



HIPAA, FERPA, and School Health:

*Confidentiality and
Information Sharing in
School-Based Health Care*

September 14th, 2023



School-Based Health Alliance

Transforming Health Care for Students

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Standards



Promotes high-quality clinical practices and standards, including for telehealth

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Supports data collection and reporting, evaluation, and research

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HIPAA or FERPA: Information Sharing and Confidentiality in School-Based Health Care

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September 2023



Who We Are

We believe in the incredible power, agency, and wisdom of youth.

For more than 50 years, the National Center for Youth Law has worked to center the voices and experiences of youth in educational, health, and social well-being opportunities, particularly youth of color, youth who identify as LGBTQ, who are disabled, are immigrants, and youth in child welfare and juvenile justice systems.



Our vision is a world in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves.

Webinar Objectives



Describe the federal privacy laws that most frequently apply to youth's health and mental health information in the setting of school-based health centers.



Analyze the intersection of federal health privacy laws, state health privacy laws, and state minor consent laws.



Explain how the relevant federal and state laws apply to information sharing among the individuals and entities involved in the delivery of health services to students in schools.

A Scenario About Information Sharing and Privacy

John is in third grade at Franklin Elementary School. He's been distracted and fidgeting in class. His teacher refers him and his family to the mental health counselor from a local nonprofit who comes to campus once a week.

The counselor learns from John's mom that an aunt recently passed away and that he's scared about losing other family members. He hasn't been sleeping well and is feeling anxious. John's teacher reaches out to the counselor to ask if there's anything she can do to help him.



Important Role of Information Sharing



Individual case management
(referral, treatment)



Insurance and payment



Evaluation of programs



Population level impacts on education and health outcomes



Targeted interventions

Important Role of Confidentiality

“ I’M NEVER GOING TO TELL MY THERAPIST ANYTHING AGAIN. EVER. ”

14-year-old following release of information to a third party

Foundations for Confidentiality

Confidentiality:

- Recognizes the unique dignity of patients as persons
- Precondition for personal autonomy
- Precondition for trust

Research demonstrates:

- Essential to securing an alliance between provider and patient.
- Influences where and when patients seek care.
- Patients are more likely to seek care in the first instance.
- Patients are more likely to communicate information fully and accurately.

All patients expect that
their personal health
information will be
kept private...

Young people and their families are no different.

Handling information about youth in a multi-system environment can feel like a tug of war



Sharing



Confidentiality

Balancing Confidentiality and Sharing



What is the scale?

Federal and State laws establish:

When, what, and to whom information **must not** be disclosed

When, what, and to whom information **must** be disclosed

When, what, and to whom information **may** be disclosed

**MUST NOT
Disclose**

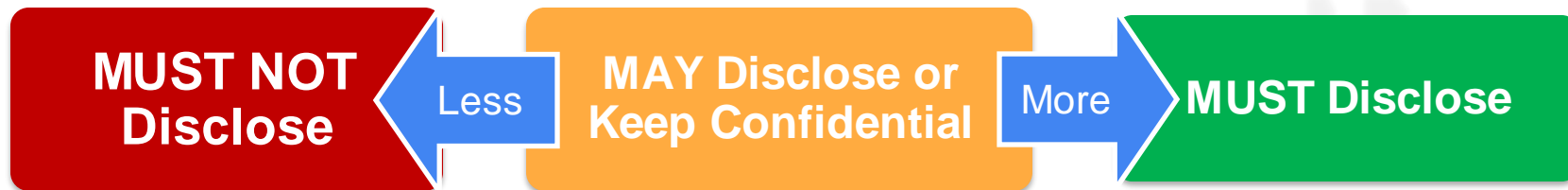
**MAY Disclose or
Keep Confidential**

MUST Disclose

Where does the balance lie?

Many factors may shape how much is and is not shared and how it is shared within parameters of the law, including:

- State and federal laws, including minor consent and funding
- Ethical and professional practice standards
- Clinical practice
- Relationships and trust
- Community norms
- Sensitivity of underlying information
- Policies, protocols, contracts, and tools



What are examples of possibly relevant laws?

