HIPAA PRIVACY REGULATIONS AND THE SCHOOLS

by Roy H. Henley

Public schools have joined countless other employers, insurance carriers, and health care providers in analyzing the impact of recent federal privacy regulations under the Health Insurance Portability and Accountability Act ("HIPAA"). Many individuals have at least a passing familiarity with Title I of HIPAA, which protects health insurance coverage opportunities for employees and their dependents in case of job change or job loss, particularly where the covered individual may have a pre-existing medical condition. In essence, Title I of that Act was intended to prevent health insurance considerations from causing "job lock."

The new regulations, however, pertain to Title II of HIPAA. Title II, commonly known as the "administrative simplification provisions," requires the United States Department of Health and Human Services ("HHS") to establish, among other things, standards for the security and privacy of "individually identifiable health information" See 42 USC § 1320d-2.

To comply with that statutory mandate, on August 14, 2002 HHS issued its final rules and commentary setting privacy standards (the "Privacy Rule"). Since then, affected entities and their attorneys have been studying this triple column, 99-page document in an effort to determine the new regulations' effect upon their business practices, and to debate whether the term "administrative simplification" is inaccurate or merely Orwellian.

Fortunately, Michigan school districts will not be required to make many of the substantial changes in business practices required of many other organizations which either directly or peripherally deal with health care issues. Nevertheless, some notable changes in business practice may likely occur upon the Privacy Rule’s April 2003 effective date. A discussion of some of the issues which may be of general interest to school districts follows.

Q: What is the Privacy Rule?

A: Entities regulated by the Rule ("covered entities") may not disclose "protected health information" without consent or authorization, except as permitted or
required by law. "Protected health information" is generally defined as individually identifiable health information. This definition is subject to important exceptions, which will be discussed below.

Q: **What are "covered entities?"**

A: Covered entities are "health plans, health care clearing houses, and health care providers who transmit health information in electronic form" relating to transactions concerning health claims, health plans, injury reports, and referral certification and authorization.

Q: **Are Michigan public school districts covered entities?**

A: For practical purposes, not under most readily imaginable circumstances. School districts, in the course of providing school psychological, nursing, and some special education related services fall within the definition of a "health care provider," which is a "covered entity." For purposes of the privacy regulation, a "health care provider" is any "person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 CFR § 160.102. The regulations define "health care" broadly enough to include the school functions listed above.

Although school districts are technically "covered entities," the vast majority of the health information they process or maintain is exempt from Privacy Rule protections. The definition of "protected health information" subject to the Privacy Rule excludes education records covered by the Family Educational Rights and Privacy Act ("FERPA"). 45 CFR § 164.501. FERPA defines "education records" as including those records which are directly related to a student and maintained by an education agency or institution, or by a person acting for such agency or institution. 20 USC § 1232g(a)(4)(A). This definition encompasses essentially all student health-related records. Based upon the foregoing, school districts are in the unusual position of being "covered entities" which deal almost exclusively with health information not subject to the HIPAA Privacy Rule.

Despite this de facto exclusion from Privacy Rule coverage, school districts may nevertheless be significantly impacted by the Rule after it takes effect. Ms. Nadine Schwab, a Connecticut attorney specializing in school health issues, expects that HIPAA-compliant contractors which conduct Medicaid billing and other similar functions for school districts may eventually require districts to submit information to them in a HIPAA-compliant manner as a condition of doing business. Although this administrative burden may not be placed upon schools immediately, it may occur when compliance is substantially achieved with the statutory mandate to adopt standards for transactions and data elements which will enable health information to be exchanged electronically. 42 USC § 1230d-2.

Q: **How will the Privacy Rule affect school district child immunization recordkeeping requirements?**
A: Some additional administrative hurdles may be encountered in obtaining immunization information. The Michigan Public Health Code places the burden on parents and guardians to provide school officials with legally required immunization information regarding their children. MCL 333.9208. The HIPAA Privacy Rule generally provides parents and guardians with control over their children’s health care information. 45 CFR § 164.502(g).

Although child immunization information may be released directly to the parent, a written release is required to allow the health care provider to give the immunization information directly to school districts. The parent must execute an authorization including a description of the information to be used or disclosed, the specific persons authorized to make the disclosure, the name of the person(s) to whom the disclosure will be made, the purpose of the disclosure, and the date upon which the authorization expires. 45 CFR § 164.508(c). Any previous practices involving less formal authorization for disclosure of child immunization information must be discontinued.

School officials, however, likely may continue to disclose immunization information to public health officials in accordance with previous practice. Once the immunization record is provided and maintained by the school district, the FERPA exception described above would probably apply.

Q: Do school officials require written authorization before providing medical information supporting a report of suspected child abuse under the Michigan Child Protection Law?

A: No authorization is required, even if the information has not been reduced to an "education record" exempt from the Privacy Rule. A covered "health care provider" need not treat a parent as a child’s personal representative when abuse or harm to the child is a concern. 45 CFR § 164.502(g)(5). Moreover, a covered entity may disclose protected information if necessary to prevent or lessen a serious and imminent threat to the health or safety of the involved person or the public. 45 CFR § 164.512(j).

Q: How does the Privacy Rule impact the school district's personnel function?

A: No effect is intended. Employment records are expressly excluded from the definition of "protected health information." 45 CFR § 164.501. In that regard, HHS has stated:

When the individual gives his or her medical information to the covered entity as the employer, such as when submitting a doctor's statement to document sick leave, or when the covered entity as employer obtains the employee’s written authorization for disclosure of protected health information, such as an authorization to disclose
the results of a fitness for duty examination, that medical information becomes part of the employment record, and, as such, is no longer protected health information.

67 FR 53192 (2002). Medical information used solely in a school district's personnel function is thus exempt from the Privacy Rule.

Q: **Will my district face increased administrative burdens with respect to employee health insurance coverage?**

A: Probably, yes. Those few school districts which self-insure health benefits will be required to become HIPAA-compliant. To the extent administration of that function is contracted out to the private sector, "business associate" contracts, pertaining to transfer and use of protected health information, must be executed.

The vast majority of school districts which purchase health insurance policies for their employees may experience additional administrative burdens as HIPAA "plan sponsors." As "plan sponsors," employers may continue to obtain protected health information from group insurance plans to conduct administrative functions. Before the group health plan may disclose this information, however, the employer must provide a certification indicating that it agrees to:

- Not use or further disclose the information other than as permitted by plan documents or required by law.
- Ensure that all agents to which the information is re-disclosed will abide by the same restrictions.
- Not use or disclose the information for employment-related actions and decisions, or in connection with any of the sponsor's other benefits.
- Report to the group health plan any unauthorized disclosures about which the employer becomes aware.
- Allow individuals access to protected health information, as required by regulation.
- Amend the protected health information, as required by regulation.
- Provide an accounting of disclosures of protected health information, as required by regulation.
- Make its internal books and records pertaining to use and disclosure of protected health information available for audit by the appropriate governmental officials.
To the extent feasible, destroy or return all protected health information to the group health plan.

Separate the protected health information from other administrative documents, as required by regulation.

HIPAA privacy standards will become effective in April 2003. Certain entities which have applied for extensions of time will have until October 2003 to comply. Finally, "small health plans" must become compliant by April 14, 2004. Based upon those rapidly approaching dates, school districts should work with their insurance carriers and legal counsel to take necessary steps to ensure operational compliance with the privacy aspects of HIPAA's "administrative simplification."

This article provides information of a general nature regarding legislative and regulatory developments. None of this information is intended as legal advice or opinion relative to specific facts, matters, situations or issues. Additional facts or future legal developments may affect the subjects addressed.