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MEMORANDUM

Date: December 3, 2008

To: Janet Matthews, MS, FNP, WHCNP
School-Based Health Center Program

Leslie Currin, School Health Specialist
Oregon Department of Education

From: Shannon O'Fallon, Sr. AAG SO
Oregon Department of Justice

Gary Cordy, Sr. AAG GMC
Oregon Department of Justice

Re: School Based Health Centers, school nurses, and the applicability of HIPAA and FERPA
DOJ Matter No: 100717-GH1438-08 (Health Division)
581090-GH1020-08 (Department of Education)

You have asked a number of questions about the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA) and how these two federal laws affect school based health centers (SBHC), and school nurses.[1]

Your questions are essentially these:

1. Does HIPAA apply to SBHCs?

Short answer: Yes.

2. If HIPAA does apply, what are the rules governing the release of a student's information held by a SBHC?

Short answer: Generally an authorization for the disclosure of information must be obtained before releasing protected health information (PHI). However, PHI

[1] The Oregon Department of Justice advises state agencies, and cannot give legal advice to a SBHC or a school district. A SBHC and a school district should consult with its own legal counsel about these issues. For additional guidance on the Application of FERPA and HIPAA to student health records go to: http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf

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may be released without a valid authorization to a student, for payment or treatment purposes, or if another exception applies.[2]

3. Can a SBHC nurse and a school nurse, employed by or contracting with the school, share information about a student?

Short answer: A SBHC may share information about a student with a school nurse for treatment purposes. Otherwise, a SBHC will need a release of information that meets HIPAA requirements and a school nurse will need a release of information that meets FERPA requirements, unless an exception applies.

4. Can a SBHC notify a parent about the care a student received?

Short answer: It depends on the type of treatment the minor has received and whether the minor or the parent consented to treatment.[3]

5. Does HIPAA or FERPA apply to a nurse employed by or contracting with a school?

Short answer: FERPA.

6. What confidentiality rules apply to a nurse employed by or contracting with a school?

Short answer: FERPA's confidentiality rules.

You asked an additional question about whether a SBHC nurse may give out over-the-counter medications without direct or standing orders from a licensed health care practitioner. Questions related to the scope of practice of a school nurse or a nurse working in a SBHC should be directed to the Oregon Board of Nursing.

BACKGROUND

A SBHC is a health center within a school, designed to ease access to health care by reducing the barriers that have historically prevented children and adolescents from seeking the health services they need, including inconvenience, cost, transportation, concerns surrounding confidentiality and apprehension about discussing personal health problems.[4] SBHCs provide a full range of primary care services with a health prevention focus, regardless of whether a

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[2] On page eight, we describe the exceptions to the HIPAA requirement that a release is required prior to the release of information.

[3] *See* pages 10-12 for a full discussion.

[4] We understand that a SBHC may provide services to members of the public, not just students. This advice does not deal with any related legal issues that might arise when a SBHC is treating members of the public. However, as a general matter, HIPAA applies to non-students seen at a SBHC.

student has health insurance. These services include routine physical exams, mental health care with drug and alcohol counseling, treating minor injuries and illnesses, administering immunizations, and reproductive health services.

The Department of Human Services (DHS) certifies SBHCs, and a state certified SBHC is eligible for state dollars through its local public health authority. There are currently 44 SBHCs in 19 counties. There are SBHCs in elementary, middle, and high schools. DHS has standards for certification that a SBHC must meet. A SBHC must have at least one sponsoring agency to provide funding, staffing, medical oversight, chart ownership, or liability insurance. While a student may be provided services at a SBHC regardless of insurance coverage, SBHCs can bill insurance.

School nurses are employed by a school district or education service district, registered by the State Board of Nursing, and certified by the Teacher's Standards and Practices Commission (TSPC), as qualified to conduct and coordinate the health service programs of a school. OAR 584-021-0105(12). School districts may employ nurses who are not TSPC certified but the district shall not designate such personnel as a "school nurse". OAR 584-021-0110(2).

