

Overdose of Privacy Law Creates Headaches for Student Health Clinics

Save to myBoK

by Julie A. Roth, MHSA, JD, RHIA

When the HIPAA privacy rule went into effect, HIM professionals began juggling HIPAA standards along with all the other federal and state laws impacting health information privacy. While this juggling act is always difficult, the mix of HIPAA and the Family Educational Rights and Privacy Act (FERPA) is particularly challenging for HIM professionals working in certain university student health clinics. This article explores these challenges and offers some guidance about how they may be addressed.

What Does FERPA Say?

Under FERPA, universities that receive federal funding must protect the privacy of “education records,” which generally include any record directly related to a student. Certain records, although directly related, are exempt from FERPA’s requirements, most notably student treatment records to the extent that they are shared only between treatment providers for treatment purposes. When they are shared with anyone else (including the student) or for nontreatment purposes, they transform into education records and become subject to FERPA’s protections (see “[Scope of FERPA and HIPAA Privacy Rules](#)”).

What Does HIPAA Say?

Under HIPAA privacy regulations, covered entities must protect the privacy of protected health information. Certain records, although containing individuals’ health information, are exempt from HIPAA’s privacy requirements, specifically education records as they are already protected by FERPA. Student treatment records are also excluded because state law protections apply when they are shared between treatment providers for treatment purposes, and FERPA applies whenever they are shared under any other circumstance (see “[Scope of FERPA and HIPAA Privacy Rules](#)”).

The Challenge

In addition to treating students, university health clinics may also see students’ dependents, university employees, or faculty members. When a clinic is a HIPAA-covered entity, different sets of laws can apply to different sets of records. For example, state laws apply to student treatment records shared between treatment providers for treatment purposes. FERPA applies to those same records when they are shared with anyone else, and HIPAA applies to any nonstudent medical records. HIPAA and FERPA have a number of broad similarities in how they protect information. However, the two laws vary in how these broad standards are actually implemented. The challenge is determining how to set up a workable infrastructure that complies with these similar privacy laws while taking into account their differences (see “[Comparison of Select HIPAA and FERPA Rules](#)”).

No Easy Solution

Before resources are expended on the complexities of dual compliance with HIPAA and FERPA, university legal counsel should confirm whether one, both, or neither of the laws apply to the student health clinic. Not all universities receive federal funding or treat nonstudents while engaging in HIPAA-covered transactions. Although a number of alternatives are available to clinics covered by both laws, none of them are clear-cut from an HIM perspective. Clinics may consider the following options:

1. Implement FERPA with respect to student records and HIPAA with respect to nonstudent records
 - Requires a reliable system for separating the two types of records

- Two different sets of policies and procedures must be created
- Staff must be trained on both laws and how they apply to each type of record

2. Simply follow HIPAA with respect to both student and nonstudent records

- Exposes university to potential FERPA sanctions because in some cases, FERPA provides greater protections than HIPAA

3. Create a single set of privacy standards complying with both FERPA and HIPAA

- Where the two laws differ or one law is silent, implement the standard providing greater privacy protection or rights

4. Cease conducting covered transactions in electronic form when treating nonstudents or cease treating nonstudents

- A clinic no longer meets the definition of a HIPAA “covered entity” or no longer creates protected health information as defined by HIPAA

Each of the above alternatives has advantages and disadvantages, and any decision about what course of action to take should involve the HIM director, the privacy officer, and the university’s administration and legal counsel.

The US Departments of Education and Health and Human Services Office for Civil Rights have released little guidance on how to reconcile HIPAA and FERPA where both apply. However, leadership organizations such as the American College Health Association have been advocating that lawmakers change the law so that one federal standard applies to all university health clinic records. In the meantime, affected university student health clinics must continue to grapple with both laws.

Scope of FERPA and HIPAA Privacy Rules		
	FERPA	HIPAA
Who must comply?	Educational institutions or agencies <ul style="list-style-type: none"> • All schools that receive federal funding through the US Department of Education 	Covered entities <ul style="list-style-type: none"> • Health plans, clearinghouses • Healthcare providers who transmit electronic health information in connection with a covered transaction
What information is directly protected?	Education records <ul style="list-style-type: none"> • Records directly related to a student and maintained by an educational institution or agency (or by a party acting on its behalf) 	Protected health information (PHI) <ul style="list-style-type: none"> • "Individually identifiable health information" that is transmitted by, or maintained in, electronic media, or trans- mitted or maintained in any other form
What information is not directly protected?	<ul style="list-style-type: none"> • Student treatment records are excluded from the definition of education records • These are records on students over 18 or who attend a college or university that are: <ul style="list-style-type: none"> – Made or maintained by a physician or other recognized health professional – Used only in connection with treatment of the student – Disclosed only to individuals providing the treatment 	<ul style="list-style-type: none"> • PHI does not include: <ul style="list-style-type: none"> – Education records – Student treatment records

Comparison of Select HIPAA and FERPA Rules		
	FERPA	HIPAA

Access to Records	<ul style="list-style-type: none"> • With limited exceptions, students may "inspect and review" their education records • Because treatment records are excluded from education records, students do not have FERPA access to those records • However, students may have their treatment records reviewed by a provider and any state access laws must be followed 	<ul style="list-style-type: none"> • With limited exceptions, individuals have a right of access to inspect and obtain a copy of their PHI • Access time frame is generally 30 days from request • Fees are reasonable and cost-based, including cost of supplies, labor for copying (not searching/retrieving), and postage
Disclosure of Records	<ul style="list-style-type: none"> • Written consent isn't expressly required to share treatment records between treating providers, but state law or clinic policy may require otherwise • With certain exceptions, written consent is required to disclose education records • Consent must be signed, dated, and: <ul style="list-style-type: none"> – Specify the records – Identify the recipient – State the purpose of disclosure 	<ul style="list-style-type: none"> • PHI may be shared without written authorization for treatment, payment, and healthcare operations, and a variety of public benefit circumstances • In all other cases, written authorization must be obtained • Authorization must contain certain core elements (e.g., expiration date) and required statements (e.g., potential for redisclosure)

References

"Family Educational Rights and Privacy Act Final Rule." 34 CFR Part 99. Available online at www.ed.gov/policy/gen/guid/fpcg/index.html.

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