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Patient Privacy on Campus

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Introduction

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Overview

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Goal for Today's Webinar

- To help University and AMC professionals who work in varied campus patient care settings to understand the differences between HIPAA and FERPA and move back and forth between the different privacy regimes

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Big Picture

- On campus, attorneys and clinicians interact with multiple privacy regimes
- FERPA – Baseline federal privacy rules for educational institutions
- HIPAA – Baseline federal privacy rules for health care providers
- State law also applies to licensed health professionals
- Key settings on campus: student health clinics, teaching clinics, and clinical operations serving the general public

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Roadmap

- Part 1 - Overview of HIPAA and FERPA, when they apply, key differences, and best practices
- Part 2 - Practical application: guiding questions and example scenarios
- Beyond the scope of today's presentation: health plans, research data, and disability accommodations

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FERPA and HIPAA Compared

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Side by Side Comparison

Element	HIPAA	FERPA
Who Must Comply	Covered entities (health plans, healthcare clearinghouses, healthcare providers who transmit health information electronically) and their business associates	Educational institutions receiving federal funding (and their contractors)
What's Protected	Protected Health Information (PHI) - individually identifiable health information	Education records - records directly related to a student maintained by an educational institution
Breach Notification	Media notice for breaches of unsecured PHI affecting 500+ individuals; all breaches require individual and HHS notification	No federal breach notification requirement (state laws may apply); record of disclosure required
Enforcement	Civil monetary penalties; resolution agreements; criminal penalties possible	Administrative complaints; cease and desist orders; withholding of federal funds

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HIPAA Key Terms

- HIPAA defines "covered entities" to include health care providers who electronically transmit "health information" in a covered transaction, 45 C.F.R. § 160.103
- For HIPAA, "protected health information" and "health information" are separately defined terms.
- HIPAA defines "protected health information" to exclude both "education records" and "treatment records" as described in FERPA, 45 C.F.R. § 160.103.

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HIPAA Business Associate Defined

- Simplified definition: A business associate is an organization that creates, receives, maintains, and transmits PHI on behalf of a covered entity, 45 C.F.R. § 160.103
- Exclusion: Does not include a health care provider that receives information concerning treatment from a covered entity, *Id.*

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Business Associate Obligations

- Covered entities must enter agreements with their business associates that step down HIPAA requirements (business associate agreements or BAAs)
- Business associate obligations include implementing administrative, physical, and technical security measures to safeguard PHI and reporting breaches to the covered entity
- Business Associates have direct liability for regulatory compliance under the current statutes and regulations in addition to contractual liability under their BAA.

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Scope of HIPAA Responsibilities

- HIPAA generally applies to covered entities and their business associates
- HIPAA Transaction standards apply to covered entities and their business associates that electronically transmit health information for covered transactions
- HIPAA Privacy, Security, and Breach Notification Standards apply to covered entities and business associates that handle **PHI**, 45 C.F.R. §§ 164.302, 164.400, 164.500.

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Potential HIPAA BAA Pitfalls

Unnecessary BAAs can:

- Complicate compliance and lead to role and responsibility confusion;
- Create additional contractual liability risk;
- Create uncertainty about application of HIPAA (for example, for a student health clinic operating under FERPA only); and
- Add new HIPAA compliance obligations that a unit covered by FERPA may not be prepared to meet

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Alternatives to Consider

- Clarify scope of intended sharing and only sign a BAA if it is really required
- Shift responsibility to a business unit that is already subject to HIPAA rather than take on new HIPAA obligations
- Enter a data use agreement where confidentiality protections are desired but a HIPAA BAA is not required

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HIPAA Hybrid Entity Designation

- Designate covered components in writing
- Internal disclosures between covered components are treated like transfers between distinct legal entities
- Leaders and employees who hold multiple roles (i.e., wear multiple hats) cannot use or disclose PHI obtained in a covered component capacity for a non-covered component capacity
- Business associate requirements still apply

45 C.F.R. §§ 164.103 and 164.105

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42 C.F.R. part 2 Records

- 42 C.F.R. part 2 establishes heightened confidentiality requirements for federally assisted programs for substance abuse
- Requirements were revised in 2024 to be better aligned with but are still stricter than HIPAA
- Unlike HIPAA, there are not exceptions for FERPA treatment records and education records
- Regulations define “federally assisted” and “program”

