Impacts of the New Common Rule for International Research (M209)

October 21, 2019

Robert McLaughlin, JD, PhD, Public Health Institute, Oakland, CA, USA
Revised Common Rule: Sections Relevant to International Research

Section 46.101

(g) This policy does not affect any foreign laws or regulations that may otherwise be applicable and that provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the Federal Register or will be otherwise published as provided in department or agency procedures.

Section 46.102

(k) Public health authority means an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, an Indian tribe, or a foreign government, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.
Other Points of Connection to International Research

- Expanded Categories of Exemption
- Definition of Public Health Surveillance
- Categorical Exclusions from Review
- Institutional Risk and Continuing Review
Expanded Categories of Exemption

1. Research, conducted in established or commonly accepted educational settings, that specifically involves normal educational practices that are not likely to adversely impact students’ opportunity to learn required educational content or the assessment of educators who provide instruction. …

2. Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met: … (i) subjects cannot readily be ascertained … (ii) [no reasonable likelihood of harm] from disclosure of data … or (iii) subjects can readily be ascertained and IRB conducts limited review under § __.111(a)(7) (adequate provisions for confidentiality of data).

3. Research involving benign behavioral interventions in conjunction with the collection of information from an adult subject through verbal or written responses (including data entry) or audiovisual recording if the subject prospectively agrees to the intervention …

4. Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met: (i) private information/specimens are publicly available … (ii) subjects cannot readily be ascertained directly or through identifiers linked to the subjects … (iii) The research involves only information collection and analysis involving the investigator’s use of identifiable health information collected for “research” or “health care operations” … or (iv) The research is conducted by, or on behalf of, a Federal department or agency using government-generated or government-collected information obtained for non-research activities.

5. Research and demonstration projects that are conducted or supported by a Federal department or agency, or otherwise subject to the approval of department or agency heads (or the approval of the heads of bureaus or other subordinate agencies that have been delegated authority to conduct the research and demonstration projects) …

6. Taste and food quality evaluation and consumer acceptance studies …

7. Storage or maintenance for secondary research for which broad consent is required: Storage or maintenance of identifiable private information or identifiable biospecimens for potential secondary research use if an IRB conducts a limited IRB review …

8. Secondary research for which broad consent is required: Research involving the use of identifiable private information or identifiable biospecimens for secondary research [under specified conditions and limited IRB review].
Definition of Public Health Surveillance

activities. For purposes of this part, the following activities are deemed not to be research:

(1) Scholarly and journalistic activities (e.g., oral history, journalism, biography, literary criticism, legal research, and historical scholarship), including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.

(2) Public health surveillance activities, including the collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority. Such activities are limited to those necessary to allow a public health authority to identify, monitor, assess, or investigate potential public health signals, onsets of disease outbreaks, or conditions of public health importance (including trends, signals, risk factors, patterns in diseases, or increases in injuries from using consumer products). Such activities include those associated with providing timely situational awareness and priority setting during the course of an event or crisis that threatens public health (including natural or man-made disasters).
Categorical Exclusions From Review

activities. For purposes of this part, the following activities are deemed not to be research:

(1) Scholarly and journalistic activities (e.g., oral history, journalism, biography, literary criticism, legal research, and historical scholarship), including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.

(2) Public health surveillance activities, including the collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority. Such activities are limited to those necessary to allow a public health authority to identify, monitor, assess, or investigate potential public health signals, onsets of disease outbreaks, or conditions of public health importance (including trends, signals, risk factors, patterns in diseases, or increases in injuries from using consumer products). Such activities include those associated with providing timely situational awareness and priority setting during the course of an event or crisis that threatens public health (including natural or man-made disasters).
Institutional Risk and Continuing Review

(e) An IRB shall conduct continuing review of research requiring review by the convened IRB at intervals appropriate to the degree of risk, not less than once per year, except as described in § .109(f).

(f)(1) Unless an IRB determines otherwise, continuing review of research is not required in the following circumstances:

(i) Research eligible for expedited review in accordance with § .110;

(ii) Research reviewed by the IRB in accordance with the limited IRB review described in § .104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8);

(iii) Research that has progressed to the point that it involves only one or both of the following, which are part of the IRB-approved study:

(A) Data analysis, including analysis of identifiable private information or identifiable biospecimens, or

(B) Accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

(2) [Reserved.]

(g) An IRB shall have authority to observe or have a third party observe the consent process and the research.
The Contextual Character of Ethics

Map

Ladder
The Contextual Character of Ethics

Sea of Perilous Compliance Considerations

- Harm to Subjects
- Harm to Others
- Biosafety
- Plagiarism
- Fabrication
- Falsification
- Misrepresentation
- Conflicts of Interest
- Data Sharing/Security
- Intellectual Property
Key Resource

HHS.gov
Office for Human Research Protections


NOTE: This guidance document replaces two previous OHRP guidance documents: (1) “Engagement of Institutions in Research” (January 26, 1999); and (2) “Engagement of Pharmaceutical Companies in HHS-Supported Research (PDF)” (December 23, 1999).
Key Resource

Activities that indicate engagement

1. Institutions that receive an award through a grant, contract, or cooperative agreement directly from HHS for the non-exempt human subjects research (i.e. awardee institutions), even where all activities involving human subjects are carried out by employees or agents of another institution.

