

# Privacy and Confidentiality in the SBHC Context: HIPAA/FERPA 101



Michael Chase, JD, MHA, BSBA  
*Attorney, Baird Holm LLP*  
[mchase@bairdholm.com](mailto:mchase@bairdholm.com)

**BAIRD HOLM** <sup>LLP</sup>

ATTORNEYS AT LAW

EST. 1873

Anna Armstrong, PhD, MPH, CPH, MCHES  
*Director of Evaluation & Innovation, Building Healthy Futures*



# Agenda

- Introductions and interactive exercise
- Pre-test
- FERPA
- HIPAA
- Application of FERPA and HIPAA to SBHCs
- Post-test
- Questions and issue spotting

# Introduction



- Schools and health care providers are a unique partnership
- Privacy protections for education records and medical records = much confusion
- Periodic training is important
  - Issue spotting
  - Quality improvement
  - Best practices (learn about real life examples)

# Introduction



- As SBHC providers (and as schools):
  - Do you discuss privacy/confidentiality upfront with students, parents, teachers, and administrators?
  - Have students expressed concern about disclosure of information to parents, teachers, administrators, or other health care providers?

# Introduction



- Why privacy?
  - Can influence whether someone seeks care
  - Can influence when someone seeks care
  - Can influence where someone seeks care
  - Can influence the provider/patient relationship

# Introduction



# Interactive Exercise



- New SBHC project at a school location
- SBHC Privacy and Confidentiality Task Force
  - Members of the school community (teachers, administrators, and school nurses)
  - Members of the provider community (physicians, mid-level providers, nurses, and administrators)
- **Task: Identify the privacy and confidentiality issues related to access, use, and disclosure of education records and health information**

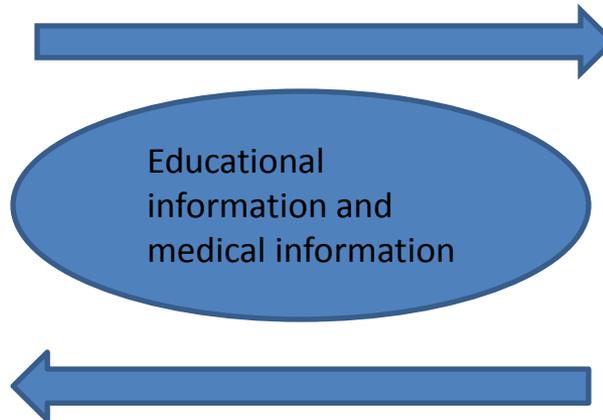
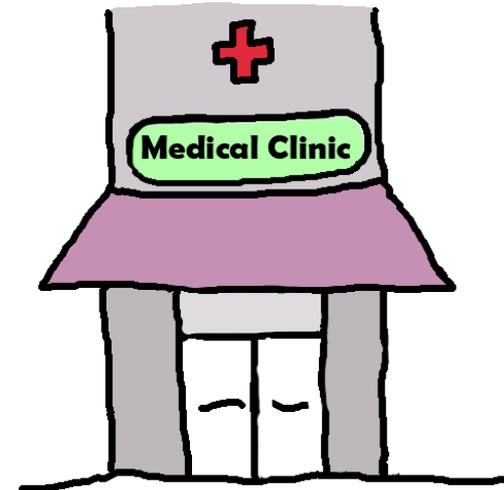
# Interactive Exercise



Chase Elementary School



Armstrong Health Care, LLC



# Interactive Exercise



- Is the information is protected by FERPA? By HIPAA?
- Why do you want to share information?
- Who are you going to share information with?
- What are the privacy and confidentiality concerns?
- Do you need consent (FERPA)? Authorization (HIPAA)?
- When will you obtain consent/authorization? From parent(s)?
- Where will you store the information?
- How will the information be accessed or disclosed?

# Interactive Exercise



## What did you come up with?

- Law enforcement
- Protected Health Information (PHI)
- Business Associate
- School administration
- Program evaluation
- Emergencies
- SBHC providers
- Research
- Enrollment forms
- Teachers
- Minor's consent
- Attendance records
- Consent to treat
- FERPA Consent
- HIPAA Authorization
- Parental consent
- EHR/EMR
- Medication instructions
- STD information
- Parents
- Treatment purposes

# Pre-Test



- Scenario #1
  - a. School nurse calls and refers student to SBHC. SBHC treats student. SBHC needs to communicate medication administration instructions back to school nurse.
  - b. Teacher contacts SBHC and wants information from the SBHC (instructions/details on medication; diagnosis; potential for side effects, etc.).

