



Testimony of

Ellen Campbell, Deputy Director

Family Policy Compliance Office

Office of Innovation and Improvement

U.S. Department of Education

on the

Intersection of the

Health Insurance Portability and Accountability Act of 1996

(HIPAA) and the

Family Educational Rights and Privacy Act (FERPA)

National Committee on Vital Health Statistics (NCVHS)

Subcommittee on Privacy and Confidentiality

February 19, 2004

Washington, D.C.

Good morning, Mr. Chairman and members of the Subcommittee. My name is Ellen Campbell, and I am the deputy director of the Family Policy Compliance Office, within the Office of Innovation and Improvement, at the U.S. Department of Education. Thank you for the opportunity to testify on the intersection of the Health Insurance Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA).

The mission of the Family Policy Compliance Office – the FPCO – is to meet the needs of the Department’s primary customers – students and their families – by effectively implementing two important federal privacy laws that seeks to ensure student and parent rights in education – FERPA and the Protection of Pupil Rights Amendment (PPRA).

The FPCO responds to complaints from parents and students, as well as inquiries and requests from school officials. In addition, the FPCO responds to a large number of telephone calls from parents, students, school officials, and other government officials requesting information on FERPA and/or PPRA.

The purpose of my testimony today is to discuss FERPA and its intersection with HIPAA. FERPA has a long-term, continuing impact on educational agencies and institutions that are the recipients of U.S. Department of Education funds. FERPA impacts all public school districts, virtually all postsecondary institutions (public and private), and all State educational agencies.

FERPA is a federal law that protects privacy interests of parents in their children's "education records." FERPA generally prevents an educational agency or 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."

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 at any age, 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 of education records as treatment or sole possession records, or on some other basis. 20 U.S.C. §1232g(a)(4)(A).

In August 1996, Congress enacted the HIPAA to ensure continued health insurance coverage to persons who change jobs and to establish transaction, security, privacy and other standards to address concerns about the electronic exchange of health information. Final regulations for the *privacy requirements*, detailing how covered entities must handle individually identifiable patient information (called “protected health information”) were published in the *Federal Register* on December 28, 2000, at 65 Fed. Reg. 82462, with final modifications to the Privacy Rule published in the *Federal Register* on August 14, 2002, at 67 Fed. Reg. 53182. Text of the final HIPAA Privacy Rule appears in 45 CFR Parts 160 and 164.

Organizations subject to the HIPAA Privacy Rule, known as “covered entities,” include health plans, health care clearinghouses, and *health care providers that transmit health information in electronic form in connection with covered transactions*. 45 CFR § 160.103. “Health care providers” include institutional providers of health or medical services, such as hospitals, as well as non-institutional providers, such as physicians, dentists, and other practitioners, along with any other person or organization that furnishes, bills, or is paid for

health care in the normal course of business and that conducts certain billing and other administrative transactions electronically.

As such, schools and school districts that provide health or medical services to students may qualify as “covered entities” under the HIPAA Privacy Rule. However, the preamble to the December 2000 final rule explains that health information maintained as an “education record” as defined by FERPA is excluded from HIPAA privacy requirements. That is, it is not the HIPAA Privacy Rule but FERPA – and the confidentiality provisions in IDEA, where applicable – that protect the privacy of information in education records, including specifically health-related information. The preamble to the December 2000 final rule stated:

We have excluded education records covered by FERPA, including those education records designated as education records under Parts B, C, and D of the Individuals with Disabilities Education Act Amendments of 1997, from the definition of protected health information. For example, individually identifiable health information of students under the age of 18 created by a nurse in a primary or secondary school that receives federal funds and that is subject to FERPA is an education record, but not protected health information. Therefore, the privacy regulation does not apply. We followed this course because Congress specifically addressed how information in education records should be protected in FERPA.

...

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for *records maintained by educational institutions and agencies* under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA.

65 Fed. Reg. at 82483. (Emphasis added.) See also 45 CFR § 160.103 (definition of “*Protected health information*”). This FERPA carve-out from the HIPAA Privacy Rule includes “treatment

records” of “eligible students” (those 18 years old or attending a postsecondary institution), which are excluded from the statutory definition of “education records” in FERPA under 20 USC § 1232g(a)(4)(B)(iv). Eligible students’ treatment records are defined as:

records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.

That is, “treatment records” of eligible students are not protected under FERPA as education records and are not subject to the HIPAA Privacy Rule. However, if an eligible students’ treatment records are used for any purpose other than the eligible students’ treatment or are made available to anyone other than the persons providing the treatment, they are covered by FERPA.

