

Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Sports and Student Physicals: Legal Issues

Insight — July 31, 2023

It's that time of year when many healthcare providers offer free or discounted sports or student physicals as a community service or marketing ploy. If you participate in such programs, make sure you consider the legal issues, including the following:

- Confirm that your malpractice insurance covers such services. Some states have statutes that protect practitioners when providing free medical services at such community events. (*See, e.g.*, Idaho Code § 39-7701 *et seq.*). If you are relying on such a statute, make sure that you comply with the conditions associated with—and beware the limits to—such protection. For example, these statutes usually do not protect the provider against intentional or grossly negligent conduct. Make sure your malpractice insurance covers any gap.
- If the student is an unemancipated minor, you likely need effective parental consent for the exam or treatment. Effective consent requires that you provide sufficient information concerning the risks, benefits, and scope of services to ensure the consent is truly informed.
- Ensure that the student and/or their personal representative understand the limited scope of your services. You may want to have them acknowledge in writing that you are only providing the limited services associated with the program, and that you are not undertaking to provide ongoing or follow-up care unless you expressly agree otherwise.
- Comply with the applicable standard of care. You may be judged against the services provided by a prudent healthcare provider in the regular office setting. Beware liability risks if, for example, you fail to obtain an adequate history, your exam is deficient, you fail to catch a condition, or fail to recommend appropriate follow-up care if the condition warrants it. Your malpractice insurer may have additional suggestions for ensuring the services are performed consistent with the applicable standard of care.
- Appropriately document the examination and maintain the record to facilitate necessary follow-up care and to protect yourself if there is ever a question about the care rendered. This can be tricky because persons examined or treated may not go through your normal registration process or be added to your electronic medical record. You want to have the record available if you need it in the future.
- Assume that HIPAA privacy and security rules apply to the

programs. You will likely need to provide a notice of privacy practices or joint notice, and protect patient information related to the examination. If the patient or personal representative wants you to disclose the information to the school or other third parties, you will need either a written request or HIPAA-compliant authorization to disclose the information. When in doubt, it is safer to simply give the results to the patient or personal representative and let them make any necessary disclosures.

- If the exam is conducted at a hospital or provider-based department of a hospital, EMTALA may be implicated if the exam reveals an emergency medical condition. Be prepared to follow up as necessary.
- Beware fraud and abuse concerns. Free or discounted services may trigger the federal Anti-Kickback Statute ("AKS") and Civil Monetary Penalties Law ("CMPL") or their state law equivalents if offered to induce referrals for items or services payable by government health care programs. (*See* OIG Special Advisory Bulletin: Offering Gifts and Other Inducements to Beneficiaries (August 2002), available at https://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandInducements.pdf). School physicals usually do not implicate federal payment programs and/or they may fit within the CMPL safe harbor for preventative services; however, the AKS and CMPL may be violated if the service is offered as a way to generate government program business. (*See, e.g.*, OIG Advisory Opinion 09-11). To be safe, you may want to incorporate certain safeguards, *e.g.*, make sure the free or discounted physical is not conditioned on or tied to the performance of other services payable by federal healthcare programs, and if follow-up services are needed, direct the patient to their own healthcare professional rather than your own clinic or facility. (*See id.*). For more information about the fraud and abuse issues, see my article at https://www.hollandhart.com/offering-free-screening-tests-to-patients).
- There may be third party payer concerns if you collect some fee for the service, but the services are otherwise covered by government or private insurance. Private payers, Medicare, and Medicaid usually prohibit providers from balance billing patients for services covered by insurance, *i.e.*, the provider needs to run such payments through the insurance rather than accepting cash outside the insurance contract. Such services may be subject to copay and deductible requirements. With that said, the HIPAA Omnibus Rule created a new regulation that generally prevents a provider from disclosing protected health information to an insurer if the patient pays for the episode of care and instructs provider not to disclose the information to the insurer. (45 CFR § 164.522(a)(1)(vi)). In most cases, you may collect payment directly from the insured patient if the patient or personal representative instructs that you not submit the claim to the insurer. Of course, these concerns only arise if you are charging the patient or their personal representative for the service; the payer would likely not care if there is no charge for the service.

- Your malpractice carrier may have additional guidance for participating in such programs. You may want to check with your insurer.

Bottom line: always remember that even when you are providing such services for free or on a discounted basis, you are still a healthcare professional providing services to a patient and likely owe corresponding duties. You should act accordingly and treat such exams and patients with the care that you would render in your usual practice.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.