MARICOPA COMMUNITY COLLEGES | Office of the General Counsel
Compliance

# HIPAA AND HIGHER EDUCATION

The Maricopa County Community College District (MCCCD) maintains medical information related to employees and students in a host of locations, including human resources files, student records, among others. Higher education administrators unfamiliar with the intricacies of HIPAA often believe the law imposes more obligations on colleges and universities than it actually does. This Melissa Talks will clarify the differences between HIPAA and FERPA and where and when HIPAA applies in the higher education setting. If you have additional questions related to HIPAA and FERPA, please consult the Office of General Counsel, Interim General Counsel Melissa Flores at Melissa.Flores@domail.maricopa.edu

## What is HIPAA (45 CFR Part 160 and Subparts A and E of Part 164)?

The Health Insurance Portability & Accountability Act imposes certain data privacy and data security requirements with respect to medical information and creates national standards to protect individuals' personal health information (PHI) and gives patients/clients increased access to their healthcare records. Entities subject to the HIPAA Administrative Simplification Rules, known as "covered entities," are health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions. "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. Covered transactions are those for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan.

## What is FERPA (20 U.S.C. § 1232g; 34 CFR Part 99)?

The Family Educational Rights & Privacy Act FERPA is a federal law that protects the privacy of students' "education records," including "treatment records." In most college health settings, FERPA applies to care provided to students at our student health and counseling services. FERPA does not allow the disclosure of personally identifiable information from education records, without a parent or eligible student's written consent, unless the disclosure qualifies under one or more consent exceptions. An "eligible student" is a student who is at least 18 years of age or who attends a postsecondary institution at any age. The term "education records" is broadly defined to mean 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 of institution.

## Where FERPA and HIPAA May Intersect

When a college or university provides health care to students and the general public in the normal course of business, such as through its health clinic, it is also a "health care provider" as defined by HIPAA. If that college or university also conducts any covered transactions electronically in connection with that health care, it is then a covered entity under HIPAA. However, in this case any records regarding students would be covered under FERPA as either maintained "education records" or "treatment records," both of which are excluded from coverage under the HIPAA Privacy Rule. The records related to any member of the public would need to be protected under HIPAA standards. MCCCD does not fall under this intersection of HIPAA and FERPA.

**Ok, so what does all of this mean to MCCCD student records?**

As a matter of law, HIPAA applies only to "covered entities," which includes health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions. Postsecondary institutions, such as MCCCD, generally do not engage in any of the covered transactions, such as billing health plans electronically for their services.

Even if an institution is a covered entity, most still are not subject to the HIPAA Privacy Rule because the student health information they maintain is kept as part of their "education records" or "treatment records," as those terms are defined under FERPA. HIPAA Privacy Rule expressly excludes student health information from its coverage if the information is already protected under FERPA, on the basis that the institution already must maintain the information in a manner consistent with FERPA's privacy requirements. (See, DOE/HHS Guidance and Jan. 2013 revisions to HIPAA regulations).

**What does all of this mean to MCCCD employees?**

Since HIPAA only applies to covered entities, there is no violation of HIPAA if Human Resources, a supervisor, an office mate, or a colleague asks if you have been vaccinated against COVID-19 (or any other vaccination, for that matter). In fact, there is nothing in HIPAA that would bar an employer from asking for proof that one's vaccination status is accurate. In a December guidance, the Equal Employment Opportunity Commission, which enforces federal workplace anti-discrimination laws, essentially confirmed that "there's no indication that there's any federal law that would be violated by the employer asking questions about vaccination status. That being said, while there is no prohibition against asking or requiring proof of vaccinations, you should seek guidance from District HR or legal if you have any questions in this regard because it is easy to get into dangerous territory.

## Top 5 Common HIPAA "Myths" That Arise in Higher Education

1. **HIPAA applies to all medical information we maintain as a District.**

While HIPAA's privacy rule does govern the privacy of protected health information (PHI), HIPAA's privacy rule only applies to HIPAA "covered entit[ies]." As a general rule, covered entities include: (1) health plans; (2) health care clearinghouses; and (3) healthcare providers who electronically transmit health information in connection with certain electronic transactions relating to billing, payment, and/or insurance coverage.

HIPAA's privacy rule contains an important exception—it does not apply to health records maintained by an educational institution if those health records meet the definition of "education records" or "treatment records" under the Family Educational Rights and Privacy Act (FERPA).

Human resources professionals who work in higher education may mistakenly believe that all medical records held by an institution are subject to HIPAA's privacy rule because the institution offers health insurance to its employees and thus constitutes a HIPAA covered "health plan." However, under HIPAA, health plans are considered to be separate legal entities from the institution that sponsors the plan. So, HIPAA's privacy rule applies only to PHI that it disclosed or generated in the course of a covered-entity's HIPAA-covered operations, such as to documents an employee submits to its health plan when making an insurance claim but not a doctor's note the employee submits as part of a request for an ADA accommodation or supporting taking sick time.

2. **If we release medical information about a student or employee we can be sued for violating HIPAA.**

While a disgruntled student or employee might *attempt* to sue your institution for violating his or her "HIPAA rights," such a suit will almost certainly fail because federal courts have consistently held that HIPAA does not create private right of action that would permit a person to sue in the event his or her records are improperly released. FERPA also does not create a private right of action. While HIPAA and FERPA do not recognize private rights of action, employees or students whose private medical information is released may have successful claims under state common law governing negligence or under state "data breach" laws that apply when certain personal information is released. Thus, institutions still have a powerful incentive to treat medical information with great care.

3. **HIPAA prohibits the District from asking an employee or student for medical information.**

HIPAA does not regulate the ability of institutions to request medical information from their employees and students for legitimate business reasons. So, if an employee refuses to provide a doctor's note that her supervisor has requested in order to substantiate a claimed sick day on the basis that "HIPAA prohibits you from asking for that," the employee is wrong. Similarly, HIPAA in no way protects a student from having to provide medical documentation to substantiate absences or to provide the basis for a request for accommodations under the Americans With Disabilities Act (ADA) or Section 504 of the Rehabilitation Act.

4. **HIPAA applies to any person with medical training and a professional license.**

Because they receive training in HIPAA as part of their professional education, a nurse, athletic trainer, or counselor may believe that he or she has an individual obligation to comply with HIPAA whenever he or she comes into receipt of medical information. This is not the case. HIPAA only applies to health care providers who are engaged in certain types of covered transactions, and even then, it does not apply with respect to medical records that fall within the scope of FERPA.

5. **HIPAA prohibits employees from talking about the health situation of their co-workers or their students.**

HIPAA applies to protected health information received or generated by covered entities in the course of operating a health plan, a health care clearing house, or in the provision of health care services. It does not apply generally to any medical information that may be learned about or observed by employees of the

District. Thus, for example, if a faculty member shares with her chair that she will need to take a leave of absence to undergo cancer treatment, it does not violate HIPAA for the chair to share this information with a faculty member who will have to take over instruction duties in the sick faculty member's absence. Of course, respecting one's privacy should always be paramount.

Also, while it might be imprudent and violate institutional policies for a faculty member to discuss a student's medical information with a colleague, this act would not violate HIPAA. However, if the faculty member learned of the medical information from a student record (as opposed to a personal observation), the faculty member would violate FERPA if he or she disclosed it to a colleague without a legitimate educational interest in the information or if he or she disclosed it to a third-party without the presence of a valid FERPA exception, such as a health or safety emergency.

**Key takeaways:**

HIPPA generally does not apply to higher education.

FERPA covers all records maintained as part of a student's education record, including treatment records.

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