



June 21, 2007

Honorable Michael O. Leavitt
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue
Washington, D.C. 20201

Re: Improving the interaction of FERPA and the HIPAA Privacy Rule with regard to school health records

Dear Secretary Leavitt:

On June 17, 2004, the National Committee on Vital and Health Statistics (NCVHS) sent a letter to your predecessor, Secretary Tommy G. Thompson, making recommendations on the disclosure of health records by health care providers to schools for both treatment and public health purposes. This letter addresses the confusion between the federal law that affects school records and the law covering health records at the federal level and recommends approaches to consider.

The NCVHS revisited the issue of sharing health information with schools and also heard testimony on the disclosure of health care information by schools during a series of hearings in September 2006 and January 2007 as part of our effort to monitor health privacy protections by entities currently not covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Most schools fall into this category because the education records of schools that receive funds from the U.S. Department of Education are subject to the Family Educational Rights and Privacy Act (FERPA), and are specifically excluded from coverage under the HIPAA Privacy Rule. Even the medical records that schools create (for example, through the school nurse or athletic programs) are considered education records subject to FERPA and explicitly excluded. This letter is intended to bring to your attention a broader set of concerns about the protection of health information in the school setting,

At the time of the 2004 hearings, we were concerned with the ability of schools to obtain information about students' prior immunizations, both to facilitate registration for school and to avoid duplicate immunizations. Providers may not disclose immunization information to schools for a purpose other than treatment without a HIPAA-compliant authorization, because schools are generally not considered public health authorities, and therefore do not fall into the HIPAA exception for public health disclosures. We recommended that HHS deem such disclosures to be public health disclosures under HIPAA. We also reported that there was confusion about the need for authorizations for the purpose of treatment because HIPAA does not require authorization to share records for the purpose of treatment, but FERPA does require them. In addition, HIPAA-compliant authorizations, which are required to share records other than for treatment, were difficult to obtain to confirm that a student had already been immunized. Even



where there were HIPAA-compliant authorizations, some health care providers refused to disclose records to schools in response to valid authorizations, delaying registration in school or causing students to undergo duplicate immunizations.

This letter addresses the interaction of HIPAA and FERPA in three areas: (1) release of health information from educational institutions, (2) privacy and security of health information held by educational institutions, and (3) differentiating health information of students (covered by FERPA) from health information of employees of an educational institution (covered by HIPAA).

Release of information

In our more recent hearings on this subject, we heard from the American School Health Association, the American College Health Association, and the National Athletic Trainers' Association about a problem related to release of information. These witnesses told us that, absent an emergency, FERPA requires parental authorization prior to disclosing a student's medical information to public health officials, or even to a student's personal physician. Parental authorization is not required for a health care provider to share records for the purpose of treatment under the HIPAA Privacy Rule. The requirement for parental authorization under FERPA has the effect of limiting reports of the following: immunizations, communicable diseases, hearing test results, autism screening, and other health information collected in school settings that might be disclosed to public health officials or health care providers for surveillance and follow-up treatment.

Privacy and security

Representatives of two school health associations testified that they, and other school organizations, would generally prefer that health information be protected in schools the way it is in health settings. Furthermore, both acknowledged that having more robust guidance on security would be helpful, since school environments generally lack the security protections required by HIPAA. Nevertheless, there may be other individuals or groups that would prefer to continue to have school health records covered only by FERPA, which has fewer disclosure exceptions than HIPAA, and we did not hear from them. Consequently, we do not have a specific recommendation now, we want to alert you to the problems in this area, and advise you that the issue warrants further exploration.

Student employees of educational institutions

Another problem identified by the American College Health Association at our 2006 hearing was the overlapping coverage of HIPAA and FERPA in the very common instance where an individual is both a student and an employee of a college or university. As a student, all of the individual's education records, including health records, are covered by FERPA. As an employee, an individual may be enrolled in a group health plan where the individual's health records are subject to HIPAA. In either role, the individual may become a patient of the associated university health center or hospital where both FERPA and HIPAA records are under the roof of the same institution. Consequently, ambiguity and confusion arise as to whether the

individual’s medical records are covered by FERPA, and thereby excluded from coverage under HIPAA. Another example is the case of the athletic trainer who treats a student covered by the university’s health insurance plan, so that it is not clear whether the trainer is creating records covered by FERPA or HIPAA.

As we highlighted in 2004, FERPA was enacted at a time before students with significant physical, developmental, behavioral, and mental health conditions regularly attended school, and before schools became providers of a wide variety of physical and mental health services. NCVHS recognizes that over 30 years ago, at the time of the passage of FERPA, the role of schools as health care providers and as partners with public health officials was not as prominent as it is today.

Recommendation: NCVHS reiterates our recommendation that HHS work with the U.S. Department of Education to improve the interaction of FERPA and the Privacy Rule with respect to health records in school settings and to ensure that disclosures to and from schools for public health or health care purposes work smoothly in appropriate circumstances. The effort should clarify the circumstances under which each law applies, and explore the need for any changes in legislation or regulation to accomplish these goals.

Recommendation: We also recommend that the Department strengthen its outreach and education program to eliminate the unintended confusion that has arisen in recent years with respect to the protection of health records in schools.

We appreciate the opportunity to share with you our additional thoughts and recommendations on the issue of school health records.

Sincerely,

/s/

Simon P. Cohn, M.D., M.P.H.
Chairman, National Committee on
Vital and Health Statistics

Cc: HHS Data Council Co-Chairs