# Pre-Test



- Scenario #2
  - Student cuts himself at school and is referred by a teacher to the SBHC. While at the SBHC student states that he has a weapon in his locker and is going to hurt teachers and other students tomorrow. SBHC wants to call the school, parents, and law enforcement.

# Pre-Test



- Scenario #3\*
  - Minor consents (on her own) to STD testing at SBHC.
  - Minor pays for service in cash.
  - Parents see prescription and are furious.
  - Parents call SBHC demanding information.

# Pre-Test



- Scenario #4
  - School principal wants to evaluate the outcomes associated with obese students who are seen at the SBHCs.
  - School and SBHC want to engage a local college of public health to evaluate on their behalf.
  - Need to use school data.
  - Need to use SHBC data.
  - Link the two types of data.

# Pre-Test



- Scenario #5
  - SHBC provider stops at a gas station on the way from the school to the SBHC main office.
  - Leaves car unlocked. Paper medical records stolen.
  - Now what???

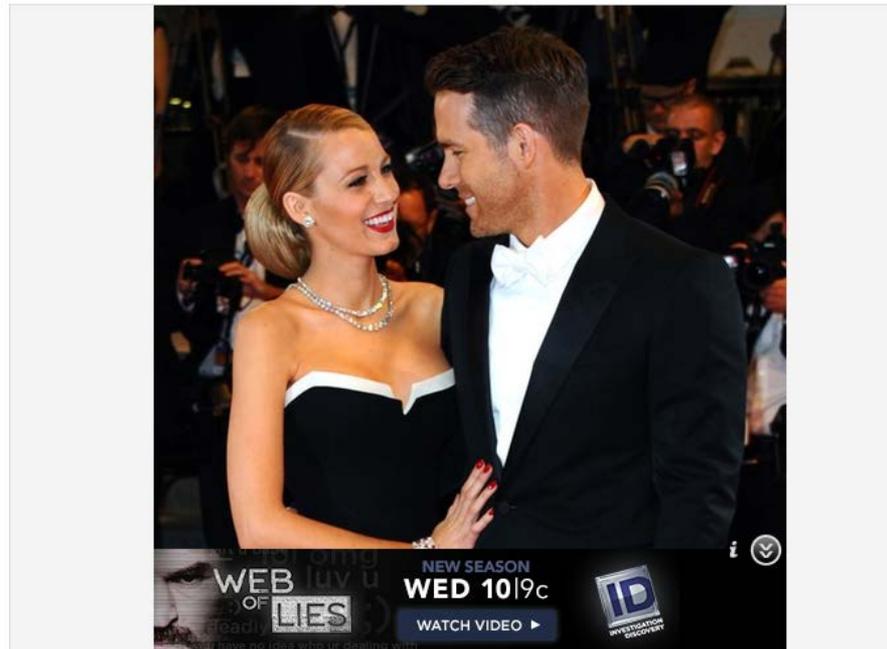
# Pre-Test

## FREEBIE!

- Scenario #6
  - SBHC provider (#1) sees fellow SBHC provider (#2) treating a child in the exam room next door. Provider #1 knows the child's neighbors. Provider #1 looks up child's problems/diagnosis. Provider #1 meets the neighbor for coffee and explains the child's medical history and diagnosis.

# Really?

## It's a...Girl?: Did Blake Lively and Ryan Reynolds Name Their Baby Violet?



Blake Lively and Ryan Reynolds reportedly have a daughter named Violet!  
Getty Images

# Really?



**sam**  
@kimbanksy



 Follow

Congrats @blakelively #blakelively glad to have you and baby girl violet in our care



RETWEETS

19

FAVORITES

12



9:29 PM - 5 Jan 2015

# Really?



k

@kimbanksy



Follow

I think I'm in trouble



RETWEETS

4

FAVORITES

7



1:20 PM - 6 Jan 2015

# FERPA & HIPAA



- Comparison of FERPA and HIPAA
  - General privacy rights
  - Who is covered
  - What information is covered
  - **Uses and disclosures**
    - Is consent/authorization required? Is there an exception?
  - Breaches (HIPAA)

