPA
  (ii) in “treatment records” (FERPA excludes these from its definition of education records)

Treating students and non-students

• Options
  – Manage student records under FERPA and other records under HIPAA
    • Administrative complexities
  – Treat all records the same (as if HIPAA applies)
    • One set of policies and procedures
    • BUT, you will be held to your policies (even if they set a higher standard than would have been required under FERA)
  – Use HIPAA procedures but include FERPA exception—explicit that will comply with FERPA and applicable law
Summary

- HIPAA does not apply to student medical records at the college or university the student attends.
- A student does not have a FERPA right to inspect and review unshared treatment records (look to state law and ethical obligations).
- A student has a FERPA right to “inspect and review” shared treatment records (subject to state law and ethical obligations).

DOE Proposed Guidance

- 2015, DOE proposed guidance:
  - With respect to litigation between institutions and their students, institutions generally should not share student medical records with school attorneys or courts without a court order or written consent (unless the litigation relates to the treatment or payment therefor).
Unintended Consequences

• Problems with the proposed guidance

• FERPA does not give campus attorneys greater access to student medical records than attorneys for off-campus providers have to patient records under HIPAA and state laws

Unintended Consequences

• Campus medical providers need access to legal counsel
  – Not just after litigation has been filed

• Current law provides sufficient protection
Good Reasons to Seek Legal Advice

• Possible payment or malpractice claim, not yet filed
• Questions about medical confidentiality or involuntary commitment laws
• Advice regarding patient’s right to access
• Reporting requirements (e.g., abuse or neglect of a minor)
• Advice regarding duty to warn
• Litigation holds imposed to preserve records
• Behavior and threat assessment teams need access to legal advice

Seeking Legal Advice

• Focus is on when and whether campus providers are entitled to share the record
• Does not mean that attorneys can demand access
• FERPA may not prohibit sharing, but other laws might
Disclosing a Student Record to a Campus Lawyer

• Does NOT authorize the lawyer to use the information for any purpose the lawyer chooses
• Lawyer may only use the information if the medical provider would be authorized to use and disclose it and authorizes the lawyer to do so
• Campus providers and the institution may receive legal advice

Summary

• HIPAA does not apply to student medical records at the college or university the student attends
• FERPA’s right to inspect and review does not apply to unshared treatment records
• FERPA applies to shared treatment records, but disclosure is also subject to other laws
• You can (and should) receive legal advice
Questions?

Additional Resources

- 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)

- Letter from National Association of College and University Attorneys (NACUA) urging clarification in proposed guidance from Department of Education on sharing student treatment records with lawyers
Additional Resources

- Family Educational Rights and Privacy Act (FERPA)
  - https://www.law.cornell.edu/uscode/text/20/1232g
- FERPA Regulations:
  - https://www.law.cornell.edu/cfr/text/34/part‐99
- HIPAA Definition of PHI (excluding student education records and unshared treatment records under definition of “protected health information”)