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FERPA Key Principles

- FERPA rights and obligations generally apply to "education records", 20 U.S.C. § 1232g
  - (1) directly related to the student and (2) maintained by an educational agency/institution or a party acting on behalf of the agency/institution
- Rights shift from parent to student at 18, or upon attendance at postsecondary institution
  - "Eligible Student"
- Prior written consent is required to share education records, ***unless an exception applies***

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FERPA – Treatment Records

- FERPA excludes so-called "treatment records" from the definition of "education records", 20 U.S.C. § 1232g(a)(4)(B)(iv)
  - (1) made or maintained by a healthcare professional; (2) used only in connection with treatment; *and* (3) disclosed only to individuals providing treatment.
- "Treatment records" must be used exclusively used for treatment purposes – otherwise, they become education records
  - Example: A screening tool administered by a psychologist may initially be a treatment record, but if it is later shared with student disability services, it becomes an education record.
  - Example: Billing records are considered education records rather than treatment records.

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FERPA – Internal Sharing & Contractors

- Internal sharing to school officials with legitimate educational interests
- May include contractors where performing an institutional service/function that would otherwise be performed by employees
- This exception may include threat assessment teams
- Consider clarifying language in contractor agreements when appropriate

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FERPA – Other Exceptions

- Directory information
  - *Must provide opt-out!*
- Health and safety emergency exception
  - *Based on totality of the circumstances*
  - *Limited to the period of emergency (e.g., campus shooting; disease outbreak)*
- Alcohol or substance abuse
  - *Disciplinary records for student under 21*
- Parents of someone who is a dependent for tax purposes
  - *Best practice: have adult student confirm dependency status*
- Also: surveys, audits, subpoenas, accreditation, and more!

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State Laws

- When HIPAA or FERPA applies, organizations must generally still comply with more stringent state law.
- General confidentiality laws, professional licensing laws, and common law duties
- Special purpose state laws
  - For example, shield laws for specific categories of sensitive information

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The Relationship Between HIPAA and FERPA - Takeaways

- Education records and treatment records under FERPA are not PHI under HIPAA
- Campus clinics that treat nonstudents (not covered by FERPA) can be subject to both HIPAA and FERPA
- A student health clinic can also be subject to both FERPA and HIPAA on a limited basis when it transmits electronic billing information
- A clinic that is not a HIPAA covered entity could become subject to HIPAA obligations by agreeing to be a business associate of a HIPAA covered entity or covered component

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Tips and Best Practices

- FERPA is generally less prescriptive; if it applies, avoid becoming subject to HIPAA inadvertently
- HIPAA hybrid entity designation can be used to define and limit scope of HIPAA application
- Employees who wear multiple hats should keep roles distinct
- Segregate treatment and education records to reduce complexity
- Deidentify when possible and reinforce need-to-know expectations to limit opportunities for inadvertent misuse

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Practical Application

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Guiding Questions

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HIPAA Threshold Questions

- Does the clinic transmit health information electronically in connection with covered transactions?
  - If NO → Not a HIPAA covered entity
  - If YES → HIPAA covered entity. Transaction standards apply and, to the extent the clinic maintains "PHI," privacy and security standards apply.
- Has the clinic agreed to be a business associate of a HIPAA covered entity?
  - If NO → BA obligations do not apply.
  - If YES → Consider BA obligations under agreement.

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Patient Record Types

- What patients does the clinic serve?
  - Only enrolled students – treatment and education records under FERPA
  - The general public (non-students) – PHI under HIPAA
  - Both students and non-students – treatment and education records under FERPA and PHI under HIPAA.

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Trainee Involvement

- Are students involved in an educational/training capacity?
  - No – focus is on classification of student patient records as treatment records versus education records for FERPA.
  - Yes – trainee educational records likely being created as well.
    - Are patient care records and student education records segregated?
    - Do any records contain both patient care info AND student assessment?