# FERPA



- Family Educational Rights and Privacy Act of 1974
- **Federal law that protects the privacy of students' education records**
  - To protect students' right to privacy by limiting the disclosure of information in certain records
  - To assure parents and students that they have access to students' education records

# FERPA



- Parents have the right to:
  - Have access to their child’s education records
  - Seek to have the records amended
  - Consent to the disclosure of personally identifiable information from education records, except as provided by law

# FERPA



- Applies to all public and private schools that accept Federal funds (virtually all public schools and most private schools)
  - Elementary
  - Secondary
  - Post-secondary

# FERPA



- General FERPA Rule:
  - An educational agency or institution may not have a policy or practice of disclosing educational records of students, or personally identifiable information from education records, without a parent or eligible student’s written consent.

# FERPA



- “Education Records”
  - Records directly related to a student
  - Maintained by an educational agency or institution
  - Examples
    - Grades; student health records; comments made by teachers; psychological records; disciplinary records; special education records

# FERPA



- “Personally Identifiable Information”
  - Name (including parents and other family members)
  - Personal identifier (SSN#; student ID number; etc.)
  - Other identifiers (e.g., date of birth; mother’s maiden name; address)
  - Information that alone, or in combination, can be linked to a specific student

# FERPA



- Does the school disclose “education records” to the SBHC? (see “Directory Information” later on)
  - Allow access into school’s information system?
- What information received from the SBHCs goes into the school’s education record?

# FERPA



- Right to consent to disclosures:
  - Except for specific exceptions, a parent shall provide a signed and dated written consent before a school may disclose education records. The consent must:
    - Specify records that may be disclosed;
    - State the purpose of the disclosure; and
    - Identify the party/parties to whom disclosure may be made.

# FERPA



- When is prior consent not required?
  - School officials
  - **Contractor (outsourced institutional service/function)**
    - Look at SBHC structure – is the school outsourcing this?
  - Parents of a dependent student
  - Other schools to which student is transferring
  - Judicial orders and subpoenas
  - Health and safety emergencies
  - Organizations conducting studies for (or on behalf of) school

# FERPA



- What about “directory information?”
  - An educational institution may release directory information about a student even though it includes what might otherwise be considered personally identifiable information.

# FERPA

- “Directory Information”
  - Information contained in an education record of a student that would generally not be considered harmful or an invasion of privacy if disclosed.

# FERPA



- Name
- Address
- Telephone number
- E-mail address
- Photograph
- Date and place of birth
- Dates of attendance
- Most recent educational agency or institution attended
- Grade level
- Enrollment status
- Participation in officially recognized activities and sports
- Weight and height for members of athletic teams
- Degrees, honors and awards received

# FERPA

- Must include directory information notice in FERPA notice
- Must honor “opt-outs” by parents and eligible students
- Check state law for other directory information requirements

# HIPAA



- Health Insurance Portability and Accountability Act of 1996
- **Requires covered entities to protect the privacy and security of individually identifiable health information by requiring appropriate safeguards to protect privacy**
  - Sets limits and conditions on the uses and disclosures that may be made without patient authorization

# HIPAA

- Creates the rule of privacy
- Grants individual rights
- Requires structured remediation steps
- Imposes consequences
  - Civil penalties on covered entities
  - Criminal penalties on anyone
- No individual right to sue
  - But remember other state law claims possible

# HIPAA



- Applies to “Covered Entities”
  - Health care providers who transmit any health information in electronic form in connection with covered transactions
  - Health plans
  - Health care clearinghouses

# HIPAA



- “Health care providers”
  - Institutional and non-institutional providers of health or medical services
    - Hospitals
    - Physicians
    - Dentists
    - Other persons/organizations that furnish, bill, or are paid for health care in the normal course of business

# HIPAA



- HIPAA regulates “Protected Health Information” (PHI)
  - Individually identifiable health information
    - Relates to past, present, or future physical or mental health or condition
    - Relates to provision of health care to an individual
    - Related to past, present, or future payment for health care
  - Identifies the individual
  - Reasonable basis to believe information can be used to identify the individual

