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Student Health Care Records and COVID-19

September 2021

Since the start of the COVID-19 pandemic, school administrators have spent a heightened amount of time discussing and addressing student health. Whether those conversations involved student mental health and/or the physical health of students, more stakeholders – both internal and external – have asked questions and sought district data regarding student health. From the number of COVID-19 positive cases to the number of students excluded from school as close contacts to the supports offered for students’ mental health, all districts have had to address how they maintain, and in limited circumstances, release student patient health care records.

So, what are student health records under state law?

Under state law, s. 118.125 “Pupil physical health records” means those pupil records that include basic health information about a pupil, including the pupil’s immunization records, an emergency medical card, a log of first aid and medicine administered to the pupil, an athletic permit card, a record concerning the pupil’s ability to participate in an education program, any lead screening records required under s. 254.162, the results of any routine screening test, such as for hearing, vision or scoliosis, and any follow-up to such test, and any other basic health information, as determined by the state superintendent.

The above statute would include immunization data that is available underneath the Wisconsin Immunization Registry. The Wisconsin Immunization Registry, also called WIR, is an internet database that tracks vaccine records for Wisconsin children and adults.

The above definition of a pupil physical health record is different than patient health care records. Wisconsin’s statutes have an interesting definition that distinguish a pupil physical health record from a patient health care record. Under s. 118.125(2m) *Confidentiality of Pupil Physical Health Records* the statute provides that “any pupil record that relates to a pupil’s physical health and that is not a pupil physical health record shall be treated as a patient health care record under ss. 146.81 to 146.84.” In addition, any pupil record that concerns the results of an HIV test, as defined in s. 252.01 (2m), shall be treated as provided under s. 252.15.

As an administrator you need to be aware of special provisions that apply to the transfer of patient health care records, psychological treatment records, records concerning drug/alcohol treatment, etc.

In addition to state law, the Family Educational Rights and Privacy Act (FERPA) also addresses student health information. The U.S. Department of Education and the Office for Civil Rights at the U.S.

Department of Health and Human Services in December 2019 released updated joint guidance addressing the application of the [Family Educational Rights and Privacy Act \(FERPA\) and the Health Insurance Portability and Accountability Act of 1996 \(HIPAA\)](#) Privacy Rule to records maintained on students.

The guidance, which was first issued in November 2008 and updated in December 2019, clarifies for school administrators, health care professionals, families, and others how FERPA and HIPAA apply to education and health records maintained about students. The revised guidance includes additional frequently asked questions and answers addressing when a student's health information can be shared without the written consent of the parent or eligible student under FERPA, or without written authorization under the HIPAA Privacy Rule.

It should be noted that all student patient health care records shall remain confidential. They may only be released to persons specifically designated in state or federal law or to other persons with the informed consent of the patient or a person authorized by the patient. Student patient health care records maintained by a district may only be released without informed consent to a district employee or agent if any of the following apply:

- The employee or agent has responsibility for the preparation or storage of patient health care records.
- Access to patient health care records is necessary to comply with a requirement in federal or state law.

Any record that concerns the results of a test for the presence of HIV or antibody to HIV (the virus which causes acquired immunodeficiency syndrome—AIDS) shall be confidential and may be disclosed only with the informed written consent of the test subject.

So, let's apply the above to a real-world example – a request for district data regarding the number of COVID-19 positive cases and the number of students excluded from school as close contacts.

While there is no general requirement under the ADA for you to report cases of COVID-19 among your workforce [see more on this below with respect to quarantine/exclusions under state law], you may be required to disclose the name of an employee to a public health agency when you learn that the employee has COVID-19. There is no corollary authority under the ADA to disclose that information to the school board or the public. Similarly, for students you are required report the information to the county health department for its mitigation efforts pertaining to the virus to determine if they will be doing contact tracing or will be asking you to perform that service. You do not have to release the number of students if the release of the student data would personally identify any student.

In September of last year, the Student Privacy Policy Office addressed the release of student health information, in particular, whether the law allows schools to disclose information about cases of COVID-19 in the school to the community. Please see some excerpts from that document below:

May a school disclose the number of students who have COVID-19 to parents and students in the school community without prior written consent?

Yes, provided that the information the school shares with parents and students does not allow for any individual student to be identified. If a school discloses information about students in a non-identifiable

form, then prior written consent from the parent or student (depending on the age of the student) is not needed under FERPA. When determining what information may be shared without consent, the school must take into account other reasonably available information that could potentially enable non-identifiable information to become identifiable.

For example, a school generally could release the fact that five students are absent due to COVID-19 without disclosing the students' identities. This would be allowed under FERPA as long as there are a sufficient number of other students who attend the school and other students at the school are absent for other reasons. However, we caution schools to ensure that in releasing such facts, they do so in a way that does not reveal information that, alone or in combination with other information, would allow a person in the school community to identify the students who are absent due to COVID-19.

May a school identify a particular student who has COVID-19 to parents and students in the school community without prior written consent?

In most cases, it will be sufficient for a school to report the fact that an individual in the school has COVID-19, rather than identifying the specific student who is infected. However, there may be situations during a health or safety emergency in which a school may determine that it is appropriate to disclose identifiable information to parents or students about a student with COVID-19 if knowledge of such information is necessary to protect their health. For example, if a student with COVID-19 is an athlete and has been in close contact with other students on a sports team or students who have higher health risks, school officials may determine that these other students or their parents need to know the identity of the infected student in order to take protective measures.