For those students with disabilities who are on an individual education plan (IEP) as called for under the Individual with Disabilities in Education Act (IDEA) a school nurse may be a required school participant in IEP meetings because the nurse's services are necessary to provide a student with a free appropriate public education (FAPE) as mandated by state law (ORS 339.115). *See* 20 USC §1414; 34 CFR §300.34(c)(13); 34 CFR §300.321. Similarly, a school nurse may be a required participant in accommodation planning and plan implementation for students with disabilities who qualify under Section 504 of the Rehabilitation Act if the nurse's services are needed to provide the student with a FAPE. *See* 29 USC §794; 34 CFR § 104.33.

School nurses are considered an integral part of the public schools and ordinarily have access to student educational records. Education records are very broadly defined by FERPA as records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution. In the school setting even medical health and immunization records are considered education records and subject to FERPA. *See* discussion below.

I. HIPAA, FERPA and SBHCs

A. HIPAA

HIPAA protects the privacy of an individual's health information and medical records and specifies when an individual's authorization is required for disclosure of protected health information. HIPAA only applies to: (1) A health plan; (2) A health care clearinghouse; and (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA. 42 CFR §164.104. This third category refers to health

care providers that furnish, bill or receive payment for health care electronically. At least some of the SBHCs likely fall within the third category because they engage in electronic billing.[5] If a SBHC does not engage in any electronic billing, even through its sponsor, the SBHC is likely not a covered entity and not required to comply with HIPAA.

Education records that are subject to FERPA, including individually identifiable health information contained in such records, are specifically exempt from HIPAA.

B. FERPA

A good description of FERPA and health records is found in a February 25, 2004 Family Policy Compliance Office (FPCO) letter issued by the U.S. Department of Education. The FPCO is authorized to interpret FERPA and to mandate corrective action for any violations. 20 U.S.C. §1232g(f). A portion of that letter provides:

> FERPA is a federal law that protects privacy interests of parents in their children's "education records," and generally prevents an educational institution from having a policy or practice of disclosing the education records of students, or personally identifiable information contained in education records, without the written consent of the parent. The term "education records" is defined as all records, files, documents and other materials which contain information directly related to a student and are maintained by the educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R § 99.3 "Education records."
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> Additionally, the records of a student that pertain to services provided to that student under the Individuals with Disabilities Education Act (IDEA) are "education records" under FERPA and are subject to the confidentiality provisions under IDEA (see 34 C.F.R §§ 300.560-300.576) and to all of the provisions of FERPA. When a student reaches the age of 18 or attends an institution of postsecondary education, the student is considered an "eligible student" under FERPA and all of the rights afforded by FERPA transfer from the parents to the student. 20 U.S.C. § 1232g(d); 34 C.F.R § 99.3 "Eligible student."
>
> A K-12 student's health records, including immunization records, maintained by an educational agency or institution subject to FERPA, including records maintained by a school nurse, would generally be "education records" subject to FERPA because they are 1) directly related to a student; 2) maintained by an educational agency or institution, or a party acting for the agency or institution; and 3) not excluded from the definition as treatment or sole possession records, or on some other basis. 20 U.S.C. §1232g(a)(4)(a).
> * * *

[5] Note that the state has its own version of HIPAA found at ORS 192.529 to 192.529.

For FERPA purposes, it is important to understand what role a SBHC has with an educational institution. The role of SBHCs may vary with educational institutions and the applicability of FERPA rests on careful consideration of the SBHC and the educational institution relationship. In general it is highly unlikely that a SBHC will have access to school nurse records regarding students unless specific consent by the parent or emancipated student is obtained by the SBHC. The reason is explained in a FPCO letter, this time from June 28, 2006. A portion of that letter provides:

