

THE RELATIONSHIP OF HIPAA TO SPECIAL EDUCATION

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The purpose of this paper is to provide clarification to educators regarding the privacy of records and information related to the requirements of the Health Insurance Portability and Accountability Act (HIPAA) of 1996. This paper was originally distributed in 2003 and has been updated with resources and web page links. Additional resources and websites are provided for the reader to obtain current information regarding the required privacy regulations.

What is HIPAA?

The Health Insurance Portability and Accountability Act of 1996, known as HIPAA, includes important—but limited—protections for millions of working Americans and their families around the ability to obtain and keep health coverage. Among its specific protections, HIPAA does the following:

- Limits the use of preexisting condition exclusions.
- Prohibits group health plans from discriminating by denying you coverage or charging you extra for coverage based on your or your family member's past or present poor health.
- Guarantees certain small employers and certain individuals who lose job-related coverage the right to purchase health insurance.
- Guarantees, in most cases, that employers or individuals who purchase health insurance can renew the coverage regardless of any health conditions of individuals covered under the insurance policy.

In short, HIPAA may lower the individual's chance of losing existing coverage, ease the ability to switch health plans, and/or help buy coverage if an individual loses an employer's plan and has no other coverage available.

What is the HIPAA Privacy Rule?

The privacy provisions of the federal law, HIPAA, apply to health information created or maintained by health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses. The Department of Health and Human Services (DHHS) has issued the regulation, "Standards for Privacy of Individually Identifiable Health Information," applicable to entities covered by HIPAA. The Office for Civil Rights (OCR) is the departmental component responsible for implementing and enforcing

the privacy regulation. (See the Statement of Delegation of Authority to the Office for Civil Rights, as published in the Federal Register on December 28, 2000.

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

The DHHS issued the privacy rule to implement the requirement of HIPAA. The privacy rule standards address the use and disclosure of individuals' health information, or "protected health information," by organizations subject to the privacy rule, or "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used. Within DHHS, the OCR has the responsibility for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.

A major goal of the privacy rule is to ensure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high-quality health care and to protect the public's health and well being. The rule strikes a balance that permits important uses of information while protecting the privacy of people who seek care and healing. Given that the health care marketplace is diverse, the rule is designed to be flexible and comprehensive to cover the variety of uses and disclosures that need to be addressed. (See *U.S. DHHS, OCR PRIVACY BRIEF, Summary of the HIPAA Privacy Rule, HIPAA Compliance Assistance* at <http://www.DHHS.gov/ocr/privacysummary.pdf>)

What is FERPA and how is it different from HIPAA?

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of student **education records**. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

FERPA defines education records as those records that contain information directly related to a student that are maintained by an education agency, institution, or person acting for the agency or institution. (<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>)

Health records are defined through the HIPAA privacy regulation, 45 CRR, § 164.501: *Protected Health Information* means any individually identifiable health information that is

- Transmitted by electronic media,
- Maintained in any medium described in the definition of electronic media at §162.103 of this subchapter, and
- Transmitted or maintained in any other form or medium.

Protected health information **excludes** individually identifiable health information in education records covered by FERPA, as amended, 20 U.S.C. 1232g.

Must public schools and education agencies comply with HIPAA?

The preamble to the privacy regulation includes the following statement by the DHHS, the entity responsible for developing HIPAA Privacy:

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

The HIPAA final rule explains that records that are subject to FERPA are not subject to HIPAA. Additionally, medical records that are exempt from FERPA's definition of "education records" under the section 99.3 provision are also exempt from coverage by HIPAA. (*Page 82483 of the December 28, 2000, Federal Register HIPAA final rule*)

Who must comply with HIPAA?

As required by Congress in HIPAA, the Privacy Rule covers the items listed below:

- Health plans
- Health care clearinghouses
- Health care providers who conduct certain financial and administrative transactions electronically (These electronic transactions are those for which standards have been adopted by the Secretary under HIPAA, such as electronic billing and fund transfers.)