# HIPAA

- Names
- Geographic subdivisions smaller than a state
- All elements of dates (except year) for dates directly related to an individual
- Telephone numbers
- Fax numbers
- E-mail addresses
- Social Security numbers
- Medical record numbers
- Health plan beneficiary numbers
- Account numbers
- Certificate/license numbers
- Vehicle identifiers and serial numbers
- Device identifiers and serial numbers
- Web URLs
- IP addresses
- Biometric identifiers
- Full-face photographic images
- Any other unique number, characteristic or code

# HIPAA



- **RULE:** Individually identifiable health information is confidential by law and cannot be accessed, used or disclosed except according to an exception
- **EXCEPTIONS**
  - Broad: treatment, payment, health care operations
  - Narrow: As listed in 512 of HIPAA
  - In between: Friends and family (narrow)
  - Authorization

# HIPAA – Treatment Exception

- A covered entity (CE) may access, use and disclose PHI to treat a patient
- A CE may disclose PHI to another health care provider for its treatment activities

Hospital → Physician

Physician → Physician

Provider → Provider

# HIPAA – Payment Exception

- Meaning:
  - Activities to obtain and support payment
  - Broad authority to disclose PHI to another health care provider or covered entity for its payment purposes
  - Minimum necessary applies
  - Treatment function → Business function
  - Physician/Clinic → Hospital

# HIPAA – Health Care Operations

- Meaning:
  - PI/ QI/ Peer Review
  - Population-based health activities
  - Underwriting, business management, other
- CE can use PHI for its own health care operations
- Can disclose to another covered entity for its qualifying health care operations

# HIPAA – Other Exceptions

- (a) Required by law
- (b) Authorized disclosures for public health activities
- (c) Health oversight activities
- (d) Judicial and administrative proceedings
- (e) Law enforcement activities
- (f) Avert a serious threat to health or safety

# HIPAA – Disclosures



- Uses and disclosures with authorization
  - Uses and disclosure where no exception or requirement exists
  - Psychotherapy notes
  - Marketing
  - Sale of PHI
- Authorizations must have specific elements
- **Must be a stand-alone document** (not combined with a consent to treat)

# HIPAA – Disclosures



## Key Provision – Required by Law

- Providers may disclose Protected Health Information (PHI) as required by a specific State or Federal law
- Key provision we always look to first
- Is there a law that *requires* disclosure, not just permissive

# HIPAA – Disclosures



## Abuse, Neglect and Domestic Violence

- A covered entity may disclose PHI about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority authorized by law to receive such reports in the following limited circumstances:
  - When the disclosure is *required by law* and the disclosure complies with and limited to the relevant requirements of such law; or
  - If the individual agrees to the disclosure; or

# HIPAA – Disclosures



## Abuse, Neglect and Domestic Violence (cont.)

- Without the agreement of the individual if the disclosure is expressly authorized by statute or regulation and one of the following conditions is met: (i) covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or (ii) if the individual is incapacitated, a law enforcement officer authorized to receive the disclosure represents to the covered entity that a delay in the disclosure will materially and adversely affect an immediate law enforcement activity and the information is not intended to be used against the individual

# HIPAA – Disclosures



- Law Enforcement
  - Must have authority to disclose patient PHI to law enforcement under HIPAA
  - Call and tell them that a drug seeking patient showed up?
  - Call and tell them that the patient is going to injure a current or former patient? (or another individual)?

# HIPAA – Disclosures



- HIPAA authority
  - Crime on premises (164.512(f)(5))
  - May disclose PHI that the CE believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the CE
    - Example: narcotic-seeking patient vs. medical identity theft

# HIPAA – Disclosures



- HIPAA authority
  - Disclosure to avert a serious threat to health or safety (164.512(j))
    - Is necessary to prevent or lessen a serious threat to the health or safety of a person or the public
    - Is to a person(s) reasonably able to prevent or lessen the threat, including the target of the threat
    - Needs good faith belief

# HIPAA – Minors



- Minor consent in all states
  - STD testing
  - HIV testing?
  - Pregnancy testing?
  - Drug and alcohol abuse counseling?

# HIPAA – Minors



- HIPAA treats the minor as the “individual” if the minor is authorized to and does consent
  - Parent access then depends on State or other law
- Minor has the right to access PHI
- Minor must authorize disclosure of PHI related to the service to which the minor consented
  - But see State law regarding permissive disclosures to parents
  - What if parent receives an Explanation of Benefits?

