N SERVICES

I. Introduction

The purpose of this guidance is to explain the relationship between the Family Educational Rights and Privacy Act (FERPA) statute and implementing regulations and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. This document updates and expands on prior guidance to help address potential confusion on the part of school administrators, health care professionals, and others on how FERPA and HIPAA apply to records maintained on students. It also addresses certain disclosures that are allowed without the written consent of the parent or eligible student under FERPA or without authorization under the HIPAA Privacy Rule, especially those related to emergency health or safety situations. While this guidance seeks to answer many questions that school officials, parents, and others may have about the intersection of these Federal laws, ongoing discussions may raise additional questions. Contact information for submitting additional questions or suggestions for purposes of informing future guidance is provided at the end of this document. The U.S. Departments of Education and Health and Human Services are committed to a continuing dialogue on these important matters affecting the safety and security of our nation's schools, students, and communities.

Note: This guidance does not have the force and effect of law and is not meant to bind the public in any way. Instead, it is intended only to provide clarity to the public regarding existing requirements under the law or agencya1(qui)-2c regard onaise

student if the student is an “eligible student,” unless an exception applies. 20 U.S.C. §§ 1232g (b)(1) and (b)(2); 34 CFR §§ 99.30 and 99.31. FERPA contains several exceptions to the general consent requirement which are set forth in 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j), and 34 CFR § 99.31. For example, educational agencies and institutions can disclose PII from a student’s education records, including health and medical information, to teachers and other school officials within the school, without prior written consent, if these school officials have been determined to have “legitimate educational interests” in the education records, pursuant to criteria set forth in the school’s annual notification of FERPA rights. 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A). Educational agencies and institutions can also disclose PII from a student’s education records, without prior written consent, to appropriate parties in connection with an emergency, if these parties’ knowledge of the information is necessary to protect the health or safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

The term “education records” is defined to mean, with certain exceptions, those records that are: (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 (definition of “education records”). For instance, a student’s health records, including immunization records, maintained by an educational agency or institution (such as by an elementary or secondary s-34.91 -1.1c(on r)-2 (sp9oc (s)1TJ m) c(on [(, wou1c(on d -1 (ge))8 (e)-1 (r)5 (na)-1

authorization. The rule also gives patients certain rights with respect to their health information, including rights to examine and obtain a copy of their health records, and to request corrections (amendments).

HIPAA Disclosures that are Relevant in Emergency Situations

Where the HIPAA Privacy Rule applies, it permits covered entities to disclose PHI without patient authorization in certain circumstances, including emergency or other situations. Examples of such permitted disclosures include:

- **Disclosures for Treatment:** Covered entities may disclose, without a patient's authorization, PHI about the patient as necessary to treat the patient or to treat another person (who might be, for example, affected by the same emergency situation). Treatment includes the coordination or management of health care and related services by one or more health care providers and others, consultation between providers, and the referral of patients for treatment. *See* 45 CFR §§ 164.502(a)(1)(ii), 164.506(c), and the definition of "treatment" at § 164.501.

- **Disclosures to Family, Friends, and Others Involved in an Individual's Care and for Notification:** Covered entities are permitted to share PHI with family members (or other caregivers) that is directly relevant to the involvement of a family member in the patient's health care or payment for care if, when given the opportunity, the patient does not object to the disclosure. A covered entity also may share this information with such a family member when the patient is not present—or when it is impracticable, because of emergency circumstances or the patient's incapacity, for the covered entity to ask the patient about sharing information with a family member—if it determines, in the exercise of professional judgment, that doing so would be in the best interest of the patient. *See* 45 CFR § 164.510(b).

  A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include situations where it is necessary to notify family members and others, the police, the press, or the public at large. *See* 45 CFR § 164.510(b).

- **Disclosures to Prevent a Serious and Imminfwher2(t)-2mp51.15 d [(a)a:f [(Se)-1(e)]TJ -0.002 Tw**

Health records that directly relate to students and are maintained by a health care provider, such as a third party contractor, acting for a FERPA-covered elementary or secondary school, would qualify as education records subject to FERPA regardless of whether the health care provider is employed by the school.

Conversely, student health records that are maintained by a health care provider that provides services directly to students and that is not acting for a FERPA-covered educational agency or institution do not constitute FERPA-protected education records.

hospitals generally do not provide health care services to students for the university. Rather, these

treatment to the student, or physicians or other appropriate professionals of the student's choice, are "education records," not "treatment records," under FERPA.