These covered entities are bound by the new privacy standards even if they contract with others (called "business associates") to perform some of their essential functions. The law does not give the DHHS the authority to regulate other types of private businesses or public agencies through this regulation. For example, DHHS does not have the authority to regulate employers, life insurance companies, or public agencies that deliver social security or welfare benefits.

Many of the questions regarding covered entities, disclosures, access, and policies can be found at the Question and Answer site located at <http://answers.hhs.gov/>. Specific questions are answered by clicking on the link to Health Information Privacy Policy sub-categories.

What does the HIPAA Privacy Rule require providers to do?

Covered Entities must protect individually identifiable health information against deliberate or inadvertent misuse or disclosure. Consequently, health plans and providers must maintain administrative and physical safeguards to protect the confidentiality of health information as well as protect against unauthorized access. HIPAA final rules explicitly mention the following actions:

- Adopt written privacy procedures.
- Train employees about security.
- Designate a privacy officer.
- Develop legal agreements that extend privacy protections to third-party business associates.
- Obtain patient consent for most disclosures of protected health information.
- Provide the minimum amount of information necessary.

Those that misuse personal health information can be punished. The DHHS Office for Civil Rights, which is responsible for implementing the Privacy rules, can impose civil monetary penalties and criminal penalties for certain wrongful disclosures of protected information. Civil penalties can be imposed up to \$25,000 per year and criminal penalties can range from \$50,000 and one year in prison to \$250,000 and 10 years in prison.

These entities must inform individuals about how their health information is used and disclosed and ensure them access to their information. Written authorization from patients for the use and disclosure of health information for most purposes is also required with the exception of health care treatment, payment, and operations (and for certain national priority purposes).

(See Kumekawa, Joanne K. (September 30, 2001) "Health Information Privacy Protection: Crisis or Common Sense?" *Online Journal of Issues in Nursing*. Vol. #6 No. #3, Manuscript 2. Available at http://www.nursingworld.org/ojin/topic16/tpc16_2.htm)

Would education programs ever be subject to HIPAA?

You may need to contact DHHS to inquire about the applicability of HIPAA to records on non-students. However, students' medical records and education records under FERPA are not subject to HIPAA and should not be disclosed to DHHS under HIPAA.

Educational institutions that provide health care services to individuals other than students or that provide health care coverage to their employees need to be familiar with and may be subject to HIPAA. Educational institutions that do not receive federal funds and maintain any student medical records may also be subject to HIPAA requirements.

The procedures for the submission of electronic records and billing of medical

information would be subject to HIPAA. For example, schools or Part C agencies that bill Medicaid for therapeutic services would need to comply with HIPAA for those procedures.

The safeguards for the protection of privacy under both regulations are comparable and ensure confidentiality if staff members are trained and procedures are in place to maintain privacy and confidentiality.

Where can I locate other resources?

- Office of the Assistant Secretary for Planning and Evaluation Administrative Simplification in the Health Care Industry
<http://aspe.os.dhhs.gov/admsimp/>
- Office for Civil Rights—HIPAA
 - Medical Privacy—National Standards to Protect the Privacy of Personal Health Information
<http://www.DHHS.gov/ocr/hipaa/assist.html>
 - Overview of information from the Office of Civil Rights
<http://www.DHHS.gov/ocr/hipaa/guidelines/overview.pdf>
 - What's new at the Office for Civil Rights - HIPAA
<http://www.DHHS.gov/ocr/hipaa/whatsnew.html>
- HIPAA Privacy Rule and Research Website (National Institute of Health)
<http://privacyruleandresearch.nih.gov/>
- Final Modifications to the Privacy Rule published in the *Federal Register*
www.DHHS.gov/ocr/hipaa/finalreg.html
- FERPA Regulations
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html>
- FERPA on-line library with reference to HIPAA
<http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html>