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Documentation Practices and Other Legal Issues for School Nurses

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I. DOCUMENTATION PRACTICES

A. Standards of Nursing Practice require nurses to accurately and completely report and document:

- i. the client's status including signs and symptoms;
- ii. nursing care rendered;
- iii. physician, dentist or podiatrist orders;
- iv. administration of medications and treatments;
- v. client response(s); and
- vi. contacts with other health care team members concerning significant events regarding client's status

22 TEX. ADMIN. CODE § 217.11

B. General Techniques

It is critical that the documentation display accurate descriptions of events, conditions, and actions taken to minimize the danger that a student may suffer from misuse of a record in the future and to maximize the protection of the nurse and the School if a record is needed later to demonstrate that appropriate procedures were followed.

To insure privacy of students, education and health records should contain information on only one student in an individual folder, file, or electronic record. By this, when it is necessary to pull up records related to a student, it should be kept in a format that allows you to produce it without having to produce records from other students.

- Be accurate, objective, concise but thorough, timely, well-organized, and legible.
- Write handwritten notes in ink.
- Write legibly and spell correctly
- Accompany every entry by the nurse's name, date, and time of service

- Document any nurse or school health action taken in response to a student problem
- Include positive and negative findings in any assessment documentation
- Include only essential information
- Be precise about measurements, spelling, and standard abbreviations
- Update all records, including progress notes, IEPs, IHPs at least annually and when changes occur
- Use nursing classification language
- Be consistent over time with regard to frequency of documentation, based on district policy, nursing protocols and standards, and as the acuteness of the student's health status demands
- Record the student's (or parent's) own words
- Document only objective data, relevant to the student's care – not personal judgments and nurse opinions
- Do not reference district problems, such as staff shortages
- Avoid terms suggestive of error, such as *"accidentally"* or *"by mistake"*
- Don't erase or use "white out." Draw a line through the error, initial the line, and then write the correct entry
- Note an entry in the wrong student's file, by a line through the incorrect material, your initials, and the notation: "Entry made in error"
- Avoid late entries; when they are absolutely necessary, indicate late entries with a notation "Late entry"
- Detail any variation from standard protocols and any unusual student circumstances or situations
- Document in detail notifications regarding changes in a student's health status or unusual findings

- Document content of any telephone consultations and direction to assistive personnel
- Include any prescriber orders and referral orders in health record
- Document medications given, stating when the medication was started and ended, at the end of the year, at the end of a course of medication, or when the dose changes.
- Document the name and title of anyone to whom access to a child's health record was given.

C. What Records Should I Create?

Standard nursing practice includes the following Components: assessment, planning, implementation, and evaluation.

- Assessing a child's health requires collecting information from a variety of sources, such as the student, families, health care providers, school staff, and out-of-school organizations.
- Planning requires identification of action steps and interventions to promote, maintain, or restore health, prevent illness, and/or provide rehabilitation for the individual student or a given population.
- Implementing the plan requires execution of the plan of care in a safe and appropriate manner.
- Evaluation is the systematic and ongoing appraisal of the effectiveness of the interventions as they relate to the outcomes and can result in identification of a need to reassess and revise health care plans.

Each component requires collecting information and compiling that information into some sort of document. Standards of practice require the nurse to document each step in each component.

D. What About My Personal Notes?

Under federal law, a school nurse's personal notes or calendar log would be considered a protected educational record, only as long as the school nurse kept them in her sole possession and did not share the actual notes. Current federal regulations define the sole possession" exception: as records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not

accessible or revealed to any other person except a temporary substitute for the maker of the record.

E. What about sensitive issues?

The rules about maintaining confidentiality are stricter in health care settings than in schools with regard to certain sensitive health information, such as HIV status, mental health issues, pregnancy, abortion, and sexually transmitted diseases. In health care settings, medical information of this nature may not be released without the *patient's* consent. These rules, however, do not apply in the school setting unless there are specific school district policies that address those issues.

A concern may arise if parents ask to see information in their child's health record when that record might contain information about sensitive issues that the student does not want the parent to see. The school nurse must make sure that, if documentation of such information is contained in the student's record, the file can be compartmentalized in such a way that access to information about sensitive services can be protected from parental access until the student authorizes disclosure. (The advantages of electronic files for this type of information "layering" are obvious.)

