

“FERPA, HIPAA and California Minor Consent Law: A Brief Overview”

The federal laws surrounding confidentiality and the sharing of student information and records are traditionally covered by the federal Family Educational Rights and Privacy Act (*FERPA*) and the Health Insurance Portability and Accountability Act (*HIPAA*).

FERPA

FERPA aims to: 1) Protect the privacy of student educational records, defines educational records; and 2) Allow parent access to student educational records.

Educational Record: Definition from U.S. Department of Health and Human Services & U.S. Department of Education, “Joint Guidance on the Application of the Family Education Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records”, November 2008, p.1-2

- “Education Records” is broadly defined to mean those records that are: (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution See 34 CFR; 99.3 At the elementary or secondary level, a student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are “education records” subject to FERPA. In addition records that the schools maintain on special education students, including records on services provided to students under the Individuals with Disabilities Education Act (IDEA), are “education records” under FERPA. This is because these records are (1) directly related to a student, (2) maintained by the school or party acting for the school, and (3) not excluded from the definition of “education records”.
- -FAQ:
http://familypolicy.ed.gov/sites/fpcoco.ed.gov/files/FPCO_Parents%20and%20Eligible%20Students%20FAQ.pdf

While most records held by schools and school employees will be subject to FERPA, not all records created by school employees or held at schools are absolutely covered by FERPA, although these other records may well be subject to other laws governing disclosure. Two examples of records that are not subject to FERPA include:

Records of instructional, supervisory, and administrative personnel in the sole possession of the maker and which are not accessible to any other person except a substitute, also known as “sole possession” records. Sole possession records are generally “memory jogger” notes not intended to be a record of service.

Records on students eighteen years or older made by a physician, psychologist or other recognized professional and used only in connection with the provision of medical treatment.

FERPA applies to any public or private agency or institution which is the recipient of funds administered by the Sec. of Education under any applicable program if the agency provides educational services or instruction to students, or the agency is authorized to direct and control schools. In general, FERPA also applies to agencies who are providing services through contracts with the schools.

Generally, FERPA requires written parental consent for the release of educational records of a student under 18 years of age. Among other exceptions, parental release of educational records is not necessary

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to: 1) share information with other school officials with legitimate educational interests in the information; 2) allow parents to inspect and review records; 3) report child abuse; 4) when school staff believe there is a serious and imminent threat to someone (like a possible suicide); and 5) comply with a court order. Parents are entitled to inspect and review all FERPA records, including records created by school nurses, school social workers, teachers and other school personnel.

HIPAA

In contrast, medical and mental health providers outside of the school setting are governed by Health Insurance Portability and Accountability Act (HIPAA) if they use electronic records. Independent school based clinics that do not accept public school funding and do not provide services on behalf of the school are generally covered by HIPAA, even if they are located in a public school. It is important to take into consideration how the source of funding for the services. If public school monies are being used to fund services, providers should make a careful determination of whether FERPA applies to the records. If FERPA applies to a young person's record, HIPAA does not.

The records created by independent medical and mental health providers outside the school setting are covered by HIPAA. These records are also covered by California law. In general, health care providers must protect the confidentiality of personal health information. Providers must have a signed "authorization" to share protected health information unless the disclosure of records is specifically allowed or required under HIPAA. For example, disclosure is allowed or required for child abuse reporting, reporting certain violence, or for treatment purposes.

While in general parents have the right to consent to medical services on behalf of their children, young people can consent to some types of health care and mental health care services under California law, e.g. reproductive health care, mental health care and substance abuse services. When a minor consents to mental health care, some drug treatment and sexual assault treatment, under California law, the provider is required to involve the parent unless the provider determines that involvement by the parents is not appropriate. Involving the parents does not mean providing the parents with access to treatment records.

If the minor has the right to consent to services, the authorization to release records must be signed by the minor. In all other cases, the legal representative (generally a parent or legal guardian) must sign the release. Even when the parent has the right to access the young person's medical or mental health records, a provider can refuse to release records under HIPAA when the provider determines that treating the parent as the child's personal representative is not in the child's best interest or could endanger the child. Psychotherapy notes are provided additional protections regarding release and are not part of the patient's file.

General tips for sharing information:

Medical Providers

Know what system you are working in (do not assume you are covered by HIPAA if you are working with students in schools)

Know what services are confidential

Talk with young people about why sharing information may be in their best interests

Develop protocols for sharing information with families and schools

Schools

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- Know whether services being offered to students on campus are confidential
- Develop protocols to guide “need to know” information sharing within the school setting
- Develop protocols to guide sharing information with outside providers
- Develop release forms with clear, understandable language
- Support parents as partners

Parents

- Understand that confidential services increase access to services for young people -- young people might be more willing to get help
- Even if you have a “right” to information, allowing the young person to have some control over how information is shared with you might improve outcomes
- Help your student understand his/her rights and ask for what s/he needs
- Be careful about making decisions about what a young person needs without comprehensive information

Youth

- Learn about your own health and mental health needs.
- Learn about the services available for young people in your school and in your community
- If you are worried about whether your concerns will be kept confidential -- ASK
- Remember many young people ask a trusted adult to help them connect to services
- Be your own best advocate

Cross system work

- Agree on shared goals -- what are you trying to accomplish by working together?
- Listen to the interests and concerns each partner brings to the table
- Identify what information needs to be shared
- Consult with a lawyer to develop policies and procedures, and draft release of information depending on the need for and purpose of sharing information.

For More information

HIPAA or FERPA? A Primer on School Health Information Sharing in California

Available at <https://youthlaw.org/publication/hipaa-or-ferpa-a-primer-on-school-health-information-sharing-in-california/>

Confidential Medical Release FAQ from Schools and Districts <https://www.schoolhealthcenters.org/wp-content/uploads/2016/01/NCYL-FAQ-ConfidentialMedicalRelease-2015.pdf>