2. Institutions whose employees or agents intervene for research purposes with any human subjects of the research by performing invasive or noninvasive procedures. Examples of invasive or noninvasive procedures include drawing blood; collecting buccal mucosa cells using a cotton swab; administering individual or group counseling or psychotherapy; administering drugs or other treatments; surgically implanting medical devices; utilizing physical sensors; and utilizing other measurement procedures. [See scenarios B.(1), B.(2), and B.(3) below for limited exceptions.]

3. Institutions whose employees or agents intervene for research purposes with any human subject of the research by manipulating the environment. Examples of manipulating the environment include controlling environmental light, sound, or temperature; presenting sensory stimuli; and orchestrating environmental events or social interactions. [See scenarios B.(1) and B.(3) below for limited exceptions.]

4. Institutions whose employees or agents interact for research purposes with any human subject of the research. Examples of interacting include engaging in protocol dictated communication or interpersonal contact; asking someone to provide a specimen by voiding or spitting into a specimen container; and conducting research interviews or administering questionnaires. [See scenarios B.(1), B.(2), B.(3), and B.(4) below for limited exceptions.]

5. Institutions whose employees or agents obtain the informed consent of human subjects for the research.

6. Institutions whose employees or agents obtain for research purposes identifiable private information or identifiable biological specimens from any source for the research. It is important to note that, in general, institutions whose employees or agents obtain identifiable private information or identifiable specimens for non-exempt human subjects research are considered engaged in the research, even if the institution’s employees or agents do not directly interact or intervene with human subjects. In general, obtaining identifiable private information or identifiable specimens includes, but is not limited to:
   - observing or recording private behavior;
   - using, studying, or analyzing for research purposes identifiable private information or identifiable specimens provided by another institution; and
   - using, studying, or analyzing for research purposes identifiable private information or identifiable specimens already in the possession of the investigators.

In general, OHRP considers private information or specimens to be individually identifiable as defined in 45 CFR 46.102(f) when they can be linked to specific individuals by the investigator(s) either directly or indirectly through coding systems.
Activities that DO NOT indicate engagement

1. Institutions whose employees or agents perform commercial or other services for investigators provided that all of the following conditions also are met:
   • the services performed do not merit professional recognition or publication privileges;
   • the services performed are typically performed by those institutions for non-research purposes; and
   • the institution’s employees or agents do not administer any study intervention being tested or evaluated under the protocol.

2. Institutions (including private practices) not selected as a research site whose employees or agents provide clinical trial-related medical services that are dictated by the protocol and would typically be performed as part of routine clinical monitoring and/or follow-up of subjects enrolled at a study site by clinical trial investigators (e.g., medical history, physical examination, assessment of adverse events, blood test, chest X-ray, or CT scan) provided that all of the following conditions also are met:
   • the institution’s employees or agents do not administer the study interventions being tested or evaluated under the protocol;
   • the clinical trial-related medical services are typically provided by the institution for clinical purposes;
   • the institution’s employees or agents do not enroll subjects or obtain the informed consent of any subject for participation in the research; and
   • when appropriate, investigators from an institution engaged in the research retain responsibility for:
     • overseeing protocol-related activities; and
     • ensuring appropriate arrangements are made for reporting protocol-related data to investigators at an engaged institution, including the reporting of safety monitoring data and adverse events as required under the IRB-approved protocol.

3. Institutions (including private practices) not initially selected as a research site whose employees or agents administer the study interventions being tested or evaluated under the protocol limited to a one-time or short-term basis (e.g., an oncologist at the institution administers chemotherapy to a research subject as part of a clinical trial because the subject unexpectedly goes out of town, or is unexpectedly hospitalized), provided that all of the following conditions also are met:
   • an investigator from an institution engaged in the research determines that it would be in the subject’s best interest to receive the study interventions being tested or evaluated under the protocol;
   • the institution’s employees or agents do not enroll subjects or obtain the informed consent of any subject for participation in the research;
   • investigators from the institution engaged in the research retain responsibility for:
     • overseeing protocol-related activities;
     • ensuring the study interventions are administered in accordance with the IRB-approved protocol; and
     • ensuring appropriate arrangements are made for reporting protocol-related data to investigators at the engaged institution, including the reporting of safety monitoring data and adverse events as required under the IRB-approved protocol; and
     • an IRB designated on the engaged institution’s FWA is informed that study interventions being tested or evaluated under the protocol have been administered at an institution not selected as a research site.
Activities that DO NOT indicate engagement

4. Institutions whose employees or agents:
   - inform prospective subjects about the availability of the research;
   - provide prospective subjects with information about the research (which may include a copy of the relevant informed consent document and other IRB approved materials) but do not obtain subjects’ consent for the research or act as representatives of the investigators;
   - provide prospective subjects with information about contacting investigators for information or enrollment; and/or
   - seek or obtain the prospective subjects’ permission for investigators to contact them.