II. FEDERAL LAWS AND RULES RELATING TO HEALTH ISSUES IN SCHOOLS

A. Health Insurance Portability and Accountability Act ("HIPAA")

1. Establishes a national standard for the protection and security of certain protected health information.
3. The goal is to permit important uses of information while protecting the privacy of people who seek care.
4. What is protected health information (PHI)?
 - a. Any individually identifiable health information, whether **oral or recorded**, whether electronic or hard copy, that is created or received by employers that relates to the physical or mental health or condition of any individual.
 - b. Examples:
 - i. Demographic information
 - ii. Treatment information
 - iii. Diagnosis information

iv. Genetic Information

5. What is the difference between HIPAA Privacy and HIPAA Security?

- a. The Privacy rule focuses on the right of an individual to control the use of his or her personal information. Protected health information (PHI) should not be divulged or used by others against their wishes. The Privacy rule covers the confidentiality of PHI in all formats including electronic, paper and oral. Confidentiality is an assurance that the information will be safeguarded from unauthorized disclosure. The physical security of PHI in all formats is an element of the Privacy rule.
- b. The Security rule focuses on administrative, technical and physical safeguards specifically as they relate to electronic PHI (ePHI). Protection of ePHI data from unauthorized access, whether external or internal, stored or in transit, is all part of the security rule. Typically ePHI is stored in:
 - i. Computer hard drives
 - ii. Magnetic tapes, disks, memory cards
 - iii. Any kind of removable/transportable digital memory media
 - iv. All transmission media used to exchange information such as the Internet, leased lines, dial-up, intranets, and private networks

6. Sharing PHI:

- a. Permissible (but make reasonable efforts to limit disclosures of PHI to the minimum necessary to accomplish the intended purpose).
 - i. For treatment, payment, or health care operations;
 - ii. Pursuant to a valid authorization;
 - ii. Includes certain business associates, workers' compensation carriers, and the individual.
- b. You should not share PHI with other District employees unless there is a specific need to know the information.

7. Breach Notification Rule

Prior to 2013, a breach was defined as an inappropriate use or disclosure of PHI involving a significant risk of financial, reputational or other harm.

The 2013 Amendments modify this definition by providing that an impermissible use or disclosure of PHI is presumed to be a breach, unless it can be demonstrated that there is a low probability that PHI has been compromised based upon a four-part risk assessment that considers: (1) the nature and extent of the PHI involved in the breach; (2) the unauthorized person who used the PHI or to whom the disclosure was made; (3) whether the PHI was actually acquired or viewed; and (4) the extent to which the risk to PHI has been mitigated.

In the case of a breach, covered entities are required to notify each affected individual who's unsecured PHI has been compromised.

8. Civil and Criminal Penalties

a. Civil Penalties

- i. Individual did not know (and by exercising reasonable diligence would not have known) that he/she violated HIPAA - \$100 per violation, with an annual maximum of \$25,000 for repeat violations
- ii. HIPAA violation due to reasonable cause and not due to willful neglect - \$1,000 per violation, with an annual maximum of \$100,000 for repeat violations
- iii. HIPAA violation due to willful neglect but violation is corrected within the required time period \$10,000 per violation, with an annual maximum of \$250,000 for repeat violations - \$50,000 per violation, with an annual maximum of \$1.5 million
- iv. HIPAA violation is due to willful neglect and is not corrected - \$50,000 per violation, with an annual maximum of \$1.5 million

b. Criminal Penalties – up to \$250,000 per violation and 10 years in prison.

- B. FERPA – The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (commonly referred to as “FERPA” or “the Buckley Amendment”) protects the confidentiality of student *education records*, and grants a parent or eligible student the right to inspect and review those records.

1. "Education Records"

- a. Directly related to a student; *AND*
- b. Maintained by an educational institution or by a party acting for the institution.
- c. Includes the health records of students that are maintained by the school nurse.

"Education Records" are NOT

- a. Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- b. Records of the law enforcement unit of an educational agency or institution
- c. Records relating to an individual who is employed by an educational agency or institution, that:
 - i. Are made and maintained in the normal course of business
 - ii. Relate exclusively to the individual in that individual's capacity as an employee
 - iii. Are not available for use for any other purpose.

2. "Personally Identifiable Information" includes, but is not limited to:

- a. The student's name;
- b. The name of the student's parent(s) or other family member;
- c. The address of the student's family;
- d. A personal identifier, such as the student's social security number or student number;
- e. A list of personal characteristics that would make the student's identity more easily traceable; or
- f. Other information that would make the student's identity easily traceable.

34 C.F.R. § 99.3.

3. Consent Requirement – The Act prohibits an educational institution from releasing *personally identifiable student information* **without** prior written consent from:
 - a. A student’s parent(s);
 - b. A student’s guardian(s); or
 - c. The student if s/he is at least 18 years of age or is attending a post-secondary institution.