# HIPAA – Breach Notification



- Covered entity must notify individual(s) of a “breach” of unsecured PHI
  - Secured = encrypted if electronic; destroyed if paper
- Notification without unreasonable delay but in no event later than 60 days after discovery
- Notification to Office for Civil Rights (OCR)
  - OCR may investigate any reported breach
- Notification to media if affecting > 500
- OCR will investigate all reported breaches >500

# HIPAA – Breach Notification

## *Breach:*

- The access, acquisition, use or disclosure of PHI not permitted under the Privacy Rule that ***compromises*** the security or privacy of the PHI.

# HIPAA – Breach Notification

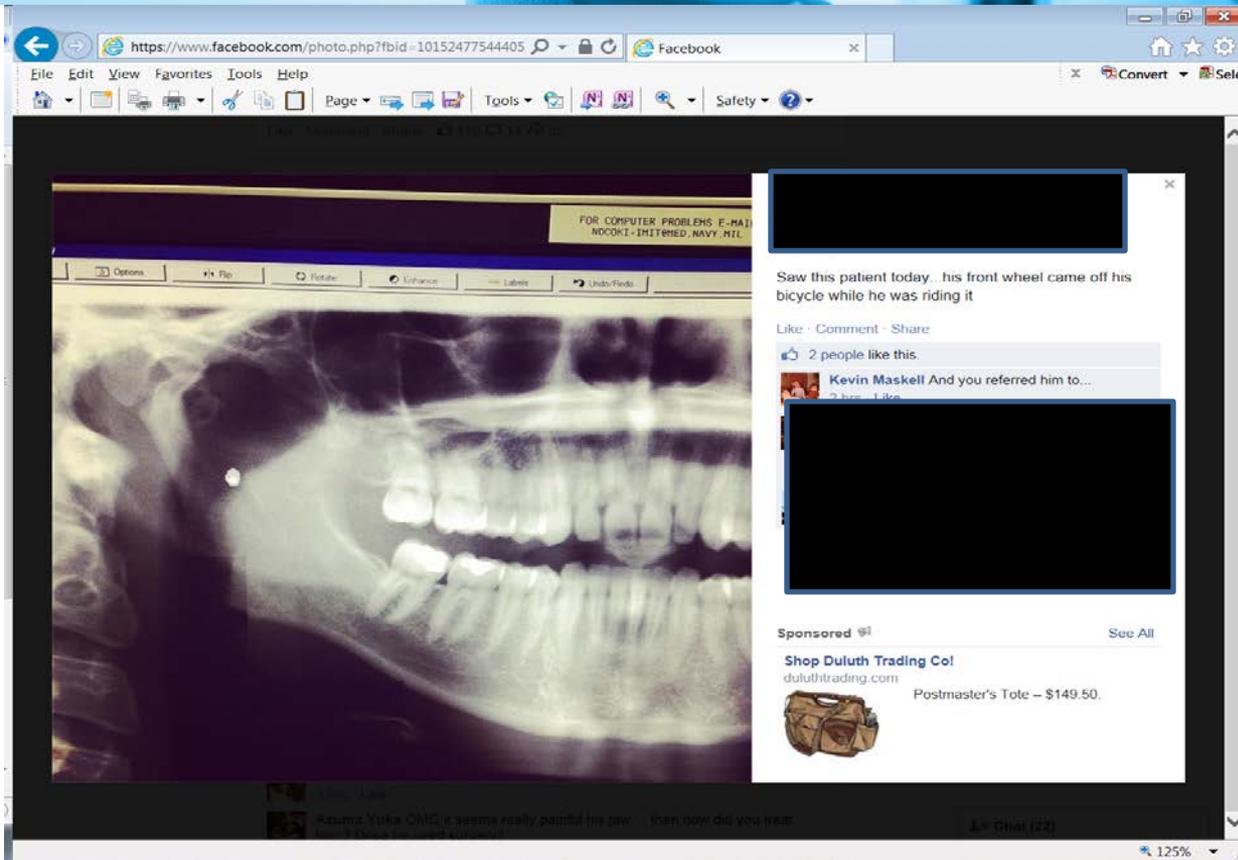


- Compromised?
- Risk Assessment Factors
  1. Nature and extent of PHI, including types of identifiers and likelihood of re-identification.
  2. Who is the unauthorized recipient?
  3. Was the PHI actually acquired or viewed?
  4. Extent to which the potential risk to the PHI has been mitigated.
- Must document risk analysis for every incident
- Breach notification policies and procedures critical

# HIPAA – Breach Notification

- Examples of breaches
  - Lost laptops
  - Misdirected faxes
  - Leaving a record out in plain view or in car
  - Failure to shred
  - Access to record without treatment relationship (snooping)
  - Social media posts, tweets, pictures, etc.

