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Release of Educational Records for the Purpose of Medicaid Reimbursement

I. Introduction

In November 2003, the Oregon Department of Education (ODE) received a request for clarification from a group of education agencies that participate in the School Based Health Services (SBHS) program under Oregon Medicaid.

These agencies posed the following questions regarding the application of confidentiality rules to Medicaid reimbursement:

Must educational agencies get written consent from parents to check for Medicaid eligibility: (a) for children in the Early Intervention Early Childhood Special Education (EI/ECSE) program; or (b) for students in a K-12 special education program?

Must educational agencies get written consent from parents to bill Medicaid: (a) for children in the EI/ECSE program; or (b) for students in a K-12 special education program? If yes, how often?

When considering confidentiality issues in regard to Medicaid Reimbursement for School Based Health Services, four laws are applicable: (1) the Family Education Rights and Privacy Act (FERPA); (2) the Health Information Portability and Accountability Act (HIPAA); (3) the Individuals with Disabilities Education Act (IDEA); and (4) Federal and State Medicaid laws and rules. Educational agencies need to get parent consent if any of these laws require permission to exchange information regarding Medicaid eligibility or permission to release educational records to obtain Medicaid reimbursement.

Oregon's Medicaid System

The Department of Human Services (DHS) is Oregon's State Medicaid agency. To receive Medicaid, individuals must be enrolled on the Oregon Health Plan. The Office of Medical Assistance Programs (OMAP) is the DHS office that manages the Oregon Health Plan. School-based Health Services (SBHS) is one of the medical assistance programs coordinated by the Federal Financial Policy Unity of DHS.

DHS obtains permission to release enrollment information to providers when families enroll in the Oregon Health plan. Medicaid does not need any further permission to share eligibility information.

III. Directory Information

FERPA protects the privacy of educational records. The general rule under FERPA is that educational agencies need written parent consent to release educational records. Under FERPA, if the information

shared with a Medicaid agency is student specific and personally identifiable, it would be considered a release of educational records.

Educational agencies that have a *directory information* policy may share directory information with other agencies without permission. Directory information means "those items of personally identifiable information contained in an educational record of a student which would not generally be considered harmful or an invasion of privacy if disclosed." Directory information may include, but is not limited to, "the student's name, address, telephone listing, photograph, data and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended." OAR 581-021-0220(2).

The educational agency's educational records policy must specify the types of personally identifiable information the educational agency has designated as directory information, if any. OAR 581-021-0250. Agencies must give annual notice to parents of students "in attendance" of the types of personally identifiable information that the agency has designated as directory information. OAR 581-021-0390(1).

Parents have the right to "opt out" of the directory information process by giving prior notice that they do not want information about their child shared even if it is directory information. When parents do this, education agencies may not share any information about that child without prior consent from the parents.

The release of directory information cannot be "linked to other, non-directory information about a student, such as special education status. Thus a list of names of students who are disabled and/or who are receiving services under Part B cannot be considered 'directory information' under FERPA and disclosed to an unauthorized third party [such as the state Medicaid agency] for purposes of ascertaining [Medicaid] eligibility." *Wisconsin Department of Public Instruction, 28 IDELR 497* (Family Policy Compliance Office, July 22, 1997).

IV. Response to Specific Questions

(1) Are educational agencies required to obtain consent from parents to check for Medicaid eligibility for children enrolled in EI/ECSE programs?

The answer to this question depends on how the program or billing agent checks for eligibility, and whether the program has a directory information policy.

Individual eligibility checks. Programs and/or billing agents do not need consent to conduct individual name checks using the Automated Information System (AIS). That is because the program or billing agent is not actually releasing confidential information. The system does not store the name, and DHS does not have access this information after the search.

"Batched" eligibility checks. As a general rule, EI/ECSE programs must have parent consent to release lists of names of EI/ECSE students to the DHS "bulletin board" to check for Medicaid eligibility. The list is stored in the DHS computer and constitutes a release of educational records.

Directory information exception. The program or billing agent does not need consent for "batched" eligibility checks if:

(a) The program has a directory information policy that includes the types of information released (e.g.

name, birth date, address) and has given parents annual notice of this policy and an opportunity to opt out;

(b) The parent has not opted out of directory information releases; and

(c) The program or billing agent submits the list of names in a list that includes children with and without disabilities.

For EI/ECSE children, the latter is difficult to accomplish because programs often do not have access to names of students without disabilities. The Department asked the Family Policy Compliance Office (FPCO), the federal agency responsible for interpreting FERPA, whether EI/ECSE names could be combined with names of school-age children without disabilities to create a combined list. FPCO has advised that if the list includes birthdates the disability status would still be readily identifiable for the EI/ECSE children. Alternatively, EI/ECSE programs that operate programs that include non-disabled children could batch those names with the EI/ECSE eligible children to achieve a mixed list that does not identify disability status, as long as nothing on the list itself identifies the program as being a program for students with disabilities.

(2) Are educational agencies required to obtain consent from parents to check for Medicaid eligibility for K-12 students?

The answer to this question depends on how the district or billing agent checks for eligibility, and whether the district has a directory information policy.

Individual eligibility checks. Districts and/or billing agents do not need consent to conduct individual name checks using AIS. That is because the program or billing agent is not actually releasing confidential information. The system does not store the name, and DHS does not have access to this information after the search.

