Higher Education Institute:
Avoiding Compliance Pitfalls Across Your Campus –
From Admissions to the Title IX Office to the Board Room

Regulatory Issues Facing Student Health Centers
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Goals

• Provide an overview of laws, rules and regulations respecting privacy, scope of practice by providers in student health centers and how to respond in emergency situations.

• Understand limits on services provided and restrictions on information sharing.

• Advise on practical considerations involved in the operation of student health centers.
Student Health Centers - Generally

- Provide services to students, faculty and staff
- No services provided to general public
- Services are limited in scope
- Often covered by payment of a flat student health fee (e.g., no Medicare/Medicaid, private insurance reimbursement)
  - Important for HIPAA
• Federal Laws
• State Laws
• Agency Regulations
• Professional Practice Standards
• Institution Policies, Procedures, Rules, Etc.
Not regulated like hospitals, diagnostic & treatment centers or clinics

Generally treated like private offices

- Practitioners are subject to laws governing practitioners
- Scope of practice and limitations consistent with scope of licensure/certification
- Regulated through licensure of providers by Education Department
Scope of Services

• Limited – typically primary care and treatment
• Can provide counseling services through center or campus counseling office
• Referral to outside providers
• Emergency treatment situations
Rules of Conduct

• New York State grants license to practice medicine and regulates the scope of practice

• Professional Misconduct
  – Gross negligence or gross incompetence
  – Negligence or incompetence on more than one occasion
  – Practicing while impaired
  – Willful or grossly negligent failure to comply with provisions of federal or state law
  – Directly or indirectly offering, giving, soliciting or receiving or agreeing to receive, any fee or other consideration to or from a third party for a referral
• **Examples:**
  
  — Revealing personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient
  
  — Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient
  
  — Failing to exercise appropriate supervision over persons who are authorized to practice only under the supervision of a licensed professional
Medical Records

- **General Purpose:** Document evaluation and treatment, promote good care, and support administrative functions, discipline and billing
- **Contemporaneous record of the event**
- **Electronic Medical Records**
- **Must have a records retention policy (active records vs. historical retention)**
- **Unprofessional conduct to fail to maintain a record for each patient, which accurately reflects the evaluation and treatment of the patient**
Copies of Medical Records

- Requests must be in writing
- Should be made in advance
- Must have a policy in place to address records requests
Confidentiality of Medical Records

• **Sources of Confidentiality Obligation**
  
  – Hippocratic Oath
  
  – AMA Principles of Medical Ethics
  
  – Federal Law: HIPAA/FERPA overlay
  
  – State Law: Education Law, Public Health Law, Mental Hygiene Law, CPLR
Confidentiality of Medical Records

• Important to protect students’ privacy
• Avoid illegal and unethical disclosures
• Understand to whom and when permissive disclosures can be made
• Generally, with consent, disclosure is usually permitted
• Practically, should be limited to those with a legitimate need to use the information
HIPAA/FERPA

• **HIPAA** – “Health Insurance Portability and Accountability Act of 1996”

• **FERPA** – “Family Educational Rights and Privacy Act”

• Both restrict access to records, require consent to release and have certain exceptions that allow disclosure without consent
HIPAA/FERPA

• Tension between two:
  – What records are covered by each?
  – Who has access?
  – Can parents access records?
  – Application:
    • HIPAA – Hybrid Entity
    • FERPA – If applicable, applies to institution as a whole

• Intersect in student health center
HIPAA

- Uniform Federal Privacy Law
- **Protected health information (PHI):** information that is oral or recorded, created or received, and relates to past, present or future health or condition, healthcare provided, or payment
  - “Education Records” covered by FERPA are explicitly excluded from the definition of PHI
- General Rule: May not use or disclose PHI without an authorization unless an exception applies
- Exceptions:
  - Payment, treatment and healthcare operations
HIPAA – Preemption

• HIPAA - provides a Federal floor of privacy protections for protected health information.

• State laws that are contrary to the Federal HIPAA Privacy Rule are preempted by the Federal requirements, unless a specific exception applies. Exceptions include if the State law:
  – provides greater privacy protections or privacy rights with respect to such information
  – reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention

• In these circumstances, a HIPAA Covered Entity is not required to comply with a contrary provision of the HIPAA Privacy Rule.
HIPAA – Covered Entity

• **Covered Entity:** In order to be a “Covered Entity” a health care provider must:
  – Furnish, bill or receive payment for health care in the normal course of business
  – Transmit covered transactions electronically

• Not all health care providers are “Covered Entities” under HIPAA

• Is a student health center a Covered Entity?
“Covered transactions”: health care claims or equivalent encounter information, coordination of benefits, referral certification and authorization, etc.

- Simply maintaining electronic medical records on behalf of students is NOT a covered transaction
- Transmitting medical records to students, parents, other providers for a student’s treatment is NOT a covered transaction
- HOWEVER, if:
  - A student health center transmits medical records to obtain authorization to obtain authorization for referring a student to a health care provider; or
  - A provider electronically transmits medical records to a health plan to substantiate claims for payment.
- The center MAY be engaging in a covered transaction

• HR assistance with claims processing for employees – can also render an organization a Covered Entity
• Implications of being deemed a covered entity? Significant.
  – Must create policies and procedures
  – HIPAA Privacy Rules and Security Rules apply
  – Must enter into “business associate agreements” with vendors to whom the student health center transmits protected health information
  – Liability for breaches
HIPAA-Patient’s Rights

• Access
• Amendment
• Accounting of disclosures
• Restrictions on use and disclosure
• Confidential communications – alternate means or location
• Breach notification
• Parents may be “personal representatives” for HIPAA purposes and authorized to make medical decisions for the students
  – Access information
  – Control use and disclosure
Institution may be a “hybrid entity” as its activities include covered and non-covered functions under HIPAA