# HIPAA – Examples of Breaches



# HIPAA – Examples of Breaches

- *Dr. Catherine Puetz, Grand Rapids, MI*
  - Associate Medical Director of Emergency Services
  - Another ED nurse posted picture of a patient’s backside on Facebook
  - Dr. Puetz commented “Is that TB?”
  - Other Hospital employees also commented (without naming the patient)
- Puetz removed from leadership role; later terminated
- Other employees also terminated

# HIPAA – Examples of Breaches

- The mustache that went viral
  - Torrence Memorial Medical Center – in 2011 female patient sedated for surgery
  - Anesthesiologist drew mustache and put stickers on her face – ha ha.
  - Nurses aide with cell phone took picture
  - Naturally, the picture made it to Facebook
  - State investigation and civil lawsuit – certain penalties
  - (latimes.com 9/4/13)

# HIPAA – Examples of Breaches

- *Toledo Clinic* cardiology nurse
  - Duties included accessing lab results and diagnostic test results
  - Received HIPAA training; signed agreement to protect patient confidentiality
  - Accessed mother's records 44 times
  - Access sister's records 28 times
  - Mother and sister were not cardiology patients; no authorization; no POA
- Anonymously reported to the Privacy Officer
- Immediately terminated

# HIPAA – Examples of Breaches

## Hospital Employees Fired For Accessing Sacra's Medical Record

Updated: Fri 1:42 PM, Sep 26, 2014

By: WOWT 6 News Email

[Home](#) / [Headlines List](#) / [Article](#)

The Nebraska Medical Center said Friday two hospital employees have been fired for looking at Dr. Rick Sacra's medical file, a privacy violation.

The Med Center released the following statement:

"During an audit of our electronic medical records, we discovered that two med center employees inappropriately accessed the record of Ebola patient Dr. Rick Sacra. This is a violation of HIPAA regulations and an issue we take very seriously. Based on the results of the investigation conducted, two employees no longer work for the organization and other corrective action has been taken.

While this is extremely uncommon, we have a zero tolerance for unauthorized access to patient information. In accordance with HIPAA regulations, Dr. Sacra was notified in person and in writing before his departure from the hospital."



Yes- HIPAA even  
applies in Nebraska!

# HIPAA – Breach Notification

- NO EXCEPTION BECAUSE
  - You are an employee or a licensed healthcare professional
  - You have a password and EASY access
  - You know the patient/student
  - It's family
  - You are the employer or peer
- Exceptions are narrow and exclusive
- Sanctions are significant

# HIPAA – Breach Notification

- Educate and train your organization
  - Everyone **must** report an incident – even when in doubt - right away.
  - Everyone’s access must be audited
  - Effective process for internal reporting is critical

# HIPAA/FERPA

- School → SBHC
  - Information from education records? Directory information?
    - Immunization information?
    - Disciplinary records?
    - Access through school's information system?
  - Do you have a FERPA consent?
  - As part of school enrollment process?

# HIPAA/FERPA

- SBHC → School
  - Input into the school's information system? Fax? Oral communication?
  - Who at the school?
    - Nurse?
    - Teacher?
    - Administration?

# HIPAA/FERPA

- SBHC → School
  - What is the purpose?
    - Nurse? (Treatment?)
    - Teacher? (Not treatment)
    - Administration? (Not treatment)

# HIPAA/FERPA

- SBHC → School
  - Do you need a HIPAA Authorization? If yes:
    - What is the purpose of the disclosure?
    - What information will be disclosed?
    - When will you obtain the authorization? (At the time of consent to treat? At enrollment?)
    - Have you discussed this with the parents and/or student/patient?