"Batched" eligibility checks. As a general rule, districts and billing agents must have parent consent to release lists of names of special education eligible students to the DHS "bulletin board" to check for Medicaid eligibility. The list is stored in the DHS computer and constitutes a release of educational records.

Directory information exception. The district or billing agent does not need consent if:

(a) The district has a directory information policy and includes the types of information released (e.g. name, birth date, address) and has given parents annual notice of this policy and an opportunity to opt out;

(b) The parent has not opted out of directory information releases; and

(c) The names are submitted in a list that includes children with and without disabilities.

(3) Must educational agencies get written consent from parents to bill Medicaid: (a) for children in the EI/ECSE program; or (b) for students in a K-12 special education program? If yes, how often?

The IDEA does not require parent consent for educational agencies to bill Medicaid. See 34 CFR 300.142(e); OAR 581-015-0607 (for school age programs) and OAR 581-015-1051 (for EI-ECSE programs).

Nevertheless, FERPA does require consent, because OMAP requires educational agencies to release educational records to OMAP to justify billing. Under the SBHS reimbursement system instituted in the fall

of 2003, education agencies must release very specific information to OMAP to receive reimbursement. This information includes the student's diagnosis, the type of professional who provided the reimbursable service and the type of service provided. All of these items are considered confidential educational information under FERPA. Parents must give permission to release this information to OMAP.

OHP Release Form. In some states, the release form that families sign when they receive Medicaid is broad enough to cover educational agencies' release of information to the Medicaid agency. The Family Policy Compliance Office has ruled that under these circumstances, the educational agency does not need to get its own consent. To satisfy FERPA requirements, the Medicaid agency consent form must: (1) be signed and dated; (2) specify the records that will be disclosed; (3) state the purpose of the disclosure; and (4) identify the parties or class of parties to whom the disclosure may be made.

In Oregon, the OHP release states:

"I allow the Department [DHS] to share the health care records of myself and anyone I apply for with other DHS agencies, and Department contractors and their providers."

ODE has reviewed this statement carefully. While the consent form clearly authorizes DHS to share information with school providers, it does not authorize the release of educational records to DHS. Therefore, under FERPA, education agencies must obtain permission to submit confidential educational information to OMAP for the purposes of Medicaid reimbursement.

Permission Duration: The release of information from the educational agency to OMAP to justify billing is governed by both FERPA and HIPAA. FERPA statutes and regulations do not specify a time period for the effectiveness of consent, and do not require that a time period be stated. Under HIPAA, the permission to disclose Personal Health Information must include a date or an event after which the permission is not in effect. HIPAA does not specify what that duration should be, but ODE found that a one year period seemed to be acceptable under HIPAA.

ODE's sample form for obtaining consent for release of information states that the consent is good for one year. The purpose of adding this statement to the form was to develop one form that was both HIPAA and FERPA compliant. If a program uses this form, then consent would be good for one year, or whatever lesser time period is stated on the form. If a district uses a different form, then the duration would be whatever is stated on that form. The Department recommends a 3-year maximum on the duration of release forms.

V. Additional Questions and Answers

Can EI/ECSE programs or billing agents "batch" names of students who were evaluated and found not eligible for EI/ECSE with eligible students to avoid linking non-directory information (disability status) with directory information?

No. The directory information exception only applies to students who are "attending" a program.

When should educational agencies get parent consent for releasing information to OMAP?

Programs need to get consent before sending records to OMAP. Programs could establish a procedure to get consent at the time parents give consent for the initial evaluation, or at an initial IEP or IFSP meeting or annual review. The Department has modified the sample consent form to ensure that it includes release for checking Medicaid eligibility along with release for billing purposes. A copy of this modified form is attached to this memo, and will be available on the Department's web site along with other sample forms.

Can parents give permission for releases that occurred before the date of the consent?

Educational agencies should get parent consent before releasing records to OMAP. In the case where permission to release educational records is needed, districts that did not obtain initial permission before providing the service may indicate the dates for which services service information will be released. These dates may be before the date that the parent grants permission as long as the parent understands what educational records will be shared. Educational agencies should never ask parents to backdate a consent form – the form should always be dated when the parent actually signs it. However, parents may authorize the previous releases. The Department acknowledges a great deal of confusion in the field over these issues. Authorization of previous releases should only be necessary for a very short transition period until educational agencies adopt practices consistent with this memorandum.

Who can give written consent for children in EI/ECSE or school-age special education programs for release of records to OMAP?

For students under age 18, consent should come from the parent or guardian.

If the student is a ward of the court, the consent should come from the surrogate parent. Consent would come from the parent or foster parent only if the parent or foster parent has been appointed as the student's surrogate parent. A DHS case worker may not be appointed as surrogate parent.

For students who are 18 or older, FERPA and IDEA rights transfer to the student, so the student would give written consent. This is also true for students younger than 18 who are married or legally emancipated. If the student has a court-appointed legal guardian that is not the state, the legal guardian would give consent. If the student does not have a legal guardian but has requested appointment of a surrogate parent, the surrogate parent would give consent.

For more information about transfer of rights, see: *Transfer of Rights*, posted at:

<http://www.ode.state.or.us/sped/spedareas/transition/pdfs/transferofrightstap22.pdf>.