



Fagen Friedman & Fulfrost LLP

Health Wearables & Student Privacy

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Agenda

- The law
- What are health wearables?
- Current (and future) uses
- Where does the information go?
- Considerations during COVID-19 pandemic



The Law

- Federal
- State
- Local
- FERPA and HIPAA



FERPA and HIPAA

- *Joint Guidance* updated in December 2019
- Last updated in 2008



FERPA

- Federal law that protects the privacy of students' "education records"
 1. Directly related to a student and...
 2. Maintained by an educational agency
- Include student's health records, including immunization records, maintained by an educational agency (such as by a school nurse)



HIPAA

- Enacted in 1996
- Applies to “covered entities”
 - providers of health or medical services that “transmit health information in electronic form in connection with covered transactions”
- Requires covered entities to protect individual’s health records and other personal health information



The Intersection

- School that provides health care in normal course of business (health clinic) and transmits health information electronically
- But not if health information is maintained only in education records
- HIPAA privacy rule specifically excludes FERPA education records



????????

- Is information collected from health wearables “maintained” by the school?
- Is information from health wearables pushed (electronically) to a third party?
- When can PHI be disclosed (especially in a COVID-19 world)?



What Are Health Wearables?

- Two-way interface between the user and the world
 - Collect information automatically
 - Analyze the information
 - Provide feedback to the user (or someone else)
 - Prompt action by the user



The Range of Health Wearables

- Activity Trackers, Smartwatches, Armbands
- Wristbands
- Wearable GPS
- Eye-trackers
- Brain wave headsets
- Health management
- Other



Example - Brainwave Headsets

- Uses EEG to measure user's brain activity
- Offers real-time feedback on brain state through app
- App prompts student to refocus using mindfulness strategies
- Piloted on students with disciplinary issues



Example – Diabetes Monitoring

- Wearable glucose monitor with sensor to take measurements
- Data collected, read and pushed to an app or smart phone
- Available in real-time to student, parent, school nurse



Data Collection

What if...

- Sent to an app
- Via WiFi or Bluetooth connection
- Anonymized or aggregated data
- Stored by tech company
- Data specific to individual student
- Stored by school district



Potential Concerns

- WiFi security
- Randomized data becoming unrandomized
- Storage and student records
- Special education child find obligations
- Search and seizure???



Before Using Health Wearables

- Is staff aware of potential privacy concerns?
- Has the device, website, app been vetted?
- Is there a procedure for notifying parents of its use?
- Is there a process for safeguarding student data?
- Is the device accessible to all students?
- Consider a specific board policy



COVID-19 and Student Health Data

- CDC guidelines for school reopening (Updated May 19)
- Self-reporting for symptoms, positive test or exposure
- Daily health checks
 - Temperatures, symptoms
- Required notification to local health officials
- All create student PHI



COVID-19 and Student Health Data

- USDOE issued an FAQs related to FERPA and COVID-19 (March 2020)
- FERPA includes an exception for health and safety emergency
 - Not a blanket exception
- Disclosure should be made on a case-by-case basis



Final Thoughts

- Connection to learning
- Transparency is key
- Equity (access and accessibility)



Thank you and questions

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