Federal level:

- HIPAA Security Rule
- FERPA
- Individuals with Disabilities Education Act (IDEA)
- 42 C.F.R. Part 2 Substance Use Disorder Confidentiality Rules
- 21st Century Cures Act & Information Blocking Rule
- Title X Family Planning Program
- Federally Qualified Health Centers (FQHC)
- HIV/Ryan White

State level:


- Minor consent laws
- Medical confidentiality
- Specific care laws, including mental health, HIV, substance use
- Education codes
- State funding programs
- Professional licensing laws
- Evidentiary privileges

Interests of Parents and Adolescents

- First principles
 - Comprehensive services
 - Positive family involvement
 - Lack of supportive families
 - Laws & access to care
- Key interests
 - Parents & adolescents
 - Apparent conflict, ultimate harmony

AGENDA

1. Introduction to the laws – HIPAA, FERPA and the role of State Law
2. How do we know which law controls release of health information in school-based health services?
3. How can important information be shared consistent with the law?



Disclaimer

Information, not legal advice
Information current as of June 2023
Seek advice from your own legal counsel
about application!

Preview of Key Take Aways for Today

Privacy Laws Don't Prevent Sharing!

- Power of a release
 - Most information can be shared ...
... with a legally compliant release
- Importance of understanding
 - HIPAA, FERPA, other federal laws, state laws
 - The role of policies, protocols, contracts
 - Ethical standards

Federal and state medical confidentiality law

What is the difference between consent for health care and confidentiality?

CONSENT

Opens the door to care



CONFIDENTIALITY

What happens with the information generated about the care



Federal and State Confidentiality Laws

- Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA)
- State laws
- Other laws and regulations may apply in addition to or in lieu of the above—e.g. 42 C.F.R. Part 2 (substance use disorder programs), Family Educational Rights and Privacy Act (FERPA)



Source of health information

1. Records or other information from health care provider
2. Information housed in another agency or individual's file
3. Records or testimony from the patient



Who must comply with HIPAA?

HIPAA Rules apply to covered entities and business associates

Covered entities include:

- Health plans
- Health care clearinghouses
- Health care providers who conduct certain financial and administrative transactions electronically

Business associates include:

- Subcontractors that receive or transmit protected health information on behalf of the business associate

What information does HIPAA protect?

“Protected health information” (PHI)

Individually identifiable health information created or received by a health care provider, health plan, employer, or health care clearinghouse in any form, including oral communications as well as written or electronically transmitted information.

Is mental health information treated differently under HIPAA?

Generally no, but...

Special Protections for Psychotherapy Notes under HIPAA

With few exceptions, the Privacy Rule requires patient authorization prior to a disclosure of psychotherapy notes for any reason.

