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Navigating the Confidentiality Crossroads: HIPAA, FERPA, and School-Based Health Care

DAPHNE KACKLOUDIS, ESQ.
JORDAN BURDICK, ESQ.
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Introduction

- Who are we?
- Who are you?
  - School-based health care providers
  - Health care providers outside of schools
  - School districts
  - Health plans
  - State agencies
  - Other

Disclaimer

This presentation is prepared for general informational purposes only. It is not intended and should not be used for specific legal advice in a specific factual situation. Questions about the legal issues discussed in these materials should be presented to knowledgeable legal counsel with respect to any given factual situation before deciding on a specific course of action.

Agenda

- HIPAA, 42 CFR Part 2, and FERPA
  - What is the purpose of each law?
  - To whom does the law apply?
  - What information does the law protect?
  - What does it mean when the law applies?
  - When may a parent access information under the law?
  - When may a minor consent under the law?
  - How do the three laws work together
  - How do they apply to services delivered in a school-based health center?
- Miscellaneous Information and Best Practices
- Informed Consent and Best Practices
- Questions

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HIPAA, FERPA, Part 2

What is the purpose of each law?

HIPAA

- Federal law that:
  - Protects the privacy of patient information
  - Provides for the security of **protected health information (PHI)**
  - Specifies patient rights to approve access and use of their medical information

FERPA

Federal law that:

- Protects the privacy of students' personal records held by educational agencies or institutions
- Ensures access to **education records** by a student's parents or by a student 18 years or older.

42 CFR Part 2

Federal law that:

- Protects patient records (which set forth the prognosis or treatment of the patient)
- Protects the patient's identity as a Part 2 patient.
- Prohibits the disclosure of **SUD treatment records** without patient consent, other than as statutorily authorized.
- Prohibits law enforcement's use of SUD patient records in criminal prosecutions against patients, absent patient consent or a court order

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To whom does the law apply?

HIPAA	42 CFR Part 2	FERPA
• Applies to health care providers, health plans, and health care clearinghouses (**Covered Entities**) that transmit health information in electronic form regarding certain **covered transactions** • Also applies to **Business Associates** of Covered Entities	• Applies to **federally assisted programs** for the treatment of substance use disorder	• Applies to **educational agencies** and **school officials** • Also applies to organizations and individuals that contract with, or volunteer or consult for, an educational agency if certain conditions are met and they are considered a "school official."

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What information does the law protect?

HIPAA	42 CFR Part 2	FERPA
• Limits use or disclosure of PHI unless authorized. • **PHI** includes individually identifiable health information created or received by a Covered Entity in any form, including oral communications as well as written or electronically transmitted information	• Limits use or disclosure of **SUD treatment records** unless authorized.	• Controls disclosure of information maintained in the **education record**.

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What does it mean when the law applies?

HIPAA	42 CFR Part 2	FERPA
• In general, a CE may only use or disclose PHI if (1) HIPAA specifically permits or requires it; or (2) the individual who is the subject of the information gives written authorization. • **Psychotherapy note exception**	• Part 2 prohibits the disclosure of SUD treatment records without patient consent unless statutorily authorized • **SUD counseling note exception**	• Generally, FERPA prohibits educational agencies from releasing any **"personally identifiable information" (PII)** in the education record unless they have written permission for the release. • Exceptions

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When may a parent access their child's information under the law?

HIPAA

- In most cases, a parent, guardian, or other person acting *in loco parentis* is the **personal representative** of their unemancipated minor child and can exercise the minor's rights with respect to PHI *unless* an exception applies.

- If the minor patient is **emancipated**, or the **minor patient legally consented to their own treatment** (see next slide), then their parent/guardian does not have a legal right of access to their records.

FERPA

- Parents have access to their child's education records until the student turns 18 or enrolls in a postsecondary institution, at which point the student becomes an **"eligible student”**.

- If the student is an eligible student but is claimed as a **dependent** on their parents’ tax return, then the parents retain a right to access the student’s records.

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42 CFR Part 2

- Ohio law, for example, permits a minor to consent to the diagnosis and/or treatment of any condition caused by a drug of abuse, beer, or intoxicating liquor.

- When a minor has the legal capacity under state law to obtain SUD treatment, any written consent for use or disclosure of SUD treatment information may be given only by the minor patient.

- Where state law requires consent of a parent/guardian, written consent must be given by both the minor and their parent/guardian.

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How do these three laws apply to services delivered in a school-based health center?

- Depending on the situation, either FERPA ***or*** HIPAA may apply—not both.
  - FERPA and HIPAA can never apply at the same time because HIPAA excludes education records from the definition of PHI.
  - Part 2 still applies when FERPA or HIPAA apply.

How does HIPAA apply?

- **Student health records are subject to HIPAA** if they are maintained by a clinic that is funded, administered, or operated by or on behalf of a public or private health agency (including an FQHC) or another non-educational agency.

How does FERPA apply?

- **Student health records are subject to FERPA** if they are maintained by a clinic that is funded, administered or operated by or on behalf of a school or educational institution.

How does Part 2 apply?

- **Student health records are subject to Part 2** if they are maintained by a clinic (which can be operated by an FQHC or a school) that is (1) federally assisted and (2) providing SUD treatment to students.

Questions about how these laws apply:

- Are the records of a health care provider on a school campus subject to HIPAA or FERPA?
- Are records from healthcare services provided on a school campus always subject to FERPA?
- When are records from health care services provided on a school campus subject to FERPA?
- When are records from health care services provided on a school campus subject to HIPAA?

