OCHIN Position Paper

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Student Treatment Records under HIPAA vs. FERPA
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Purpose

The purpose of this document is to explain OCHIN, Inc.’s position about the relationship between the Family Education Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule and how these two laws apply to student health records maintained by schools.

Definitions

**FERPA**

FERPA is a federal law that protects privacy of students’ education records. (See 20 U.S.C. § 1232g; 34 CFR Part 99). FERPA regulations apply to all schools that receive funds from the US Department of Education. And educational agency or institution subject to FERPA may not have a policy or practice of disclosing the education records of students, or personally identifiable information from education records, without a parent or eligible student’s (student age 18 or older or who attends a postsecondary institution at any age) written consent. Under FERPA, parents and eligible students have the right to inspect and review the student’s education records and to seek to have them amended in certain circumstances.

Generally, under FERPA, schools must have written permission from the parent or the eligible student in order to release any information from a student’s education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions:

- school officials with legitimate educational interest;
- other schools to which a student is transferring;
- specified officials for audit or evaluation purposes;
- appropriate parties in connection with financial aid to a student;
- organizations conducting certain studies for, or on behalf of, the schools;
- accrediting organizations;
- to comply with a judicial order or lawfully issued subpoena;
- appropriate officials in cases of health and safety emergencies; and
- State and local authorities within a juvenile justice system, pursuant to specific state law.

See 34 CFR 99.31.

**Education Records**

The term “education records” is broadly defined to mean records that are (1) directly related to a student, and (2) maintained by an educational agency or institution or by a part of the organization that is acting for the agency or institution. At the elementary or secondary level, a student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are “education records” subject to FERPA. Records that schools maintain on special education students, including records on services provided to students under the Individuals with Disabilities Education Act (IDEA), are also “education records” under FERPA.

**Treatment Records**

At postsecondary institutions, medical and psychological treatment records of eligible students are excluded from the definition of “education records” if they are made, maintained, and used only in connection with treatment of the student and disclosed only to individuals providing the treatment. These records are commonly referred to as “treatment records.” An eligible student’s treatment records may be disclosed for purposes other than the student’s treatment provided the records are disclosed under one of the exceptions to written consent or with the student’s written
consent. If a school discloses a student’s treatment records for any purpose allowable under FERPA, the records will then be included in the definition of “education records” instead of treatment records, and the records will be subject to all other FERPA requirements.

**HIPAA**

Congress enacted HIPAA in 1996 to improve the efficiency and effectiveness of the healthcare system through the establishment of national standards and requirements for electronic healthcare transactions and to protect the privacy and security of individually identifiable health information. Collectively, these are known as HIPAA’s Administrative Simplification provisions, which include provisions regarding transactions, code sets and identifier rules (referred to as HIPAA Transaction regulations) and also include provisions regarding privacy of electronically transmitted health information (referred as HIPAA Privacy regulations).

HIPAA Privacy regulations provide regulatory protection for a patient’s protected health information (PHI). Patients or their legal representative must give authorization for the release of the patient’s information with certain exceptions. Additionally, HIPAA Privacy regulations give patients rights over their health information, including rights to examine and obtain a copy of their health records, and to request corrections. The HIPAA Security Rule is a subset to the HIPAA Privacy regulations.

HIPAA Transaction regulations prescribe requirements for certain billing and payment transactions, and requirements regarding the diagnosis and procedure codes that must be used in those electronic billing transactions.

**Covered Entity**

Entities subject to the HIPAA rules, known as “covered entities,” are health plans, health care clearinghouses, and health care providers that transmit protected health information in electronic form in connection with covered transactions. Covered transactions are those transactions for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan.

**Protected Health Information (PHI)**

Under the HIPAA Privacy Regulations, PHI means individually identifiable health information pertaining to an individual’s medical history, diagnosis, treatment, or payment for treatment

1. That is:
   (i) Transmitted by electronic media;
   (ii) Maintained in electronic media; or
   (iii) Transmitted or maintained in any other form or medium.

2. Protected health information excludes individually identifiable health information in:
   (i) “Education records” covered by the Family Educational Rights and Privacy Act (FERPA), as amended, 20 U.S.C. 1232g;
   (ii) “Treatment records” described at 20 U.S.C. 1232g (a) (4) (B) (iv); and
   (iii) Employment records held by a covered entity in its role as employer.