# HIPAA/FERPA



- Omaha Public Schools example
  - OPS; OneWorld/Charles Drew
- Timing of FERPA consent – for education records to be disclosed to SBHC
  - Includes emergency contact info; IEP; attendance records; accommodation plans; etc.
  - As part of school enrollment process
  - What is the duration of the consent? One year? Time in the building?

# HIPAA/FERPA

- Consent to treatment
  - Part of an overall consent/enrollment process?
  - Or do you get a separate consent to treat?
  - Done at first visit to SBHC by SBHC staff?
  - What if parents are unavailable?
    - Verbal consent?

# HIPAA/FERPA

- HIPAA authorization – for SBHC to disclose PHI to school
  - Do you have parents sign as part of enrollment or first visit?
  - Duration of the authorization
  - Purpose of the authorization
  - What is going to be disclosed

# HIPAA/FERPA



- Research and/or Program Evaluation
  - Detailed rules in HIPAA regarding “research” – informed consent; authorization; IRB waiver/approval
  - Program Evaluation is different (come and listen to Anna this afternoon!)
  - Will you have business associates who can conduct a program evaluation? (SBHC-side)
  - Are the evaluators performing an “outsourced” function? (school-side)

# HIPAA/FERPA

- Program Evaluation
  - Who wants it?
  - What information will go into it?
  - Are all the parties “ok” with the design and the information needed?
  - Who will get reports?
  - What will the reports be used for? (Program Evaluation!)

# Post-Test



- Scenario #1
  - a. School nurse refers student to SBHC. SBHC treats student. SBHC wants to communicate medication administration instructions back to school nurse.
  - b. Teacher contacts SBHC and wants information from the SBHC (instructions/details on medication; diagnosis; potential for side effects, etc.).

# Post-Test



- Scenario #1
  - FERPA - education records? Directory information?
  - HIPAA - Treatment purpose?
  - Authorization to disclose information to school (including teacher)?

# Post-Test



- Scenario #2
  - Student is injured and is referred to SBHC. While at the SBHC student states that he is going to hurt teachers and other students tomorrow. SBHC wants to call the school, parents, and law enforcement.

# Post-Test



- Scenario #2
  - HIPAA disclosures to law enforcement
  - HIPAA disclosures to avert a serious threat
  - Reasonable belief that the harmful threat is imminent?
  - Who can lessen the threat?
    - Law enforcement?
    - Parents?
    - School?

# Post-Test



- Scenario #3
  - Minor consents (on her own) to STD testing at SBHC.
  - Minor pays for service in cash.
  - Parents see prescription and are furious.
  - Parents call SBHC demanding information.

# Post-Test



- Scenario #3
  - Look to state law regarding permissive disclosures
  - HIPAA treats minor who could and did consent as the individual (for purposes of access, authorization, etc.)
  - What if parents would have seen billing information on an Explanation of Benefits?

# Post-Test



- Scenario #4
  - School principal wants to evaluate the outcomes associated with obese students who are seen at the SBHCs.
  - School and SBHC want to engage a local college of public health to evaluate on their behalf.
  - Need to use school data.
  - Need to use SHBC data.

# Post-Test



- Scenario #4
  - Where will the information come from?
    - Education records
    - Student records
  - FERPA consent?
    - Organization doing something on school's behalf? Outsourced function?
  - HIPAA authorization?
    - Does this fit within "health care operations?"
    - HIPAA "business associate" for program evaluation

# Post-Test



- Scenario #5
  - SHBC provider stops at a gas station on the way from the school to the SBHC main office.
  - Leaves car unlocked. Paper medical records stolen.
  - Now what?

# Post-Test



- Scenario #5
  - Information is protected by HIPAA
  - Remember the breach examples?
  - NOTIFY privacy officer IMMEDIATELY
  - Roll out the incident response plan
  - Work with privacy officer, administration, legal counsel to investigate (and notify affected individuals, if necessary)
  - Correct/mitigate the violation

# Questions



# CONTACTS

Michael W. Chase  
Baird Holm LLP  
1700 Farnam Street, Suite 1500  
Omaha, NE 68102  
(402) 636-8326  
mchase@bairdholm.com

Anna Torrens Armstrong, PhD, MPH  
Director of Evaluation & Innovation  
Building Healthy Futures  
(813) 842-0233  
a.armstrong@bhfomaha.org

[www.buildinghealthyfutures.org](http://www.buildinghealthyfutures.org)