> "Education records" are defined as records that are directly related to a student and maintained by an educational agency or institution *or by a party acting for the agency or institution*. 34 CFR §99.3 "Education records" (emphasis added). This means that records directly related to a student that are maintained by contractor or other party acting for a school, including records created by that party, are subject to all FERPA requirements.
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> "Disclosure" in the FERPA regulations means "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party" by any means and includes access to education records by school officials. Indeed, one of the exceptions to the prior written consent requirement in FERPA allows "school officials, including teachers, within the agency or institution" to obtain access to education records provided the educational agency or institution has determined that they have "legitimate educational interests" in the information. 34 CFR §99.31(a)(1). Although "school official" is not defined in the statute or regulations, this Office has interpreted the term broadly to include a teacher; school principal; president; chancellor; board member; trustee; registrar; counselor; admissions officer; attorney; accountant; human resources professional; information systems specialist; and support or clerical personnel.
>
> In addition, an educational agency or institution may disclose education records without consent to a "school official" under this exception only if it has first determined that the official has "legitimate educational interests" in obtaining the information to perform specified services for the agency or institution. An educational agency or institution that allows school officials to obtain access to education records under this exception must include in its annual notification of FERPA rights a specification of its criteria for determining who constitutes a "school official" and what constitutes "legitimate educational interests" under §99.31(a)(1). See 34 CFR §99.7(a)(3)(iii).
>
> As noted in your email, FERPA does not specifically address disclosure of education records to contractors, consultants, volunteers and service providers who are not employees of an educational agency or institution. However, the statutory definition of "education records" appears to recognize the use of outside service providers in calling for the protection of records maintained by "a person acting for" the agency or institution." Indeed, the Joint Statement in Explanation

of Buckley/Pell Amendment (120 Cong. Rec. S39862, Dec. 13, 1974) refers specifically to materials that are maintained by a school "or by one of its agents" when describing the meaning of the new term "education records" in the December 1974 amendments. Accordingly, this Office has advised that agencies and institutions subject to FERPA are not precluded from disclosing education records to parties to whom they have outsourced services so long as they do so under the same conditions applicable to school officials who are actually employed.

Note that an educational agency or institution may not disclose education records without prior written consent merely because it has entered into a contract or agreement with an outside party. Rather, the agency or institution must be able to show that **1) the outside party provides a service for the agency or institution that it would otherwise provide for itself using employees; 2) the outside party would have "legitimate educational interests" in the information disclosed if the service were performed by employees; and 3) the outside party is under the direct control of the educational agency or institution with respect to the use and maintenance of information from education records.** Further, under §99.33(a) of the regulations, any party, including a "school official," that receives education records may use the information only for the purposes for which the disclosure was made and may not redisclose the information to any other party without prior written consent, except as authorized under §99.33(b). As noted above, education records maintained by a party providing services for an educational agency or institution, including records created by that party, are subject to all FERPA requirements. An outside party that does not meet these requirements may not be given access to personally identifiable information from education records without meeting the prior written consent requirements.

Critically, an educational agency or institution must ensure that its service provider does not use or allow anyone to obtain access to personally identifiable information from education records except in strict accordance with the requirements established by the agency or institution that discloses the information. In that vein, the agency or institution that outsources services under these requirements remains completely responsible for its service provider's compliance with applicable FERPA requirements and liable for any misuse of protected information. For that reason, we recommend that these specific protections be incorporated into any contract or agreement between an educational agency or institution and any non-employees it retains to provide institutional services.

The disclosure of education records to school officials without consent under §99.31(a)(1) is ordinarily excepted from FERPA's specific recordation requirements under §99.32(d)(2) because these disclosures are identified in the school's annual FERPA notification. An educational agency or institution that has

> complied with the notification requirements in §99.7(a)(3)(iii) for disclosure of education records to contractors and other outside service providers retained as "school officials" under the above conditions may exclude these disclosures from the recordation requirements in accordance with §99.32(d)(2). If the agency or institution has not listed contractors and other outside service providers as "school officials" in its annual §99.7 FERPA notification, then it is required to record each disclosure to a qualifying contractor in accordance with §99.32(a).

(Emphasis added). The physical proximity of a SBHC to a school has no bearing on whether FERPA or HIPAA applies.

II. Use and Disclosure of Protected Health Information under HIPAA

HIPAA protects all "individually identifiable health information" or "protected health information" (PHI). 45 CFR §160.10. Individually identifiable health information is defined as:

> [Ii]nformation that is a subset of health information, including demographic information collected from an individual, and:
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
> (i) That identifies the individual; or
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 CFR §160.103. "Protected health information" is

> [I]ndividually identifiable health information:
> (1) Except as provided in paragraph (2) of this definition, that is:
> (i) Transmitted by electronic media;
> (ii) Maintained in electronic media; or
> (iii) Transmitted or maintained in any other form or medium.
> (2) ***Protected health information excludes individually identifiable health information in:***
> ***(i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g;***
> (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
> (iii) Employment records held by a covered entity in its role as employer.