**HIPAA Transactions**

HIPAA Transactions are electronic transactions that use specified standards adopted by the Secretary of the U.S. Department of Health and Human Services in the HIPAA Transaction regulations. These transactions relate to health care claims, health care payment, coordination of benefits, health care claim status, and eligibility and enrollment in a health plan including Medicaid or Medicare health plans. Covered entities are required to comply with applicable requirements in the HIPAA Transaction regulations.
School-Based Health Centers and HIPAA

Some schools, school districts, universities and colleges, generally referred to collectively as School Based Health Centers (SBHC), employ nurses, physicians, psychologists, or other healthcare providers who serve their students. Thus, the SBHC is a “healthcare provider” as defined by HIPAA. However, the SBHC is only considered a covered entity under HIPAA if it conducts any covered transactions electronically in connection with the health care it provides, such as billing insurance electronically. If the SBHC is a covered entity, then it must comply with the HIPAA Transactions regulations with respect to those covered transactions. These SBHCs generally will not be required to comply with the HIPAA Privacy regulations because the records they maintain are “education records” or “treatment records” under FERPA, which are excluded from the HIPAA Privacy regulations. In that case, FERPA privacy requirements apply to their records.

School based health centers that do not conduct covered transactions, such as billing insurance electronically, do not have to comply with any of the HIPAA regulations. However, the FERPA privacy requirements do apply to their records.

Third-Party Healthcare Providers

In some cases, students receive healthcare at a SBHC, or elsewhere, from a healthcare provider that is not employed by, or contracted with, the school. In these circumstances, these records are not “education records” subject to FERPA, even if the services are provided on school grounds, because the party creating and maintaining the records is not acting on behalf of the school. For example, the records created by a public health nurse who provides immunization or other health services to students on school grounds or otherwise in connection with school activities but who is not acting on behalf of the school would not be “education records” under FERPA. In such situations, a school that wishes to disclose to this third-party provider any personally identifiable information from education records would have to comply with FERPA and obtain parental or eligible student consent. However, if a nurse is hired as a school official or contractor, then the records maintained by the nurse or clinic are “education records” subject to FERPA.

Postsecondary School Based Health Centers

To determine the applicability of HIPAA and FERPA to postsecondary institutions, it is important to examine the context in which the institution is providing care. The applicability of HIPAA and FERPA depends on whether the care is provided to students at a health clinic run by the institution or at a clinic that is merely affiliated with the institution.

- **Institution-run Health Clinic:** FERPA applies to most public and private postsecondary institutions and, thus, to the records on students at the campus health clinics of such institutions. These records will either be education records or treatment records under FERPA. While the health records of students at postsecondary institutions may be subject to FERPA, if the institution is a HIPAA covered entity and provides healthcare to non-students, the individually identifiable health information of the clinic’s non-student patients is subject to the HIPAA Privacy regulations. Thus, when a postsecondary institution operates clinics open to staff, or the public, the clinic is required to comply with FERPA with respect to the health records of their student patients, and with the HIPAA Privacy regulations with respect to the health records of their non-student patients.

- **Institution-affiliated Health Clinic:** FERPA does not apply to a hospital that is affiliated with a postsecondary institution when the health center does not provide health care services to students on behalf of the institution. When the health center provides such services without regard to the patient’s status as a student, the student’s records are not subject to FERPA. Assuming the health
center is a HIPAA covered entity, the records it maintains will be subject to all of the HIPAA regulations.

**Conclusion**

School based health centers are ‘healthcare providers’ as defined by HIPAA; however, the SBHC is only considered a covered entity under HIPAA if it conducts electronic billing and payment transactions. Where a SBHC is sending electronic billing and payment transactions, the SBHC will need to comply with HIPAA Transaction and Code Set regulations. However, SBHC will not be required to comply with the HIPAA Privacy regulations, as follows: If a student receives health care at one of these SBHC, those records are considered to be education records or treatment records under the FERPA regulations, not protected health information under HIPAA, because education records and treatment records are specifically excluded from the HIPAA Privacy regulations. However, if an SBHC conducts electronic billing and payment transactions for services provided to a student, including billing electronically for services provided to students, the health center must send the electronic transactions in a format that complies with HIPAA Transaction and Code Set regulations.

**Note:** Please see the “FERPA Versus HIPAA School Based Health Center Records Compliance Decision Tree.”

**References**

*Interplay between FERPA and HIPAA and the impact of HIPAA on FERPA-covered schools that electronically bill Medicaid for school based services, DHFS HIPAA Communication Number 10, July 29, 2003.*

*HIPAA Regulations 45 CFR § 160, 162, and 164*

*FERPA Regulations 34 CFR § 99*


*Medicaid Reimbursement of School-Based Health Care at the State-Operated Schools and HIPAA Memorandum, November 12, 2002, Oregon Department of Justice.*

*Ohio Department of Education Medicaid Schools Program Fact Sheet HIPAA vs. FERPA, July 15, 2009.*

*Understanding the Privacy Rights of HIPAA & FERPA in Schools, Published on The National Law Review 2012.*

*Wisconsin DHFS HIPAA Communication 10, July 29, 2003.*

*Wisconsin Rule 453.11, May 28, 2003.*