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Legal News: Information Please...

HIPAA Privacy Rule: What Is It? Should Your District Care? by Holly Claghorn

As pending April 14 deadlines loom, more attention is being focused on the Privacy Rule adopted under the Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 U.S.C. § 1320c-9.

What is the Privacy Rule?

- The Privacy Rule under HIPAA is a sweeping federal regulation requiring covered entities to take affirmative steps to protect the privacy of protected health information (PHI).
- Among other things, each covered entity must designate a privacy officer, issue privacy notices to affected individuals, obtain consent before disclosing PHI, and implement procedures to prevent unauthorized disclosure of PHI.
- The Privacy Rule also sets forth rights of access for parents to the medical records of their minor children.
- Violations of the Privacy Rule are punishable with civil and criminal penalties.
- The Privacy Rule goes into effect April 14, 2003.¹

Should Your District Care?

In the simplest terms, yes.

Some districts may be covered entities under the Privacy Rule. Covered entities are health insurance plans, health care clearinghouses, and health care providers that conduct health care transactions electronically.²

- The term health care provider is very broadly defined to include any "care, services, or supplies related to the health of an individual." Districts that operate school-based health clinics may be health care providers, depending on the degree of control they exercise over the clinics and staff.
- Districts that employ nurses, athletic trainers, psychologists, social workers, and certain educational aides also may be health care providers but would not be covered unless they conduct health care transactions (such as billing) electronically.
- Districts that are self-insured for employee insurance—health, dental, vision, prescription drugs—are health insurance plans.

- Districts that process Medicaid and other medical claims for third parties may be considered health care clearinghouses.

Even if your district is not a covered entity, it will almost certainly experience an indirect impact. Covered entities that disclose PHI to third parties pursuant to a business relationship must obtain certain assurances from those third parties. Thus, a contractor that provides physical therapy services to special-education students under a contract with a district must obtain written assurances that the district will protect or maintain the confidentiality of any health information before disclosing it to the district.

Health insurance providers must obtain written assurances before releasing even summary health information. Similarly, outside health care providers must obtain written permission before releasing medical information to schools. This means that a physician must have the parent's written consent before providing a student's immunization records to a district.

What about Student and Personnel Records?

Even if a district is a covered entity, exceptions soften the burden of compliance.

- The Privacy Rule specifically excludes education records under the Family Educational Rights and Privacy Act (FERPA) from its coverage.³ However, health information that is not covered by FERPA, such as oral communications, is protected by HIPAA.
- The Privacy Rule also excludes records that an entity holds in its capacity as an employer.⁴
- The rule also contains an exception for the disclosure of workers' compensation records to an employer.⁵

However, health insurance records relating to employees are still protected by the rule.

Thus, districts can continue to receive and maintain doctors' notes and family and medical leave certifications without complying with HIPAA.

However, medical information a district obtains in its role as a sponsor of a health insurance plan cannot be used for employment decisions.

Sound Complicated?

It is. And deciphering the Privacy Rule is, at best, a Herculean task. The Privacy Rule is 99 pages of three-column, small-point text.

The long and short of it is that virtually all public school districts will be affected, directly or indirectly, due to their status as employers, providers of medical services to students, or processors of medical claims for themselves or other entities, or because they have business relationships with covered entities.

What Should Districts Do?

- First, TASB Legal Services Division recommends that each district work with a qualified consultant and its school attorney to determine if and to what extent it is

covered by HIPAA and to develop a compliance plan. In this regard, be mindful that this is a complex, fact-dependent determination for which there is no “one-size-fits-all” solution.

- Second, districts should be prepared to receive “Business Associate Agreements” from covered entities and, possibly, plan amendments from their insurance company. These documents should be reviewed by local counsel in every case to ensure that the district is not taking on any more responsibility, or liability, than absolutely necessary. It is also vitally important, as with all contracts, that the district understand its obligations before it enters into the agreement.
- Third, districts should remember that the FERPA exception to HIPAA is not a panacea to HIPAA compliance. Some health records, such as oral communications, will not fall under FERPA. These records are nonetheless protected by HIPAA if the district is a covered entity.

What is the Board’s Role?

The statute itself does not mandate that school boards adopt any formal local policies relating to health records or health care transactions.

Accordingly, the board’s role is one of general oversight to ensure that the administration is utilizing appropriate administrative regulations and procedures to comply with the law to the extent the district is covered.

Where Can I Find Out More?

The United States Department of Health and Human Services maintains a comprehensive Web site on HIPAA at www.hhs.gov/ocr/hipaa/ [<http://www.hhs.gov/ocr/hipaa/>] .

Especially useful are the Covered Entity Decision Tools, a flow-chart-type guide for determining whether an organization is covered. The link for these tools is at www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp [<http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp>] .

TASB’s Legal Services Division will continue to monitor developments relating to HIPAA, particularly as they pertain to public schools, and to keep you informed of the issues that are important to you.

¹The compliance deadline is April 14, 2004, for some small plans. This should not be confused with the compliance deadline under the HIPAA rule for electronic transactions (the Transactions Rule), which was October 2002, unless a one-year extension was obtained.

245 C.F.R. § 160.103.

345 C.F.R. § 164.501.

445 C.F.R. § 164.510.

545 C.F.R. § 164.512(l).

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