7. Can a postsecondary institution be a "hybrid entity" under the HIPAA Privacy Rule?

Yes. A postsecondary institution that is a HIPAA covered entity may have health information to

identifies the adult child by name, if the provider determines that doing so is in the best interests of a patient who is incapacitated or there is an emergency treatment circumstance, provided that the disclosure is consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider. 45 CFR § 164.510(a).

For example, a parent calls the local hospital looking for an adult child who is missing. Hospital staff may inform the parent that the adult child is in serious condition in the intensive care unit if the staff are not aware of any objection the child may have to this disclosure. The level of the parent's involvement in the adult child's care does not affect the hospital staff's ability to disclose this information.

x **Health or Safety Threats.** Informing parents or others in a position to prevent or lessen a serious and imminent threat to the health or safety of the individual, another person, or

who is not an eligible student. *See* 34 CFR § 99.31(a)(12). Further, under FERPA, a school must generally provide a parent of a student who is not an eligible student with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(b). While required to provide a parent of a student who is not an eligible student with access to their child's education records, a school is not generally required by FERPA to provide copies of education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10. One of the exceptions in which a school may be required to provide a copy of the education records requested is in the context of a request for access to education records from a parent or student who is not an eligible student where the circumstances would effectively prevent the parent from exercising his or her right to inspect and review education records; in this context, the school would be required to either provide the parent with a copy of the education records requested or make other arrangements that would allow for the parent to inspect and view the requested records. 34 CFR § 99.10 (d). An example of circumstances effectively preventing a parent from inspecting or reviewing education records is where the parent does not live within commuting distance of the school.

13. What options do family members of an adult patient with mental illness have under HIPAA if they are concerned about the patient's mental health and the patient refuses to agree to let a health care provider subject to HIPAA share information with the family?

The HIPAA Privacy Rule permits a health care provider to disclose information to the family members of an adult patient who has decision-making capacity, and indicates that he or she does not want the disclosure made, only to the extent that the provider perceives a serious and imminent threat to the health or safety of the patient or others and the family members are in a position to lessen the threat. *See*

requires prior written consent of a parent or eligible student or must satisfy one of the exceptions to FERPA's general consent requirement. *See* 20 U.S.C. §§1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR §§ 99.30 and 99.31.)

For example, in order for a physician at a university-operated health clinic treating an eligible student to disclose the student's treatment records to the student's parents, the physician would need to either obtain the eligible student's prior written consent or satisfy one of the exceptions to FERPA's general consent requirement. Under one such exception, the physician could non-consensually disclose the records to the parents if the eligible student qualified as the parents' dependent, under section 152 of the Internal Revenue Code of 1986, for Federal income tax purposes. *See* 20 U.S.C. § 1232g(b)(1)(H); 34 CFR § 99.31(a)(8). The disclosure could also be made, without prior written consent, to parents, as well as other appropriate parties, in connection with a health or safety emergency if the parents', or other parties', respective, knowledge of the records was necessary to protect the health or safety of the student or other persons. *See ()-3ti RRa)(8-2(8))-2(. T)]TJ 0.001 Tc -0.-0.001 Tc snd)6J /TTncEMC /Span <</MCID 2 >>E*

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Educational agencies and institutions are responsible for making the determination as to whether a health or safety emergency exists. *See* 34 CFR § 99.36(c). Pursuant to § 99.36(c) of the FERPA

Further, in the June 2011 guidance, the U.S. Department of Education explained the following:

> In some situations, a school official may determine that it is necessary to disclose [PII] from a student's education records to appropriate parties in order to address a health or safety emergency . . . This exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of [PII] from a student's education records. Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed under this FERPA exception. Disclosures for health or safety emergency reasons do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities.

U.S. Department of Education, *Addressing Emergencies on Campus*, p. 3 (June 2011), *available at* https://studentprivacy.ed.gov/resources/addressing-emergencies-campus.

Finally, where an educational agency or institution non-consensually discloses PII from a student's education records pursuant to FERPA's health or safety emergency exception, within a reasonable period of time after the disclosure, the educational agency or institution must record in the student's education records the articulable and significant threat to the health or safety of the student or other individual(s) that formed the basis for the disclosure, and the parties to whom the information was disclosed. 34 CFR § 99.32(a)(5).

23. Under FERPA, can an educational agency or institution disclose, without prior written consent, PII from a student's education records, including health records, to the educational agency's or institution's law enforcement officials?

