

Attachment A:

Summary of Laws Regarding Privacy, Confidentiality and Release of Information

Disclaimer - This document is not intended as nor should it be considered or relied upon as legal advice or legal opinion. School districts and non-school health agencies or service providers should obtain a legal review if there is any question about the legality of a particular statement

There are many sources, legal and ethical, that obligate providers to maintain confidentiality with respect to student records—medical and otherwise. These include the obligations implicit in the provider-student relationship, professional codes of ethics, state and federal statutes, case law and constitutional provisions. Each of the health professions has a code of ethics or set of standards of professional responsibility. While the codes are not legally binding, they may be legally relevant.

Specific laws also exist which require disclosure in certain circumstances including, but not limited to suspected child abuse or neglect, certain sexually transmitted diseases, protection of the student from known specific threats of violence or potential victims of a student who has shared an intent to harm other, gunshot wounds, and subpoenas.

Federal funding statutes generally contain requirements of confidentiality. To the extent that school based health centers and school based mental health programs use funding from these sources, they must comply with these requirements. Community Health Center regulations contain an explicit requirement of confidentiality similar to Maternal Child Health Block Grant (Title V) regulations. These would require a school-based health center to obtain the student's consent for any disclosure, unless the disclosure was required, as opposed to merely permitted, by other applicable law. Title X (Family Planning), Medicaid and AFDC all have language affirming some degree of confidentiality for minors.

FERPA

Student records in public schools, including student health records, are subject to the Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment. FERPA is intended to protect the privacy of student records by restricting outside access to, and maintaining the confidentiality of personally identifiable information about students in education records. The following items are not considered educational records under FERPA:

- Private notes of individual staff or faculty; (NOT kept in student advising or permanent record folders)

- Campus police records;
- Medical records (when the clinical services are provided by an outside agency);
- Statistical data compilations¹

Under FERPA, all education records can be accessed by parents unless a student age 18 years or older prohibits a school from disclosing his/her education records to his/her parents. FERPA also provides that school officials who have a legitimate need for the records may access education records without parent consent. School officials include those employed by the school and those contracted to provide education services or consultation. School-based health/mental health centers operated by outside agencies are not subject to FERPA. Rather, they are subject to HIPAA.²

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook or newspaper article) is left to the discretion of each school.

HIPAA

When an outside agency operates a school-based program, it is subject to the Health Insurance Portability and Accountability Act of 1996. The privacy rules under HIPAA establish restrictions on the use and release of medical records, privacy safeguard standards, rights of individuals, and penalties for misuse of information. When school-based staff or other community health care providers are asked for confidential information to be sent to the school, requests must be accompanied by an informed consent statement from parents giving permission to release the information and should indicate the status of the information once it becomes part of the student's record. Only the requested information should be sent to the school, preferably to a health care professional, even if requested by a teacher or administrator. Once referral or treatment information is documented in the school health record or transferred from an independently - run school mental health program to the school, it becomes part of the

¹ VanDusen, William R, Jr, National Academic Advising Association
<http://www.nacada.ksu.edu/Resources/FERPA-Overview.htm>

² School Health Policy and Practice, 6th Edition, American Academy of Pediatrics, Committee on School Health, 2004, pages 41-42.

school health record and is covered under FERPA. Under FERPA, all health records can be accessed by parents.³

West Virginia Codes and Case Law

Confidentiality of mental health information: WV Code 27-3-1(a) recognizes the confidentiality of mental health information. It provides that information obtained in the course of treatment or evaluation of any student or client is confidential including:

1. The fact that the person is or has been a client or student;
2. Information transmitted by a student or a family member for purposes related to diagnosis or treatment;
3. All diagnoses or opinions regarding a student's physical, emotional or mental conditions;
4. Any advice, instructions or prescriptions issued in the course of treatment or diagnosis;
5. Any record or characterization of the above.⁴

Information provided to student: WV Code 16-29-1 specifies that any licensed health care provider must furnish a copy of all or a portion of the student's record to the student or his authorized agent or representative, within a reasonable time following a written request.