Id. Note that PHI *does not* include records covered by FERPA. *Id.*, at (2)(i). As a general matter, a covered entity may not use or disclose PHI. 45 CFR §164.502. ***A covered entity may***

disclose PHI: (1) To the individual; (2) For treatment[6], payment, or health care operations in accordance with 45 CFR §164.506[7]; and (3) Pursuant to a valid authorization. *Id.*, at (a)(1)(emphasis added). 45 CFR §164.512 also addresses the disclosure of PHI *without* a written authorization from the individual. A covered entity may disclose PHI:

- If required by law, such a disease reporting required under ORS 433.004;
- To a public health authority for public health purposes;
- To report child abuse or neglect;
- To report that an individual is the victim of abuse, neglect, or domestic violence;
- In response to a court order or a subpoena;[8]
- To law enforcement under certain circumstances;[9]
- To avert a serious threat to health or safety.[10]

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[6] Under HIPAA, treatment is defined as "the provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another." 45 CFR 164.501. So, for example, if a SBHC diagnosed a student with an infection and prescribed a course of antibiotics that the student would need to take during school hours, the SBHC could provide information about the infection and the medication to the school nurse because the school nurse would need to provide the antibiotics to the student at certain times of the day.

[7] **§ 164.506 Uses and disclosures to carry out treatment, payment, or health care operations.**
(a) Standard: Permitted uses and disclosures. Except with respect to uses or disclosures that require an authorization under §164.508(a)(2) and (3), a covered entity may use or disclose protected health information for treatment, payment, or health care operations as set forth in paragraph (c) of this section, provided that such use or disclosure is consistent with other applicable requirements of this subpart.
(b) Standard: Consent for uses and disclosures permitted.
(1) A covered entity may obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations.
(2) Consent, under paragraph (b) of this section, shall not be effective to permit a use or disclosure of protected health information when an authorization, under §164.508, is required or when another condition must be met for such use or disclosure to be permissible under this subpart.
(c) Implementation specifications: Treatment, payment, or health care operations.
(1) A covered entity may use or disclose protected health information for its own treatment, payment, or health care operations.
(2) A covered entity may disclose protected health information for treatment activities of a health care provider.
(3) A covered entity may disclose protected health information to another covered entity or a health care provider for the payment activities of the entity that receives the information.
(4) A covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is:
(i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or
(ii) For the purpose of health care fraud and abuse detection or compliance.
(5) A covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to another covered entity that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.

[8] In order to disclose PHI in response to a subpoena, the party seeking the information has to make efforts to ensure that the individual who is the subject of the PHI, be given notice and an opportunity to object. 45 CFR §164.512(e). A person served with a subpoena should seek legal advice before disclosing any PHI.

[9] *See* 45 CFR §164.512(j). Again, if law enforcement requests PHI from a SBHC, the SBHC should seek legal advice before disclosing information. However, a SBHC must comply with a search warrant.

45 CFR §164.512. The list above is not exhaustive, so if a SBHC has a specific question about disclosure without authorization in a specific situation, it should seek legal counsel. In any situation where PHI is being used or disclosed, a covered entity shall make reasonable efforts to limit the disclosure or use to the minimum amount necessary to accomplish the intended purpose. 45 CFR §164.502(b).[11]

As stated above, the general rule is that a SBHC must have a written authorization to disclose or release PHI. The DHS HIPAA compliant disclosure form can be found at: http://dhsforms.hr.state.or.us/Forms/Served/DE2099.pdf. The form has instructions that include information about when a minor can authorize the release of information. The core elements of a HIPAA authorization are:

> (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
> (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
> (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
> (iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
> (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or

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[10] A covered entity may disclose PHI to avert a serious threat to health or safety if the covered entity believes, in good faith, that the disclosure:

> (i)(A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
> (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or
> (ii) Is necessary for law enforcement authorities to identify or apprehend an individual:
> (A) Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or
> (B) Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody, as those terms are defined in §164.501.