34 C.F.R. § 99.30.

4. Majority-Age Students – Consent must be obtained from the student (and not the student’s parent(s) or guardian(s)) once a student has reached the age of 18. However, student consent is **not** required for parental access if the student is considered to be a dependent for federal income tax purposes.

34 C.F.R. §§ 99.3, 99.55.

5. Exceptions – Consent is **not** required when the information is furnished or provided:
 - a. In compliance with a court order or lawfully-issued subpoena;
 - b. To other school officials, including teachers, who have been determined to have “*legitimate educational interests*”;
 - c. To other schools or school systems in which the student seeks or intends to enroll;
 - d. In connection with a student’s application or receipt of financial aid;
 - e. To organizations conducting studies for or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, student aid programs, and improving instruction;
 - f. To accrediting organizations (*e.g.*, TEA); or
 - g. In connection with a health and safety emergency.

6. Conditions Applicable to a “Health and Safety Emergency” – According to the federal implementing regulations, “[a]n educational agency ... may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or

safety of the student or other individuals.” See 34 C.F.R. § 99.36(a) (emphasis added).

7. Limitation on Access by School Officials – A school official may access records only if the official has a “legitimate educational interest.” For example, the Texas Attorney General has concluded that an employee pursuing a personnel dispute with his employer does not have a right of access under the Texas Public Information Act to records that are otherwise confidential under FERPA. See Informal Letter Ruling OR-94-546. Thus, “a School District must not release ‘education records’ to a teacher or a representative of a teacher.” *Id.* at p. 3 (citing Open Records Decision Nos. 332 (1982) and 327 (1982)).
8. Keep this “need to know rule” in mind when deciding what information gathered during an assessment should be documented in a written report and where it should be documented. But, any information that is used to make *educational* decisions must become part of the educational record.
9. Directory Information – A School District may release certain “directory information” without receiving prior consent under certain conditions. 34 C.F.R. §§ 99.31(a)(11), 99.37.
 - a. “Directory information” is defined as “information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student’s name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status, participation in officially recognized activities and sports, [and] weight and height of athletic teams” 34 C.F.R. § 99.3. Directory information does not include special ed status.
 - b. Directory information may be released only if the District has given public notice to parents or eligible students of:
 - i. The types of information designated as “directory” by the District;

- ii. The parent or eligible student’s right to refuse to allow the release of any or all types information about the student designated as directory; and
 - iii. The period of time within which the parent or eligible student may submit written notification of his or her refusal to allow disclosure of directory information.
 - 10. Fees for copies – A District may charge a fee for a copy of an education record unless imposition of a fee prevents a parent or eligible student from exercising his or her right to inspect and review the record.
 - 11. Right to opt out of military recruiters and colleges.
- C. Where HIPAA and FERPA May Intersect.
- 1. When a school provides health care to students in the normal course of business, such as through its health clinic, it is also a “health care provider” as defined by HIPAA.
 - 2. If a school conducts any “covered transactions” electronically it is also subject to HIPAA regulations.
 - a. Health insurance eligibility, enrollment and disenrollment, coordination of benefits and premium payment.
 - b. Health care authorizations and referrals.
 - c. Medicaid billing for therapeutic services would need to comply with HIPAA for those procedures.
 - 3. Student health records that are maintained by the school are “education records” and subject to FERPA, *not* HIPAA.
 - 4. Records created for employee health purposes are not education records and are protected by HIPAA provisions, *but* worker’s compensation insurance records are exempted from HIPAA regulations.
 - 5. While HIPAA contains the express civil and criminal penalties discussed above, FERPA is enforced by the Secretary of Education who may stop federal funding to the school, however this is the only express remedy provided in the statute. The Fifth Circuit has found that FERPA does not explicitly provide for a private cause of action

and that its legislative history does not indicate that the drafters of the legislation intended for there to be one. *Tarka v. Franklin*, 891 F2d 102 (5th Cir. 1989).

III. STATE LAWS AND RULES RELATING TO HEALTH ISSUES IN SCHOOLS

A. Immunizations: No Shots, No School Unless:

1. Physician's affidavit must now state that the immunization poses a "significant risk" (instead of "would be injurious") to the health and well-being of the student or any member of the student's family or household.
2. Parent's affidavit must now state that s/he declines the immunization for "reasons of conscience, including a religious belief" (instead of that the immunization "conflicts with the tenets and practice of a recognized church or religious denomination of which the applicant is an adherent or member").

