

## **Q & A on HIPAA's Privacy Rule: Its Relationship to FERPA and Student Records**

Produced by the Maryland Disability Law Center  
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In May 2003, NAPAS released a Q & A on the Health Insurance Portability and Accountability Act (HIPAA). The Q & A centered on the release of medical information by covered entities and the types of authorizations needed to obtain the release of client health/medical information by advocates. This Q & A will address the HIPAA Privacy Rule (Standards for Privacy of Individually Identifiable Health Information) in the context of school records and the Family Educational Rights Privacy Act (FERPA).

### **Brief Overview of HIPAA and FERPA**

HIPAA was enacted on August 21, 1996 as Public Law 104-191. The law required the Secretary of Health & Human Services (HHS) to develop standards for the electronic exchange, privacy, and security of health information. Additionally, the Secretary was to issue privacy regulations governing the use and disclosure of individually identifiable health information if Congress did not enact such legislation within three years. Congress not having acted, in November 1999, HHS proposed the privacy regulations. Final regulations were published on August 14, 2002. These regulations are known as The Privacy Rule. See 45 CFR Part 160 and 164, Subparts A and E, <http://www.hhs.gov/ocr/hipaa>. The Privacy Rule applies to health plans, health care clearinghouses, and any health care provider who transmits health information in electronic form according to the standards adopted under HIPAA. See *OCR Privacy Brief, Summary of the HIPAA Privacy Rule*, which can be found at <http://www.hhs.gov/ocr/hipaa>.

The HIPAA Privacy Rule specifically excludes educational records, on the basis that the privacy protections for education records are covered by FERPA. 65 FR 87462, 87483. Thus, any use or disclosure of student educational records, as described in FERPA, must meet the written authorization requirements prescribed by FERPA.

FERPA is the federal law (20 U.S.C.A. 1232g) that protects the rights of parents with regard to the educational records of their children.<sup>2</sup> FERPA prohibits federal funds for educational agencies or institutions that have a policy that:<sup>3</sup>

- a. Denies parents the right to inspect and review the education records of their children.
- b. Releases or discloses personally identifiable information in education records without specific written authorization.

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<sup>2</sup> The FERPA regulations can be found at 34 C.F.R. § 99.1

<sup>3</sup> See 20 USCA § 1232g(a)(1)(A), 20 USCA § 1232g(a)(2), 20 USCA § 1232g(b)(2), and 20 USCA § 1232g(b)(2) (A)

c. Denies parents the opportunity to inspect and correct the information maintained in educational records.<sup>4</sup>

The right to privacy resides in the parents until the student reaches the age of 18, or matriculates to a post-secondary educational placement. At that point, the student is designated an “eligible student.” Parents or an eligible student can invoke FERPA to prevent the use and disclosure of education records without a written authorization. Education records are defined by FERPA as “those records, files, documents, and other materials which--(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>5</sup> 20 U.S.C. 1232g(a)(4). FERPA requires a written authorization from a parent or eligible student to release any information from a student’s educational record. The Family Policy Compliance Office (FPCO)<sup>6</sup> of the US Department of Education, implements both FERPA and the Protection of Pupil Rights Amendment.

Two basic questions have arisen in regard to the interplay of HIPAA, FERPA with respect to educational records:

1. Does HIPAA give a school the right to release student educational records, including medical records, to public agencies?
2. Can a school deny parental access to student records citing the privacy requirements of HIPAA?

This Q & A will address each of these questions in turn.

**1. Does HIPAA give a school the right to release student educational records, including medical records, to public agencies?**

No. Congress has excluded medical information in student educational records from the privacy regulations found in HIPAA. On publication of the final rule of the HIPAA Privacy Rule, December 28, 2000 Congress stated:

FERPA, as amended, 20 U.S.C. 1232g, provides parents of students and eligible students (students who are 18 or older) with privacy protections and rights for the records of students maintained by federally funded educational agencies or institutions or persons acting for these agencies or institutions. We have excluded education records covered by FERPA, including those education records designated as education records under Parts B, C, and D of the Individuals with Disabilities Education Act Amendments of 1997,

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<sup>4</sup> There are certain specific exceptions for the disclosure of personally identifiable information from school records. See FERPA regulations.