[11] The "minimum necessary" rule does not apply to:

> (i) Disclosures to or requests by a health care provider for treatment;
> (ii) Uses or disclosures made to the individual, as permitted under paragraph (a)(1)(i) of this section or as required by paragraph (a)(2)(i) of this section;
> (iii) Uses or disclosures made pursuant to an authorization under §164.508;
> (iv) Disclosures made to the Secretary in accordance with subpart C of part 160 of this subchapter;
> (v) Uses or disclosures that are required by law, as described by §164.512(a); and
> (vi) Uses or disclosures that are required for compliance with applicable requirements of this subchapter.

45 CFR § 164.502(b)(2).

> disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.
> (vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.
> (2) Required statements. In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following:
> (i) The individual's right to revoke the authorization in writing, and either:
> (A) The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or
> (B) To the extent that the information in paragraph (c)(2)(i)(A) of this section is included in the notice required by §164.520, a reference to the covered entity's notice.
> (ii) The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization, by stating either:
> (A) The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or
> (B) The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.
> (iii) The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart.

Id., at §164.508(c).

Whether a SBHC nurse and a school nurse can share information would depend on whether there was a valid authorization to share information, or whether the disclosure falls into one of the categories where no authorization is required.

The parents of an emancipated minor would not have the right to access the minor's PHI without an authorization from the minor, unless the parent was also the minor's personal representative.

III. Use and Disclosure of FERPA Records

As stated above, FERPA protects education records and generally prohibits disclosure of education records without the written consent of a parent.

A written consent must:

(1) Specify the records that may be disclosed;
(2) State the purpose of the disclosure; and
(3) Identify the party or class of parties to whom the disclosure may be made.

34 CFR §99.30(a). However, there are exceptions to the written consent requirement. The federal regulations that implement FERPA provide a list of the exceptions, the most pertinent of which are set out below:[12]

> (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:
>
> (1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
>
> (2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.
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> * * *
>
> (9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.
>
> (ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with—
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> (A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or
>
> (B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.
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> * * *
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> (10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.
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> * * *

34 CFR §99.31.

The director of the U.S. Department of Education, Family Policy Compliance Office, has issued guidance about the application of the health and safety emergency exception:

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[12] Please note that not all exceptions are listed but only those that we thought might be related to the issues in this advice.

> [E]ducational agencies and institutions subject to FERPA may disclose personally identifiable, non-directory information from education records under the "health or safety emergency" exception only if the agency or institution determines , on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student's education records to comply with general requirements under state law. Certainly an outbreak of diseases such as measles, rubella, mumps, and polio not only pose threat of permanent disability or death for the individual, but have historically presented themselves as epidemic in nature. Thus, disclosure of personally identifiable information from students' education records to State health officials for such reasons would generally be permitted under FERPA's health or safety emergency provisions.

(Emphasis in the original). Letter to Martha Halloway, Alabama Department of Education, from LeRoy Rooker, Family Policy Compliance Office, U.S. Department of Education (February 24, 2004).

IV. Access by a parent to PHI held by a SBHC

Minors have various rights to obtain medical, dental, and mental health treatment without parental consent.[13] It would follow that if a minor can consent to treatment without parental consent, a minor may authorize the release of his or her PHI. However, without such an authorization, may a SBHC release PHI to a minor's parent? The U.S. Department of Human Services, Office for Civil Rights, HIPAA website, sets out a similar question, and provides an answer:

> **Does the HIPAA Privacy Rule allow parents the right to see their children's medical records?**
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> Answer:

[13] ORS 109.710; 433.045(5)(minor authorized to consent to the diagnosis, care and treatment of venereal disease, including AIDS, no minimum age). ORS 109.640(Physician may provide birth control information and services to any minor without regard to age). ORS 109.640(Child age 15 or older may give consent to medical or dental treatment and diagnosis). ORS 109.675(Minor 14 years of age or older may obtain, without parental knowledge or consent, outpatient diagnosis or treatment of a mental or emotional disorder or a chemical dependency, excluding methadone maintenance, though parents must be involved before end of treatment unless parents refuse or clear clinical indications to the contrary. ORS 436.205(2)(Child age 15 or older may consent to sterilization). ORS 109.670(Person 16 or older may donate blood without parent consent).