It should also be noted that, even if records maintained by schools that provide health services to students are subject to FERPA and thus are excluded from the HIPAA Privacy Rule, the schools may nonetheless be covered under other HIPAA standards, such as the Transactions Rule, which is codified at 45 CFR Part 162.

As noted, the reason for the exemption in the HIPAA Privacy Rule for records covered by FERPA is that Congress, through FERPA, previously addressed how education records should be protected. I would like to give you some more background on FERPA before we end.

Under FERPA, there are a number of specific statutory exceptions to the general rule against nonconsensual disclosure that are set forth at 20 U.S.C. § 1232g(b)-(j) and 34 C.F.R § 99.31. There is no general exception to FERPA’s prior consent rule that would permit a school subject to FERPA to disclose education records to a State health agency or to researchers. FERPA does contain a very limited exception to the prior consent rule that allows educational

agencies and institutions to disclose personally identifiable, non-directory information to appropriate officials in connection with a health or safety emergency. Specifically, FERPA provides that education records may be disclosed without consent:

in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

20 U.S.C. § 1232g(b)(1)(I). However, the regulations implementing this provision at 34 C.F.R §§ 99.31(a)(10) and 99.36 indicate that these conditions will be “strictly construed.”

The exception to FERPA’s prior written consent requirement was created with the first FERPA amendments that were signed into law on December 13, 1974. The legislative history demonstrates that Congress intended to limit application of the “health or safety” exception to exceptional circumstances, as follows:

Finally, under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for “health or safety” could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.

Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974. (These amendments were made retroactive to November 19, 1974, the date on which FERPA became effective.)

The FPCO has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the

community, or that 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. While the exception is not limited to emergencies caused by terrorist attacks, the Department’s Guidance on “Recent Amendments to [FERPA] Relating to Anti-Terrorism Activities,” issued by this Office on April 12, 2002, provides a useful and relevant summary of our interpretation (emphasis added):

[T]he health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, *any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student’s education records.*

Under the health and safety exception, school officials may share relevant information with “appropriate parties,” that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. (Citations omitted.) Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception....

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. ...

In summary, educational 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.

In disclosing the information to a State health agency under an exception in FERPA, a school should advise the agency that personally identifiable information disclosed by the school may not be redisclosed or shared with any other party outside of the appropriate officials at that agency, unless such disclosure is done with the prior written consent of parents or eligible students or is done on behalf of the school for the same purpose it was disclosed to the agency. See 34 C.F.R § 99.33. Further, FERPA establishes a recordkeeping requirement for educational agencies and institutions in 34 C.F.R § 99.32. Briefly, this section states that an educational agency or institution (1) shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student and (2) shall maintain the record with the education records of the student as long as the records are maintained. The record of disclosure must also include: (1) the parties who have requested the information from the education records, and (2) the legitimate interests the parties had in requesting or obtaining the information.

Please note, however, that FERPA does not prohibit an educational agency or institution from disclosing "non-personally identifiable information" to State health officials or to any other outside entity. Rather, FERPA prohibits the disclosure of *personally identifiable information* from education records without the prior written consent of parents and students under 34 C.F.R § 99.30. The FERPA regulations at 34 C.F.R. § 99.3 define personally identifiable information to include:



- (a) the student's name;
- (b) the name of the student's parent or other family member;
- (c) the address of the student or student's family;
- (d) a personal identifier, such as the student's social security number or student number;
- (e) a list of personal characteristics that would make the student's identity easily traceable; or
- (f) other information that would make the student's identity easily traceable.

In order to make sure that information is not personally identifiable, the disclosing educational agency or institution would need to remove the name, identification number, and any other identifier that would permit the identity of an individual student to be easily determined.

Finally, nothing in FERPA prohibits school officials from obtaining parental consent in order to disclose personally identifiable information in education records to outside entities. The written consent required before an educational agency or institution may disclose personally identifiable, non-directory information from education records 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 C.F.R § 99.30(b); see 20 U.S.C. § 1232g(b)(2)(A).

If requested, the educational agency or institution must provide a parent or eligible student with a copy of the records disclosed. 34 C.F.R § 99.30(c).

I hope that this testimony adequately explains the requirements of FERPA as they relate to the disclosure of personally identifiable information contained in students' education records, as well as to the intersection between FERPA and HIPAA. Should you have any further

questions, please do not hesitate to contact our Office at the following address and telephone number:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-5901  
(202) 260-3887