Questions about how these laws apply:

- Does HIPAA allow a health care provider or school-based health center subject to HIPAA requirements to disclose PHI to a school-employed health care provider?

- Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to a school-based health center that is not a school employee or official?

- Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to a school-based health center acting as a school official?

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Hot Topics

- Reproductive health care
- Health care for transgender students
- Health care for undocumented students and families

HIPAA/Part 2/FERPA Best Practices

- Train staff on HIPAA, Part 2, and FERPA and applicable obligations under each federal law.

- If there is a Memorandum of Understanding between a school district and health center that includes additional restrictions or requirements, train staff on those limitations.

- Know the situations under state law in which a minor can unilaterally consent to treatment. Draft or revise your Minor Consent to Treat form to reflect state law.

HIPAA/Part 2/FERPA Best Practices Cont.

- Draft policies and procedures related to disclosure and access to student records.
- Develop compliant forms authorizing release of records when appropriate. Know which federal and state laws apply to the situation and who can consent to the release of information and execute the release.
- Document any executed release in the appropriate record.
- Know when a health center can share with a school and when a school can share with a health center.

Informed Consent

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General vs. Informed Consent

General Consent	Informed Consent
• Patient's general permission to be treated by providers • Covers reasonable and necessary services, including examination, basic treatment, vital signs, x-rays and imaging, lab tests, medicines and services	• The process of the provider explaining the risks, benefits, and alternatives of a particular procedure and then the patient making a knowledgeable decision to undergo the procedure • The form is documentation of the process • Required for procedures over and above routine treatment • Failure to obtain = medical negligence (civil)

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Informed Consent

- Also referred to as “procedural” or “specific” consent.

- Informed consent is a process through which a patient (or their personal representative) voluntarily confirms their willingness to undergo a particular treatment or procedure after having been informed of all the potential risks, benefits, and alternatives.

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Informed Consent Cont.

- Informed consent is fundamentally about respecting a patient's right to make decisions about their own body and healthcare.

- Ensuring that patients are fully informed helps healthcare providers act in the best interests of the patient, maximizing benefits and minimizing harm.

- Informed consent is **necessary** to protect your health center and providers against liability!

Elements of Informed Consent

1. The provider must verify that the patient has the **capacity to understand and make decisions** about their healthcare

2. The provider must **disclose enough information** for the decision-maker to make an informed choice

3. The provider must judge that the decision-maker **understands** the information

4. The decision-maker must **freely authorize** the treatment plan and sign an Informed Consent

Disclosure

- Disclosure is critical to the informed consent process, ensuring that patients are fully informed about their treatment options.

- The goal is to provide patients with all relevant information in a clear and understandable manner, enabling them to make informed decisions about their healthcare.

Disclosure Cont.

- **Essential Information to Disclose**
  - **Nature of the Procedure:** A detailed explanation of the proposed treatment or intervention.
  - **Risks and Benefits:** Comprehensive disclosure of potential risks and benefits associated with the procedure.
  - **Alternatives:** Information about alternative treatments or procedures, including the option of no treatment.

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What Must Be Documented?

- The nature of the procedure
- The risks and benefits and the procedure
- Reasonable alternatives
- Risks and benefits of alternatives
- An assessment of the patient's understanding of the first 4 elements

Documentation Best Practices

- **Standardized Forms**
  - Use standardized consent forms tailored to specific procedures.

- **Systematic Approach**
  - Follow a consistent process for documenting consent across all patients.
    - Ex: Implementing a checklist to ensure all elements of consent are documented.

- **Clear Language**
  - Use clear and concise language in documentation.

Documentation Best Practices Cont.

- **Accuracy**
  - Ensure all documented information accurately reflects the discussions and patient decisions.
  - Double-check notes to confirm that they match the verbal explanations given to the patient.

- **Memorialize in the Patient's Record**
  - Ensure that consent (and declination) forms and related documentation are easily accessible in the patient's medical record.

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When may a minor consent to health care under the law?

- Minor consent to treatment is governed by State law.

Informed Consent and Minors

- **General rule**
  - For most medical treatments or procedures involving minors, informed consent **must** be obtained from a parent or legal guardian.
    - The parent/guardian is considered the patient's representative under HIPAA
    - The parent or guardian must be informed about the nature of the procedure, risks, benefits and any alternatives.
    - Similar to the process for adult patients.

Informed Consent and Minors Cont.

- For **children of divorced parents:**
  - Both parents retain custodial rights until and unless the court removes the right. This means that either parent can consent on behalf of the child.
- When **parents are absent from an appointment:**
  - The parent/guardian can legally consent to an authorized person bringing the minor to an appointment, and that person can consent to medical care for the minor at the appointment.
- **Minors who are legally emancipated:**
  - Can provide their own informed consent without parental involvement.

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Special Circumstances

- LEP Patients
- Reproductive Healthcare
- Foster Care

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Informed Consent Best Practices

- Have consent policies/procedures and follow them!
- Take time to discuss all the information that the patient/their parent need to know to make an informed decision about the recommended treatment.
- Ensure the conversation takes place **before** treatment and before the patient signs an informed consent.
- Speak clearly and in a way the patient understands.
- Ensure the conversation and the Informed Consent form are in the patient's primary language.
- Document the conversation and the executed form in the patient's record.

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Questions?

Daphne Kackloudis

ATTORNEY-AT-LAW

Columbus, OH
(614) 940-4543
dkackloudis@shumaker.com

Jordan Burdick

ATTORNEY-AT-LAW

Columbus, OH
(614) 628-6833
jburdick@shumaker.com