> Yes, the Privacy Rule generally allows a parent to have access to the medical records about his or her child, as his or her minor child's personal representative when such access is not inconsistent with State or other law.
>
> There are three situations when the parent would not be the minor's personal representative under the Privacy Rule. These exceptions are:
>
> 1. When the minor is the one who consents to care and the consent of the parent is not required under State or other applicable law;
> 2. When the minor obtains care at the direction of a court or a person appointed by the court; and
> 3. When, and to the extent that, the parent agrees that the minor and the health care provider may have a confidential relationship.
>
> However, even in these exceptional situations, the parent may have access to the medical records of the minor related to this treatment when State or other applicable law requires or permits such parental access. Parental access would be denied when State or other law prohibits such access. If State or other applicable law is silent on a parent's right of access in these cases, the licensed health care provider may exercise his or her professional judgment to the extent allowed by law to grant or deny parental access to the minor's medical information.
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> Finally, as is the case with respect to all personal representatives under the Privacy Rule, a provider may choose not to treat a parent as a personal representative when the provider reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child's personal representative could endanger the child.

http://www.hhs.gov/hipaafaq/personal/227.html. 45 CFR §164.502(g)(3).

> ORS 109.650 provides that:
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> A hospital or any physician, nurse practitioner or dentist as described in ORS 109.640 may advise the parent or parents or legal guardian of any minor of the care, diagnosis or treatment or the need for any treatment, without the consent of the patient, and any hospital, physician, nurse practitioner or dentist is not liable for advising the parent, parents or legal guardian without the consent of the patient.

ORS 109.675(2) requires a parent's involvement in a minor's treatment for a mental or emotional disorder, or chemical dependency, unless there are clear clinical indications to the contrary. As described above, a parent is not considered an unemancipated minor's personal representative for purposes of authorizing disclosure of the minor's PHI, if the minor can consent to their own treatment, and parental consent is not required. 45 CFR §164.502(3)(i). However, if state law

requires or permits access to PHI by a parent or guardian, the covered entity *may* provide or deny access to PHI by a parent or guardian, provided that such a decision is made by a licensed health care professional, in the exercise of professional judgment. *Id.*, at (3)(ii)(C). Access may be denied to a parent if the covered entity has a reasonable belief that:

> (A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or
> (B) Treating such person as the personal representative could endanger the individual; and
> (ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

45 CFR §164.502(g)(5)(i). In determining whether to release information to a parent or guardian, the SBHC must review what type of treatment the minor obtained, and whether there is a basis for refusing to disclose the information.

V. Confidentiality rules governing school nurses

In order for a school nurse to share the education records of a student with a SBHC a school district would need to be in compliance with FERPA and designate the SBHC as a "school official with legitimate educational interests," obtain parent or student consent for the disclosure, or one of the exceptions to the consent requirement would have to apply.[14]

If the SBHC obtains school nurse records pursuant to the "school official" exception to consent, the SBHC could be required to treat those records as would the school district, in conformance with FERPA.

VI. Conclusion

In sum, absent a special contractual arrangement between a SBHC and a school or a school district, a SBHC is governed by HIPAA and other state confidentiality laws concerning medical records, and information may only be shared: (1) With the patient; (2) For treatment purposes; (3) With a valid authorization for the release of information; or (4) Pursuant to an exception under HIPAA.[15] A school nurse is subject to FERPA and any records maintained by that school nurse may only be released in accordance with FERPA.

If you have further questions please do not hesitate to contact us.

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[14] We are not opining whether a school district could, or could not designate a SBHC as a "school official with legitimate educational interests" and still be in compliance with FERPA. Rather, we are stating that if a SBHC were given such a designation, records could be more easily shared with a SBHC.

[15] We understand that there may be schools where the school district acts as the employer of SBHC staff. Because this creates a special relationship between the school and the SBHC, this general advice may not apply and we would urge that any such SBHC and school district seek legal advice on the applicability of HIPAA and FERPA.