<sup>6</sup> Questions regarding FERPA may be sent to the FPCO by email at [FERPA@ED.Gov](mailto:FERPA@ED.Gov) or [PPRA@ED.gov](mailto:PPRA@ED.gov). The FPCO website is <http://www.ed.gov/policy/gen/guid/fpc>.

from the definition of protected health information. For example, individually identifiable health information of students under the age of 18 created by a nurse in a primary or secondary school that receives federal funds and that is subject to FERPA is an education record, but not protected health information. Therefore, the privacy regulation does not apply. We followed this course because Congress specifically addressed how information in education records should be protected in FERPA. 65 FR 87462, 87483

In the course of its FERPA implementation duties, the FPCO issues policy letters, and answers questions and complaints from families and schools. In response to a request regarding the permissibility of disclosing immunization records, the FPCO issued a policy ruling, in February 2004, stating that “[a] K-12 student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, including records maintained by a school nurse, would generally be “education records” under FERPA” as they conform to that definition. See below and 20 U.S.C. 61232g(a)(4)(a). See *Letter to Holloway*, February 15, 2004. *Letter to Holloway* can be found in the FERPA On-line Library at <http://www.ed.gov/policy/gen/guid/fpc/doc/alhippaa.doc>.

Further, the HIPAA Privacy Rule is specific as to its application to student health records: “Protected health information *excludes* individually identifiable health information in: (i) Education records covered by [FERPA], and (ii) Records described at 20 U.S.C. 1232g (a) (4) (B) (iv) . . .” (emphasis added). 45 CFR 160.103 [Definitions: Protected health information (2)]. *Letter to Holloway*.

In cases where confusion arises due to public safety issues, FERPA protections prevail. It is safe to say that, in almost all cases, schools are barred by FERPA from using or disclosing personal, individualized student health information that is maintained in education records. In those instances where there is a concrete health or safety exception, “*any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency.*” As examples of such health or safety exceptions, FPCO’s Ellen Campbell has used “Smallpox, anthrax or other bioterrorism attach[s].” (Testimony of Ellen Campbell, Deputy Director, FPCO on the intersection of HIPAA and FERPA, 2/19/2004 regarding FPCO, April 12, 1001, Guidance on “recent Amendments to [FERPA] Relating to Anti-Terrorism Activities”.)

It seems clear that student records, except in the direst of public health threats cannot be used or disclosed without parental authorization. On September 12, 2003, a Hearing Officer in New Mexico drew this same conclusion:

While there are limited circumstances where a school district might qualify as a covered entity, generally educational records that are protected by the Family Educational Rights and Privacy Act of 1974 (“FERPA”) are not subject to HIPAA. 45 CFR 6164.501, definition of “protected health information.” In re: Student with a Disability, New Mexico State Educational Agency, NMSDE DPH 0203-35, 103 LRP 57778 9/12/03.

## 2. Can a school deny parental access to student records citing the privacy requirements of HIPAA?

Schools cannot use HIPAA to deny access to parents to their child's education records. With respect to education records, HIPAA privacy protections are not applicable. It is the FERPA regulations that are the deciding factor in determining who can or cannot access education records. FERPA specifically protects parental rights to such information and, therefore, their rights cannot be overridden by HIPAA. Note that at the age of 18, it is the student herself whose rights become protected by FERPA.

In fact, schools cannot release any of a student's individual identifiable information or records without the written authorization of the parent or the eligible student. In *Letter to Holloway*, Director Rooker reiterates that "there is no exception to FERPA's prior consent rule that would permit a school subject to FERPA to disclose health or other immunization records to a State health agency." Of course, there is a tightly limited exception (explained above) for a health or safety emergency if it is a "*specific situation* that presents *imminent danger or threat* to students or other member of the community or requires an *immediate need* for information to avert the threat." Even so, the school must be sure to alert the state agency receiving the information that it "cannot be redisclosed or shared with any other party." *Letter to Holloway* at 4.<sup>7</sup>

Note, however, if a school must electronically transmit protected health information in the course of billing Medicaid for therapeutic services or individual equipment, then that information becomes protected under HIPAA. In those cases, schools would have to comply with HIPAA.<sup>8</sup> Even so, parents of students whose protected health information becomes protected under HIPAA still maintain the right to access such information. As the personal representative (see definition below) of her child, a parent has all the rights of access to a student's personal health information as the individual herself. 45 CFR § 164.502(g).<sup>9</sup>

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<sup>7</sup> See also 20 U.S.C. § 1232g (b) (1) (I) and 34 CFR 99.31(a) (10) and 99.36.