- Covered functions = health care component
- Must make a designation
- Hybrid entity functions must be separated from other functions
Similar process can/should be used for medical records requests

Contents of the Authorization:
- To whom, by whom and what disclosed
- Purpose of the disclosure
- Expiration date or event
- Right to revoke
- Information is subject to re-disclosure without protection
- Additional requirements for NYS:
  - HIV/AIDS
  - Mental health
  - Substance abuse
  - Genetic Information

Tuesday, August 2, 2016
FERPA

- Uniform Federal Law that protects and ensures access to educational records by students and parents
- Applies to public/private agencies and institutions that receive federal funds and individuals acting for those agencies and institutions
- **Education Record:** Records directly related to a student and maintained by an educational institution or a party acting on the institution’s behalf. Health records are NOT required on a post-secondary level.
  - Includes:
    - records maintained by student health center
    - Immunization records
  - Not included: records kept by the maker (e.g., personal notes and observations)
• **Personally Identifiable Information (PII):** includes name, address, personal identifiers (ss #, date of birth) or other information that, alone or in combination, can be used to ID a student
  
  – Medical and psychological treatment records are excluded if they are made, maintained and used only in connection with the treatment of a student over 18 and disclosed only to individuals providing the treatment

• Only disclosed with consent or under applicable exception
• Shields access to such records from the public; disclosure is generally prohibited without consent
• Once a student reaches 18 years of age or attends a postsecondary institution, he or she becomes an "eligible student," and all rights formerly given to parents under FERPA transfer to the student
• Campus personnel may share information with other school officials with a legitimate education interest
• Can disclose to parents if:
  – Student is under 21 and has violated an institutional rule or policy re drugs/alcohol
  – If student is dependent for federal tax purposes
• May disclose for health and safety emergencies
• Disclosure permitted without written consent if necessary to protect the health and safety of the student or other individuals
  – May be made to “appropriate parties” (e.g., public health officials, trained medical personnel, parents)
  – Case-by-case determination: must be an “articulable and significant threat” (e.g., must be able to explain, based on information, what the threat is at the time of disclosure)
  – Must document disclosure in student’s educational record
• If student health center is a HIPAA Covered Entity, it must comply with HIPAA
• However, education records (including treatment records for 18+ year old students) of students in the student health center may not be covered under HIPAA due to the carve out
• If school discloses an eligible student’s treatment records for purposes other than treatment, the treatment records are no longer excluded from definition of “education records”
• Provision of care to staff? Others? Could be covered by HIPAA and not FERPA
• HR claims information
Other Laws Respecting Confidentiality

• General: New York Public Health §§ 17-18
• Mental Health: New York Mental Hygiene Law § 33.13
• Federal Drug & Alcohol Abuse: 42 CFR Part 2
Mental Health Considerations in Higher Education

• Issues of confidentiality, treatment, scope of services, expectations
• Also legal rights of parents, students and institutions
• Need to balance privacy and security
• Review institution and counseling center policies, code of conduct and access to services
• What if you suspect an individual is a danger to others?

• **Mental Hygiene Law § 33.13(c)(6)**
  
  – Applies to facilities “licensed by or operated by” OMH or OPWDD. Private offices are not covered; however, the provisions of the MHL are persuasive and can be a guidepost for how to resolve situations.
  
  – Provides that information about patients shall not be reported except to an “endangered individual and law enforcement” when a psychiatrist or psychologist has determined that a patient presents a “serious and imminent danger” to that individual.
  
  – **Standard**: “serious and imminent danger”
  
  – Permissive, not mandatory
  
  – Any such disclosure must be documented in the patient’s medical record
Mental Hygiene Law § 9.46 - The “SAFE” Act

- Enacted January 2013
- Applies to “mental health professionals” - physicians, psychologists, RNs, licensed clinical social workers
- Mandates disclosure where a mental health professional “determines, in the exercise of reasonable professional judgment” that a patient is “likely to engage in conduct that would result in serious harm to [the patient] or others”
- Report goes to the director of community services, who then shall report to the division of criminal justice if the director believes the patient is likely to engage in such conduct
  - Information reported is limited to names and other non-clinical identifying information
  - Information may only be used to determine whether a firearm license should be suspended or revoked
- Standard: determination in the exercise of reasonable professional judgment that the person is “likely to engage in conduct that would result in serious harm”
- No action necessary where the action would endanger the professional or increase the danger to a victim

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Malpractice

• Duty (Standard) of Care
  – duty to possess required knowledge and skill
  – duty to exercise ordinary and reasonable care in the application of such knowledge and skill
• Depends on what a reasonably prudent physician would have done under the circumstances in the locality
• Breach of a duty
• Breach is the proximate cause of the injury (i.e., what you did wrong caused the injury)
Malpractice Insurance

– Occurrence based
  • Covers alleged acts of malpractice that occur while the policy is in force no matter when the claim is made.

– Claims made
  • Covers alleged acts of malpractice which both occur and are reported to the insurer during the time the policy is in continuous force.
    – Policy A, effective 1-1-16 – 12-31-16, alleged act occurs 10-1-16, and claim made in 2017. Not covered, unless tail coverage is maintained after the effective term of the policy.
Best Practices

- Consider carefully whether HIPAA applies to the student health center, consult counsel as necessary
- If HIPAA does apply, consider “hybrid entity” designation
- Maintain complete and accurate records
- Carefully and promptly respond to medical records requests
- Review when health information may/may not be disclosure
- Understand scope of services
Questions?
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