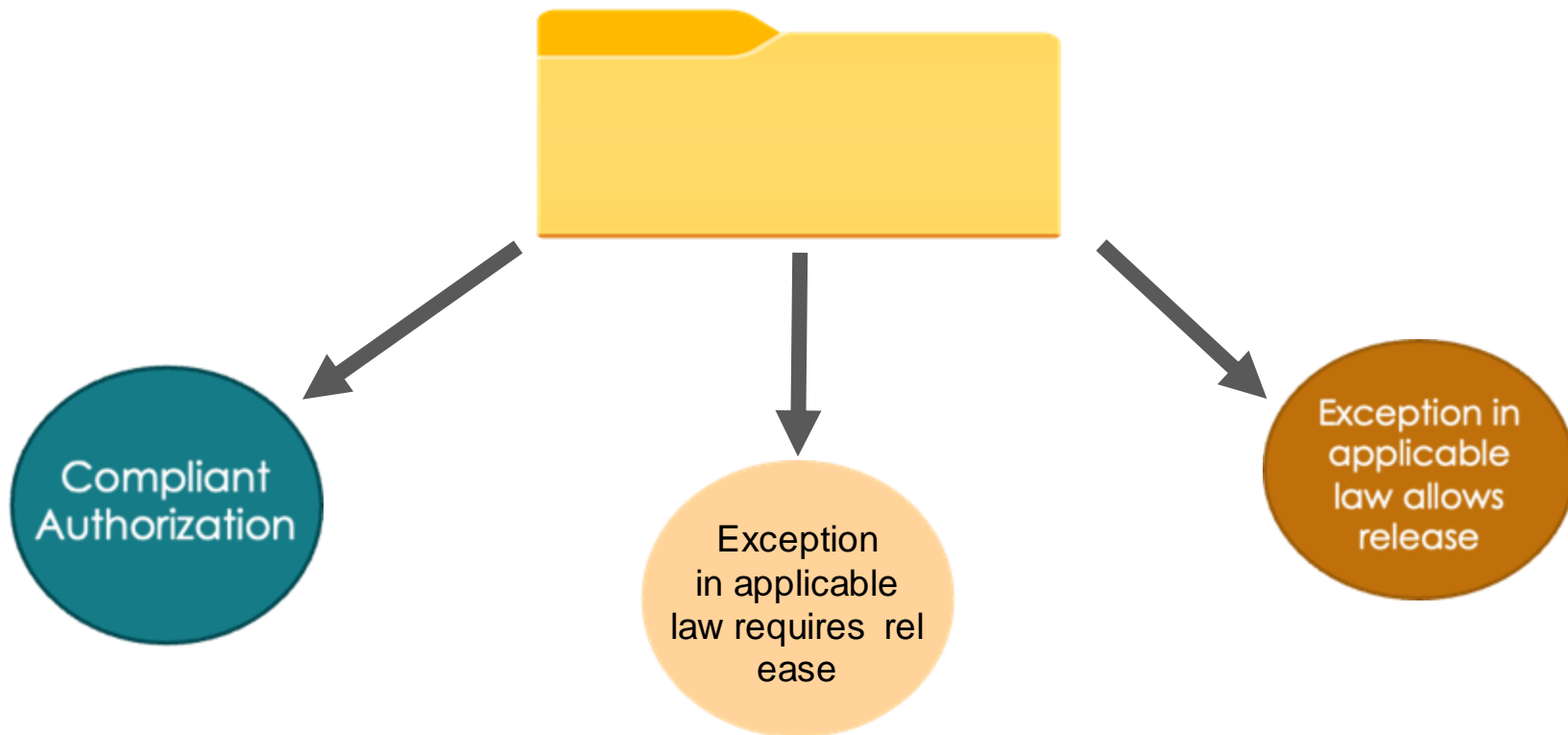
What is a psychotherapy note?

- “[N]otes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. “
- “*Psychotherapy notes* excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.”

General rule under HIPAA

- Health care providers must protect the confidentiality of protected health information.
- Providers must have a signed “**authorization**” in order to share protected health information.
- Some exceptions in HIPAA **allow** or **require** disclosure of records absent signed release.

When can protected information be shared?



What must an authorization include?



To comply with HIPAA, an authorization to release information must include specific elements, including but not limited to:

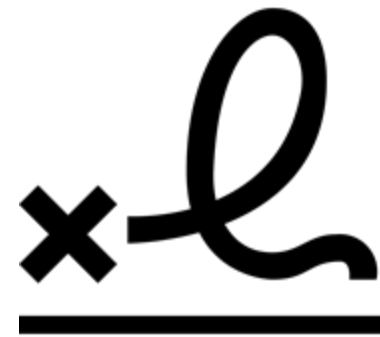
- Expiration Date or Event
- Generally no compound document
- Describes info to be disclosed in meaningful way
- Description of purpose for release
- Signature
- Required notices, including right to revoke and no conditioning of care



Always ask: Does state law require additional elements or notices?

Who signs an authorization under HIPAA?

- **Adults and emancipated minors** sign for self unless they are conserved.
- **Unemancipated minor** must sign if considered the “individual” under HIPAA
- **Parent, legal guardian, or patient’s personal representative** signs if minor is not authorized to sign on their own behalf.



When is a minor considered an individual?

Considered the “individual” under HIPAA when:

- The minor authorized to consent and has consented to the underlying healthcare, **or**
- The minor lawfully may obtain care without the consent of a parent or person acting in place of the parent, such as a legal guardian, and the minor, a court, or another person authorized by law consented for the care, **or**
- A parent, guardian, or person acting in place of a parent assents to an agreement of confidentiality.

BIG TAKE AWAY: STATE LAW MATTERS!!!!

CASE EXAMPLE: SYLVIA

Sylvia, 16, is receiving prenatal care from a community clinic whose records are subject to HIPAA. Sylvia consented to this service on her own because under her state law, minors may consent to prenatal care. The health provider suggests that it might be helpful to inform the school of her pregnancy so that she may receive appropriate accommodations.

May the health provider talk to the school based on Sylvia's verbal permission?