Therefore, in these limited situations, school officials may determine that it is appropriate to disclose such information to parents or students if the disclosure is necessary to allow parents and students to take appropriate precautions. School officials should make this determination on a case-by-case basis, taking into account the totality of the circumstances, including the risks presented to the health of students or other individuals, and the need for such individuals to have the information in order to take appropriate actions. School officials may want to consult with public health officials when making this determination.

May a school disclose the number of students who have COVID-19 in order to provide general health data to the public (including the media) without prior written consent?

Yes, provided that the information the school shares does not allow for any individual student to be identified. Similar to sharing information with the school community, if a school discloses information about students in a non-identifiable form, then consent is not needed under FERPA. As discussed above, when a school determines what information may be shared without prior written consent, the school must take into account other reasonably available information that might allow non-identifiable information to become identifiable.

As noted above, the amount of information that you share will depend upon the following:

1. Whether the employee, the adult pupil or parents of a minor pupil consent to the disclosure; and/or
2. The specificity of the information – is the information so general that no personally identifiable confidential health information is being shared.

I would recommend that you treat the COVID-19 health information like any other personally identifiable health information under the Americans with Disabilities Act [ADA], the statutory provisions that cover the confidentiality of pupil physical health records, or the statutory provisions that cover patient health care records.

In summary, you are not obligated to share any of the information with a records requester or the public if you feel that the disclosure would divulge personally identifiable health information. That being said, you may create a dashboard or share the number of cases if certain precautions are taken. I would recommend that in the sharing of such information you don't provide any personally identifiable information. In addition, you may share the information (number of positives and the number of individuals in quarantine) in the aggregate provided that the information doesn't disclose information that would personally identify the student or staff person. So, if the number of cases is extremely low (perhaps less than 5) it may personally identify a person if the pool of people in the grouping is small. Therefore, if the number is less than 5, simply report less than 5.

The school district may also be asked to report positive COVID-19 positive cases to local or state health authorities or be asked to exclude students from school who are suspected of having COVID-19.

The school district may exclude individuals from school who are close contacts under either the local school district's policy on communicable disease [including any locally adopted COVID-19 mitigation protocols] or pursuant to a recommendation and/or order of the local health officers/Department of Health Services (DHS). The school district may also be required to comply with a local health officer's order and/or be asked by the local health officer to comply with their recommendation that someone isolate and/or quarantine depending upon the facts. The school district does not have the authority to issue quarantine or isolation orders, that is the province of the local health officer and DHS. The key here is that the school may exclude someone from school pursuant to your policies and/or the recommendations/orders of the local health officers/DHS, but only the local health officer/DHS may issue quarantine/isolation orders.

Under Wisconsin statute 252.21, set forth below, the school district is required to notify the local health officer if they know or suspect a student has a communicable disease.

252.21 Communicable diseases; schools; duties of teachers, parents, officers.

- (1) If a teacher, school nurse, or principal of any school or child care center knows or suspects that a communicable disease is present in the school or center, he or she shall at once notify the local health officer.***
- (6) Any teacher, school nurse or principal may send home pupils who are suspected of having a communicable disease or any other disease the department specifies by rule. Any teacher, school nurse or principal who sends a pupil home shall immediately notify the parents of the pupil of the action and the reasons for the action. A teacher who sends a pupil home shall also notify the principal of the action and the reasons for the action.***

The local health officer can then order or recommend that the individual be quarantined and/or isolated depending upon the facts. The statute cited above also states that the school district through its agents (teacher, school nurse or principal) may send pupils home who are suspected of having a communicable disease.

Local health officers have the power to issue quarantines or isolation orders, school districts do not have that power, but may exclude students from school as discussed above. The Wisconsin Supreme Court recently issued a decision in June 2021 in [James v. Heinrich, in her capacity as Public Health Officer of Madison and Dane County](#) that addressed the power of local health officers under Wis. Stat. § 252.03. The Supreme Court held that: “local health officers do not have the statutory authority to close schools under Wis. Stat. [§ 252.03](#).” The decision also addressed the history of that statute and other specific powers of the state health department and a local health department. The decision did not address and/or limit other powers of a local health department.

Wisconsin statute [§ 252.06\(1\)](#) et al sets forth the powers of the Department of Health Services and local health departments to isolate and quarantine individuals in situations where a communicable disease is present.

In addition to the above, [Wisconsin statute 252.19](#), provides that “no person may knowingly and willfully take, aid in taking, advise or cause to be taken, *a person who is infected or is suspected of being infected* with a communicable disease into any public place or conveyance where the infected person would expose any other person to danger of contracting the disease.” Please see the full statute below:

252.19 Communicable diseases; suspected cases; protection of public. *No person who is knowingly infected with a communicable disease may willfully violate the recommendations of the local health officer or subject others to danger of contracting the disease. No person may knowingly and willfully take, aid in taking, advise or cause to be taken, a person who is infected or is suspected of being infected with a communicable disease into any public place or conveyance where the infected person would expose any other person to danger of contracting the disease.*

Due to the above statute, a school employee cannot knowingly and willfully take, aid in taking, advise or cause to be taken, a person who is infected or is suspected of being infected with a communicable disease into any public place or conveyance where the infected person would expose any other person to danger of contracting the disease.

COVID-19 has impacted us all in many ways. One of the ways is in how we realize both the individual and aggregate view of student health information.

Due to the ever-changing nature of this topic, if you have questions about the release of any student health information, you should consult with your local legal counsel.

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