TEX. EDUC. CODE § 38.001(C)

B. Out-of-Hospital Do Not Resuscitate Orders (DNR)

1. This is a legally binding directive that life-sustaining treatment should not be initiated or continued for a particular individual.
2. This includes such things as:
 - a. Advanced airway management;
 - b. CPR;
 - c. Artificial ventilation;
 - d. Defibrillation; and
 - e. Other life-sustaining treatments.

DNR does not prohibit therapies or interventions that are considered necessary to provide comfort or alleviate pain.

3. It applies to any non-hospital location, even those where medical services are not routinely administered, such as a school.

4. Applies only to health care professionals, which includes school nurses.
5. Emergency medical services personnel and other health care professionals who may be called to the school should be presented with the DNR order, should a student with such an order experience medical difficulties.
6. School nurses do not function in a vacuum.
 - a. The student may have medical distress where the nurse is not present (bus, assembly, classroom, cafeteria);
 - b. As a result, the District should have administrative procedures in place so that both the nurse and the campus administration will be prepared to handle the situation in a professional and sensitive manner, and to ensure that DNR orders are implemented consistently across the District;

TEX. HEALTH & SAFETY CODE §§ 166.002-.100.

C. Texas Education Code Chapter 26

1. Access to Records -A parent is entitled access to all written records of a School District including:
 - a. Attendance records;
 - b. Test scores;
 - c. Grades;
 - d. Disciplinary records;
 - e. Counseling records;
 - f. Psychological records;
 - g. Applications for admission;
 - h. Health and immunization information;

- i. Teacher and counselor evaluations; and
- j. Reports of behavior patterns.

TEX. EDUC. CODE § 26.004.

2. Right to Full Information

- a. A parent is entitled to full information regarding the school activities of a parent's child except as provided by § 38.004 (relating to child abuse reporting.)
- b. An attempt by any School District employee to encourage or coerce a child to withhold information from a child's parents is grounds for discipline under §§ 21.104, 21.156 or 21.211, as applicable (all relating to actions to terminate contracts).

TEX. EDUC. CODE § 26.008.

3. What is a nurse required to tell a parent with respect to information learned about a student regarding pregnancy, sexually transmitted diseases, drug use, etc.?

- a. No legal obligation to disclose this information unless there is a health/safety emergency.
 - i. No bright line rule as to what constitutes a health or safety emergency.
 - ii. Before releasing such information, make sure you can articulate a reasonable and believable explanation for why the situation qualified as an emergency.
- b. Think before you put it in writing in the health record. If the parent requests their child's health record, you must release it.
- c. But, if the student is receiving school health services for any of these conditions, the school nurse must document that fact in the health record.

D. Responding To Subpoenas For Student Records

1. Comply only if the subpoena is “lawfully issued.” School Districts may receive two types of subpoenas – **civil or criminal**.
 - a. Civil subpoenas typically involve a custody dispute.
 - i. *Who may issue them?*
 - The clerk of a court;
 - An attorney authorized to practice in Texas;
 - An office authorized to take depositions in Texas (including notary publics).
 - ii. *What are the formal requirements?*
 - State the style of the suit (names of the parties) and a cause number;
 - State the court in which the suit is pending;
 - State the date on which the subpoena is issued;
 - Identify the person to whom it is directed;
 - State the time, place, and nature of the action required by the person to whom it is directed;
 - Identify the party on whose behalf the subpoena is issued;
 - State that failure to obey a subpoena may be deemed in contempt of court and may be punishable by fine or confinement, or both;
 - Be signed by the person issuing the subpoena.
 - b. Criminal subpoenas
 - i. *Who may issue them?*
 - State criminal agents;
 - The District Attorney’s office or grand juries.
 - ii. A criminal subpoena may summon one or more persons to appear and direct that person(s) to produce documents. The subpoena should:
 - Specify the date on which the appearance or production of documents is expected;
 - Name the court or grand jury before which appearance is required;
 - Name the person who is summoned;
 - Be signed by the court or clerk issuing the subpoena; and
 - Indicate the date on which it was issued.

What do we do if we receive a criminal subpoena by fax or mail?

- ▶ Comply with it. A criminal subpoena may be served in person, by mail, or by electronically transmitting a copy of the subpoena.
2. Notice to Parents – When information is furnished in compliance with a court order or subpoena, the School District must make a *reasonable effort* to notify the parent(s) or student *in advance* of the School District’s compliance.