

Guidance related to FERPA and School Nursing
Sent from ODE to Oregon school nurses October, 2016

Hello School Nurses,

Recently there have been questions (and discussions) around the Family Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA). As with all legal questions, I am not an attorney nor can ODE provide legal advice. ODE has and will continue to look into these questions and ODE may reach out to the Federal Department of Education for additional guidance. In the meantime ODE's guidance is as follows:

Question:

May a school nurse discuss questions and concerns with a student's doctor related to doctor's orders without a signed release of information (ROI)?

Short answer:

No, FERPA requires a signed consent to disclose education records of a student.

Further explanation:

FERPA's broad definition of "education records" includes health records as well as notes, charting, and other records collected by the school nurse. Because nurses work in an educational setting and on behalf of an education program, they are bound by the FERPA regulations. As such, disclosure of such records must follow FERPA requirements and a nurse must have a signed consent to disclose information or discuss a student's health needs with a doctor. There are a few narrow exceptions to this requirement and these exceptions are limited to situations where the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals and information from education records is necessary to protect the health or safety of the student or other individuals.

FERPA differs from HIPAA in that it does not allow the sharing of information outside of specifically designated individuals within the education program without a signed consent to disclose information. HIPAA allows information to be shared between health professionals as part of the continuation of care of the patient. As such, a HIPAA covered entity may be allowed to share information with a school nurse; however, because the school nurse is bound by FERPA, he or she may not share/discuss health information without a signed consent. Disclosure includes calling or otherwise initiating a conversation about a student.

Finally, ORS 336.201(5)(b) states: "Decisions related to when or where a student receives school nursing services must jointly be made by the registered nurse or school nurse, the parent or guardian of the student and any appropriate school staff. This paragraph does not apply to students who have an individualized education program and for whom special education and related services are determined by an individualized education program team."

Since this is a joint decision, the nurse as well as any appropriate school staff may condition the school's delivery of nursing services on receiving the parent's written consent to disclose information. If the parent doesn't agree to the disclosure and therefore no agreement can be reached due to lack of consensus, no nursing services would be provided. Ultimately, the team making the decision, rather than the parent alone, controls the provision of nursing services.

Guidance related to FERPA and School Nursing

Sent from ODE to Oregon school nurses October, 2016

The following is provided for informational purposes only. If you have questions related to your practice, ODE recommends that you consult with your district administration and/or legal counsel.

- **FERPA applies to the following Persons or Entities:**
 - All educational institutions (e.g., elementary, high school, college) and agencies that receive any funds for programs administered by the U.S. Department of Education (ED) are covered by FERPA.
 - FERPA also applies to “non-school” entities that do not have students but receive funding from ED.
 - All public schools and school districts, most public and private post-secondary institutions (e.g., colleges), and any other programs receiving ED funds are covered by FERPA.
 - Private and religious elementary and secondary schools are not subject to FERPA.
- **FERPA covers the following types of information and records:**
 - “Personally identifiable information” (PII) which includes name, address, personal identifiers like Social Security number or date of birth, or other information that could be used alone or in combination to identify a student
 - “Education record” is defined as records that are: (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting on behalf of the agency or institution.
 - A student’s health records, including immunization information and other records maintained by a school nurse, are considered part of the student’s education record and are protected from disclosure under FERPA.
- **Treatment Records:**
 - “Treatment records” under FERPA, as they are commonly called, are: records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.
 - As such, in most situations the term “treatment records” do not apply to K-12 education programs and as it relates to this guidance do not include school nurse records. *
- **Written consent:**
 - Under FERPA, health agencies can access education records—including student health data maintained by the school or a person acting on its behalf—if the school has received written consent from a parent or eligible student.

Guidance related to FERPA and School Nursing
Sent from ODE to Oregon school nurses October, 2016

- **FERPA Exceptions:**
 - FERPA contains a number of exceptions that allow schools to disclose PII from a student's education record without consent of a parent or an eligible student.
 - FERPA exceptions have generally been narrowly construed by Education Department to err on the side of protecting the student's privacy and may present challenges for health agencies in accessing student health data. (Example: Health and Safety Emergency)
 - Exception is limited to situations where the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals and information from education records is necessary to protect the health or safety of the student or other individuals.

- **Public Health Activities**
 - FERPA does not contain a "public health exception" akin to the one found in HIPAA.
 - Because education records covered by FERPA are expressly excluded from the Privacy Rule, public health authorities cannot use HIPAA's public health exception to access school education records covered under FERPA without consent unless a FERPA exception applies.

- **State Law**
 - Any state law or regulation that conflicts with FERPA and its regulations are preempted by the federal law. For example, the Oregon Nurse Practice Act provides for a nurse to consult with the patient's physician; however FERPA requires a ROI prior to sharing information.

- **Data Not Maintained by School**
 - If a person or entity is employed by or acts on behalf of the school by providing health services (whether at the school or off-site) under contract or otherwise under the "direct control" of a school and maintains student health records, then these records are considered education records under FERPA as if the school was maintaining the records directly. This covers school districts who may contract, for example, with local public health, hospitals, or ESDs for school nursing services.

*ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS. Public Health and Schools Tool Kit. 2012

*Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records