Disclosure of information to others: Generally speaking, minors 'parents or legal guardians have access to the medical record. However, in *Belcher v. CAMC*, (1992) the WV Supreme Court adopted the mature minor doctrine which requires the child's written consent. "Where there is a conflict between the intentions of one or both parents and the minor, the physician's good faith assessment of the minor's maturity level would immunize him or her from liability for the failure to obtain parental consent."⁵

In certain instances, disclosure of medical information is required by law:

1. Suspected child abuse or neglect;
2. Sexually transmitted disease;

³ Ibid, page 141

⁴ Mental Health and the Law in West Virginia, Medical Educational Services, Inc. Eau Claire, WI, presentation in Charleston WV, January 2003

⁵ Mental Health and the Law in West Virginia, Medical Educational Services, Inc. Eau Claire, WI, presentation in Charleston WV, January 2003

3. Danger of imminent injury: WV code 27-3-1(b)(A) allows (i.e., does not require) health care providers to warn third parties or law enforcement if there is clear and substantial danger of injury by a student to himself or others;
4. Gunshot wounds, burns.

Release of health care records: West Virginia Code 16-29-1 specifies that upon subpoena or upon the written request of the student or authorized representative, health care providers must furnish a copy of all or that portion requested of the medical record. For students receiving mental health services, only a summary of the record must be provided following termination of the treatment program. In the case of a minor, health care providers are not required to release any information to a parent without the written consent of the minor student, for the following services:

1. Birth control
2. Prenatal care
3. Drug treatment or related services
4. Sexually transmitted diseases

In *Nelson v Ferguson* (WV, 1990) it was determined that in seeking disclosure of a minor's mental health records, the child must be a party to the proceedings and a guardian ad litem must be appointed to protect the child's rights.

Consent to Treatment Laws and Policies

In West Virginia, the general rule is that persons under eighteen years of age lack the legal capacity to give valid consent to medical treatment. However, specific laws allow for exceptions. Furthermore, most professional health associations take the position that "the health risks to the adolescent are so compelling that legal barriers and deference to parental involvement should not stand in the way of needed care." (Policy Compendium on Confidential Health Services for Adolescents, AMA, 1993). Another twist on this issue occurred in *Belcher vs. CAMC* (1986), when it was determined that if a minor is of an age to understand the issues, his or her consent should be acquired.

Specific exceptions to the rule requiring parental consent for treatment:

1. Emergencies (WV Code 16-4C-17): Limits liability for failure to obtain consent at the time of provision of emergency medical services.
2. Sexually Transmitted Diseases (WV Code 16-4-10): Although WV law defines venereal diseases only as syphilis, gonorrhea and chancroid; it can be presumed

that any common venereal disease could fall within the definition for purposes of a minor's valid consent.

3. Addiction/Drugs (WV Code 60A-5-504(e)) Any minor may be examined, diagnosed, or treated for an addiction or dependency to a controlled substance at his or her request without obtaining parental consent.
4. Contraceptives and Family Planning (Doe vs. Pickett, 1979) Minors can give consent for treatment. In fact, federally funded health care providers MUST provide such services. However, the services do not need to be provided at a SBHC; and in West Virginia, few if any SBHCs do in fact provide contraceptives on site. A student may be referred to a family planning clinic however.
5. Mature Minors: Defined as persons under age 18 who have been judged by the provider to have the ability to understand the nature and risks and consequences of the offered procedure or treatment. Persons aged 16 and 17 may be presumed to be mature minors, although such factors as education, degree of judgment or maturity, conduct and demeanor of the person at the time services are sought shall be considered in making this determination. West Virginia courts have ruled that if a minor is of an age to understand the issues, his or her consent should be acquired.
6. Emancipated Minors: A child over sixteen may become emancipated by court order or by marriage. The parents of an emancipated child have no right to control or duty to provide care and financial support.

West Virginia Code 16-4-10: Treatment of venereal disease without parental consent: Any licensed physician may examine, diagnose or treat any minor with his or her consent for any venereal disease without the knowledge of the minor's parent or guardian.

West Virginia Code 60-6-23: Treatment of minors for addiction to alcohol: Any licensed physician may examine, counsel, diagnose and treat any minor at his or her request for any addiction to or dependency upon the use of alcoholic liquor or beer without the consent of the parent or guardian.

West Virginia Code 60A-5-504: Uniform Controlled Substances Act: Any licensed physician or competent medically trained person under his direct supervision may examine, diagnose, and treat any minor at his or her request for any addiction to or dependency upon a controlled substance without the knowledge or consent of the minor's parent or guardian.

West Virginia Code 16-3C-3: AIDS related testing and consent: No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner that permits

identification of the subject of the test, except to the subject of the test. Note that there are numerous exceptions/provisions in this law too numerous to list here.

West Virginia Code 49-7-27: Emancipation: An emancipated minor shall have all of the privileges, rights and duties of an adult (with some exceptions not relevant to health care issues). A minor child over the age of sixteen may become emancipated through 1) petition and subsequent court declaration or 2) marriage