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Common Clinics on Campus

Clinic type	Key Assumed Facts	Outcome
Student health services	Treats only enrolled students; does not electronically bill insurance	FERPA and state law apply, but not HIPAA
Teaching clinic	Limited purpose clinic where faculty and supervised health professional students treat members of the public on a sliding fee scale with no insurance billing or electronic transmission of health information.	State law applies to patient records, and FERPA applies to education records of health professional students. HIPAA does not apply.
AMC full service clinic	Provides specialty services to the public. Follows industry standard billing practices. Clinical training site for University health professional students.	HIPAA applies to patient information and FERPA applies to education records for health professional students

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Specific Scenarios

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Responding to parent and guardian requests

	HIPAA	FERPA	State law
Key Considerations	Patient representative; disclosures to family and friends involved in care; disclosures to prevent serious harm	Treatment purposes; emergency exception; dependent status; alcohol or substance abuse	Age of majority; state law consent requirements

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Parental Requests - Scenarios

Situation	HIPAA Analysis	FERPA Analysis
Parent seeks 17-year-old's mental health records from student counseling center	Under 18, parents are presumptive personal representative of unemancipated minors, but state law controls. If state law allows minor to consent to mental health treatment, parent may have no access right.	Rights transferred to student at 18 or upon enrollment college. No parental access without student's consent UNLESS: (1) health/safety emergency, (2) student is tax dependent, or (3) alcohol/drug violation if under 21 (disciplinary records only). If disclosed under health/safety emergency exception, must document emergency basis.
Parent seeks 20-year-old college student's records from campus health center for depression treatment	No access without patient authorization or personal representative status. Patient is adult with full privacy rights.	
Parent of 19-year-old seeks records after suicide attempt	May disclose to family (and friends) without authorization if patient incapacitated and deemed in best interest of patient. May also disclose if necessary to prevent or lessen a serious and imminent threat to your health or safety.	

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Law enforcement or regulatory requests

	HIPAA	FERPA
Key Considerations	Health oversight activities; judicial or administrative proceedings – court orders and subpoenas; law enforcement requests; serious threat to health and safety	Subpoena/court order; emergency exception Note: law enforcement unit records are *not* education records

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Law Enforcement Disclosures

Situation	HIPAA Analysis	FERPA Analysis
Subpoena for patient/student treatment records	May disclose IF valid subpoena. If subpoena is not supported by a court order, satisfactory assurance of notice and opportunity to object or a qualified protective order are generally required.	May disclose IF lawfully issued subpoena (or judicial order) AND institution makes reasonable effort to notify student (unless court orders the existence/contents of subpoena, or the information furnished in response to the subpoena, not be disclosed).
Court order for records	May disclose pursuant to court order signed by judge or magistrate. Notice to patient not required.	
Grand jury subpoena	May disclose. Notice to patient not required.	
Detective requests records without subpoena or court order for investigation	Generally NOT permitted, except (a) limited information to identify or locate a suspect, fugitive, witness, or missing person or (b) in response to a serious and imminent threat to health and safety.	Generally NOT permitted, unless there is a health/safety emergency, or law enforcement personnel is a school official with a legitimate education interest (e.g., member of threat assessment team, for purpose of conducting threat assessment).

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Hypothetical

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Dental Teaching Clinic - Initial Treatment

Michael Rodriguez, a 58-year-old community member, visits the Riverside University Dental Clinic for treatment of a broken tooth. The clinic is a limited-purpose teaching facility where third and fourth-year dental students treat members of the public on a sliding fee scale. The clinic does not bill insurance companies or electronically transmit health information. David Chen, a fourth-year dental student, performs a root canal on Michael under the supervision of Dr. Sarah Park, a licensed faculty dentist who is physically present during the procedure.

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Dental Teaching Clinic – Follow Up Care

Two weeks later, Michael returns with severe pain and infection. A different faculty dentist determines that David's root canal treatment was inadequate—one canal was improperly cleaned, requiring retreatment by a specialist endodontist at Michael's expense. Michael is upset and demands copies of all records related to his treatment. He specifically requests: (1) his complete patient care records, (2) information about David Chen's training and qualifications, including how many root canals David had performed before treating Michael, (3) David's grades in dental school courses, and (4) Dr. Park's supervision notes documenting David's performance during the procedure.

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Questions

- What laws apply?
- Can the clinic disclose to Rodriguez:
  - Patient care records
  - Chen's training and qualifications including root canal history
  - Chen's grades
  - Dr. Park's supervision notes?

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Conclusion

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