<sup>8</sup> THE RELATIONSHIP OF HIPAA TO SPECIAL EDUCATION, Compiled by Catherine Benitz, Program Specialist Mountain Plains Regional Resource Center, May 2003, at 4.

<sup>9</sup> See <http://www.nacua.org/documents/HIPAAParentsandMinors.html>, for answers to other questions, such as: **If a child receives emergency medical care without a parent's consent, can the parent get all information about the child's treatment and condition?** Even if the parent did not provide consent to the treatment in this situation, under the Privacy Rule, the parent would still be the child's personal representative. This would not be so only if the minor provided consent (and no other consent is required) or if the treating physician suspects abuse or neglect or reasonably believes that releasing the information to the parent would endanger the child.

The following definitions are helpful in understanding the rights protected by both statutes:

### **HIPAA DEFINITIONS:<sup>10</sup>**

The Privacy Rule: Regulation issued by DHHS to govern individually identifiable health information, finalized on August 14, 2002. 45 CFR § 106.103

Protected Health Information (PHI): individually identifiable health information held or transmitted by a covered entity or associate, in any form or media, electronic, paper, or oral.

Individually identifiable medical information: information that can or might be used to identify the individual, relating to: 1. the individual's past, present or future physical or mental health, or condition 2. the provision of health care to the individual, or 3. the past, present, or future payment for the provision of health care to the individual.

Covered entities: health plans, health clearinghouses and health care providers that transmit health information in electronic form in connection with covered transactions.

Health care providers: providers of health or medical services, e.g. hospitals, physicians, dentists, other practitioners and persons or organization involved in furnishing, administering or billing for health care services.

Personal representative: a person legally authorized to make health care decisions on an individual's behalf or to act for a deceased individual or estate. Such a legally authorized person must be treated the same as the individual as to uses and disclosures of the individual's protected health information and rights under the Privacy Rule.

Minors: In most cases, parents are the personal representatives for their minor children. In the exceptional situation where a parent is not considered the personal representative, state or other applicable law determines the rights of parents to the PHI of their minor children.

### **FERPA DEFINITIONS:**

Schools and educational agencies: a state or local education agency authorized to direct and control public elementary, secondary or postsecondary institutions, including all education agencies and institutions that receive funds under any program administered by the U.S. Secretary of Education. 20 U.S.C. 1232g (a) (3)

Education records: any information recorded in any way, including all records, files, documents, and other materials, that contain information directly related to a student AND are maintained by

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<sup>10</sup> HIPAA definitions can be found at 45 CFR Parts 160.103 Definitions

the educational agency or institution or by a person acting for such agency or institution.<sup>11</sup> 1232g (a) (4) (A).

Personally identifiable information: 1. student's name, address, social security number, or student number 2. student's family members' names, addresses, or social security numbers. 3. personal characteristics of student that would be easily traceable or identifiable 4. other information that would make student's identity traceable. 34 CFR §99.3

Parental rights: Under FERPA parents have the right to review, request amendments to, and consent to the release of their child's education records.

Eligible student: At 18 years of age (or if in attendance at a post secondary education institution), the privacy rights under FERPA transfer to the student. 20 U.S.C. § 1232g (d); 34 CFR § 99.3

Links to More Information on the Web:

<http://www.ed.gov/legislation/FedRegister/finrule/2004-2/042104a.pdf>

<http://www.hhs.gov/ocr/resource.htm#health>

<http://www.nacua.org/documents/HIPAAParentsandMinors.html>

<http://www.hhs.gov/ocr/ocrhmpg.html>

<http://www.hhs.gov/ocr/hipaa/>

<http://www.hhs.gov/ocr/hipaa/finalreg.html>

<http://www.healthinschools.org/ejournal/2003/privacy.htm>

<http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html>

<http://www.ed.gov>

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<sup>11</sup> See Sec. 1232G (a) (4) (A) for definition of education records and Sec. 1232G (a) (4) (B) for definition of what are *not* considered education records. Also see 34 CFR §99.3.