Yes, if certain conditions are met. By way of background, many schools have their own law enforcement units to monitor safety and security and enforce any local, State, or Federal law or refer such enforcement matters to appropriate authorities. Those schools that do not have specific law enforcement units may designate a particular office or school official to be responsible for monitoring safety and security and referring potential or alleged violations of law to local authorities. Some smaller school districts and colleges employ off-duty police or sheriff's department officers to serve as school security officers.

If a law enforcement official is an employee of an educational agency or institution and meets the criteria specified in the school's annual notification of FERPA rights to parents and eligible students for being a "school official" who has been determined to have a "legitimate educational interest" in the education records, then the law enforcement unit official may be considered a school official to whom PII from students' education records may be disclosed, without prior written consent of a parent or eligible student. *See* 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A). Educational agencies and institutions may also consider law enforcement unit officials, such as off-duty police or sheriffs' department officers and School Resource Officers (SROs) who are not employees of the educational agency or institution, to be

Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act) (for individuals with mental illness), and section 509 of the Rehabilitation Act of 1973 (Rehabilitation Act) (for certain individuals with disabilities who, for example, are not eligible for P&A services under the DD Act or PAIMI Act). These statutes and their implementing regulations require that access to records be provided to P&A systems under certain circumstances. *See* DD Act at 42 U.S.C. § 15043(a)(2)(I) and (J), 45 CFR § 1386.22; PAIMI Act at 42 U.S.C. § 10805(a)(4), 42 CFR § 51.41; and the Rehabilitation Act at 29 U.S.C. § 794e(f)(2), 34 CFR § 381.10(a)(2).

The Privacy Rule permits a covered entity to disclose PHI without an individual's authorization to a P&A system to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law. *See* 45 CFR § 164.512(a). Thus, a covered entity may disclose PHI to the P&A system, as required by the DD Act, PAIMI Act, or section 509 of the Rehabilitation Act, as well as any other Federal statute authorizing a P&A program, when the P&A system requests access to such records in carrying out its protection and advocacy functions under these Acts. Similarly, covered entities may disclose PHI to the P&A system where another Federal, State, or other law mandates such disclosures, consistent with the requirements in such law.

Where disclosures are required by law, the Privacy Rule's minimum necessary standard does not apply; instead, the law requiring the disclosure will establish the limits on what should be disclosed. Moreover, with respect to disclosures

thus from the privacy protections of FERPA – are records of a law enforcement unit of an educational agency or institution. 20 U.S.C. 1232g(a)(4)(B)(ii); 34 CFR § 99.3 (definition of "education records," subsection (b)(2)). These records must be: (1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit. 20 U.S.C. 1232g(a)(4)(B)(ii); 34 CFR § 99.8(b)(1). Law enforcement unit records do not include the following: (1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or (2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution. 34 CFR § 99.8(b)(2). Under FERPA, "law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to (1) enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (2) maintain the physical security and safety of the agency or institution. 34 CFR § 99.8(a)(1). Therefore, subject to State or local law, educational agencies and institutions may disclose records of a law enforcement unit, as set forth in 34 CFR § 99.8, to anyone, including NICS, without consent from parents or eligible students.

V. Conclusion

While the educational agency or institution has the responsibility to make the initial, case-by-case determination of whether a disclosure meets the requirements of FERPA, the U.S. Department of Education's Student Privacy Policy Office is available to offer technical assistance to school officials in making such determinations.

For quick, informal responses to routine questions about FERPA, school officials may e-mail the Department at FERPA@ed.gov. For more formal technical assistance on the information provided in this guidance in particular or FERPA in general, please contact the Student Privacy Policy Office at the following address:

Student Privacy Policy Office
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202-8520

You may also find additional information and guidance on the Department's website at: https://studentprivacy.ed.gov.

For more information on the HIPAA Privacy, Security, Breach Notification, and Enforcement Rules, please visit the U.S. Department of Health and Human Services' HIPAA Privacy Rule Web site at: http://www.hhs.gov/ocr/hipaa/. The Web site offers a wide range of helpful information about the HIPAA Privacy Rule, including the full text of the Privacy Rule, a HIPAA Privacy Rule summary, over 400 frequently asked questions, and both consumer and covered

entity fact sheets. Information on the other HIPAA Administrative Simplification Rules is available at: http://www.cms.hhs.gov/HIPAAGenInfo/.

In addition, if you would like to submit additional questions not covered by this guidance document or suggestions for purposes of informing future guidance, please send an e-mail to OCRPrivacy@hhs.gov and FERPA@ed.gov.