5. Institutions (e.g., schools, nursing homes, businesses) that permit use of their facilities for intervention or interaction with subjects by investigators from another institution.

6. Institutions whose employees or agents release to investigators at another institution identifiable private information or identifiable biological specimens pertaining to the subjects of the research.
   
   1. Note that in some cases the institution releasing identifiable private information or identifiable biological specimens may have institutional requirements that would need to be satisfied before the information or specimens may be released, and/or may need to comply with other applicable regulations or laws. In addition, if the identifiable private information or identifiable biological specimens to be released were collected for another research study covered by 45 CFR part 46, then the institution releasing such information or specimens should:
      - ensure that the release would not violate the informed consent provided by the subjects to whom the information or biological specimens pertain (under 45 CFR 46.116), or
      - if informed consent was waived by the IRB, ensure that the release would be consistent with the IRB’s determinations that permitted a waiver of informed consent under 45 CFR 46.116 (c) or (d).
   
   2. Examples of institutions that might release identifiable private information or identifiable biological specimens to investigators at another institution include:
      - schools that release identifiable student test scores;
      - an HHS agency that releases identifiable records about its beneficiaries; and
      - medical centers that release identifiable human biological specimens.
   
   3. Note that, in general, the institutions whose employees or agents obtain the identifiable private information or identifiable biological specimens from the releasing institution would be engaged in human subjects research. [See scenario A.(6) above.]
7. Institutions whose employees or agents:
   - obtain coded private information or human biological specimens from another institution involved in the research that retains a link to individually identifying information (such as name or social security number); and
   - are unable to readily ascertain the identity of the subjects to whom the coded information or specimens pertain because, for example:
     - the institution’s employees or agents and the holder of the key enter into an agreement prohibiting the release of the key to the those employees or agents under any circumstances;
     - the releasing institution has IRB-approved written policies and operating procedures applicable to the research project that prohibit the release of the key to the institution’s employees or agents under any circumstances; or
     - there are other legal requirements prohibiting the release of the key to the institution’s employees or agents.

   - For purposes of this document, coded means that:
     - identifying information (such as name or social security number) that would enable the investigator to readily ascertain the identity of the individual to whom the private information or specimens pertain has been replaced with a number, letter, symbol, and/or combination thereof (i.e., the code); and
     - a key to decipher the code exists, enabling linkage of the identifying information to the private information or specimens.

   - Although this scenario resembles some of the language in OHRP’s Guidance on Research Involving Coded Private Information or Biological Specimens, it is important to note that OHRP’s Guidance on Research Involving Coded Private Information or Biological Specimens addresses when research involving coded private information or specimens is or is not research involving human subjects, as defined in 45 CFR 46.102(f). As stated above in Section II., this Guidance on Engagement of Institutions in Human Subjects Research should only be applied to research projects that have been determined to involve human subjects and that are not exempt under HHS regulations at 45 CFR 46.101(b).

8. Institutions whose employees or agents access or utilize individually identifiable private information only while visiting an institution that is engaged in the research, provided their research activities are overseen by the IRB of the institution that is engaged in the research.

9. Institutions whose employees or agents access or review identifiable private information for purposes of study auditing (e.g. a government agency or private company will have access to individually identifiable study data for auditing purposes).

10. Institutions whose employees or agents receive identifiable private information for purposes of satisfying U.S. Food and Drug Administration reporting requirements.

11. Institutions whose employees or agents author a paper, journal article, or presentation describing a human subjects research study.
International Compilation of Human Research Standards

2019 Edition

Compiled By:
Office for Human Research Protections
U.S. Department of Health and Human Services
Key Resource

• Optical Character Recognition/Translation Applications
Administrator’s Insights

- Protocol development cannot wait for IRB protocol preparation, processing, and review (anymore);
- Use local review (including exemption, public health surveillance, or not-human-subjects-research determinations as preparation for review Abroad;
- Monitor Active Status for Excused Projects
Emerging Challenge

• GDPR Compliance at Protocol Level

The General Data Protection Regulation requires organizations that handle personal data of covered EU nationals to do so in accordance with a set of technical rules and controls, and a set of data processing principles that include:

• Data are processed fairly, lawfully and transparently
• Data are collected and processed for specific reasons and stored for specific periods of time, and that it is not used for reasons beyond its original purpose
• Only those data necessary for the purpose for which they are intended are collected, and not more
• The data are accurate and reasonable steps are taken to ensure data remain accurate
• The data are kept in a form that allows individuals to be identified only as long as is necessary
• The data kept securely and protected from unlawful access, accidental loss or damage
New Rules, Old Problems

- Living individuals
  - Convergence of data and personhood
  - Alternative conceptions of personhood
- Collective consent
- Plunder of resources
- Equitable opportunities for researchers and research participants alike
Thank You

Questions?

Robert McLaughlin,  
Public Health Institute, USA  
robert.mclaughlin@phi.org