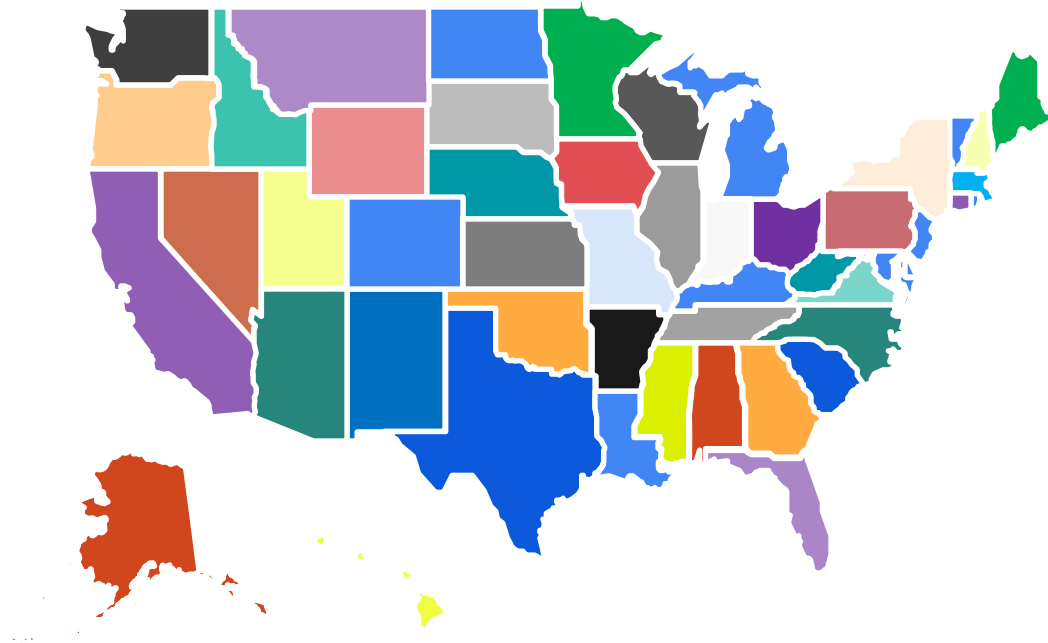
If a written "authorization" is necessary, who signs it?



What does HIPAA say about parent/guardian access to a minor's health information when the minor consented to care?

- Deference to state or other applicable law
- Four broad categories of parent access laws at the state level

Source: 45 C.F.R. § 164.502(g)(3).



BIG TAKE AWAY: STATE LAW MATTERS!!!!

1. State law grants minors control over parent/ guardian access

Example:

California law prohibits a health care provider from disclosing minor consent contraception and STI service records and information to a parent or guardian of the minor without the **express written authorization of the minor patient.**



2. State law gives providers discretion whether to share with parents/guardians

Example:

In most cases in which a minor consents for care in **Louisiana**, the physician “**may, but shall not be obligated to**, inform the ...parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the ...parent or guardian without the consent and over the express objection of the minor.”



3. State law requires providers to apply a standard to determine whether to engage parents/guardians

Example:

In **California**, when a minor consents for outpatient mental health care, the provider **must involve** the minor's parent or guardian in that care **unless**, in the opinion of the professional person who is treating or counseling the minor, the **involvement would be inappropriate**.



4. State law is silent

HIPAA says where there is no state or other law addressing parent access, a provider: “may provide or deny access ... to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment.”

Parent Access – Safety Exception under HIPAA

Even where a parent/guardian otherwise may have a right to access a minor's information under state law, HIPAA says a provider may **choose** not to disclose when:

- the provider has a reasonable belief that the minor has been or may be subject to domestic violence, abuse, or neglect by the parent, **OR**
- giving the parent/guardian the right to access the minor's medical information could endanger the minor, **AND** the provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to provide the parent with access to the minor's medical information.

Many states have similar statutes in state law as well. Talk to legal counsel about implementation.

HIPAA: Exceptions that require disclosure even absent signed release



Some exceptions to confidentiality require providers to release information. Examples include but are not limited to:

- Court order*
- When specifically required by another law
- When requested by the patient or patient's representative

BIG TAKE AWAY: STATE LAW MATTERS!!!!

*Where information may be used as evidence, evidentiary privilege also must be considered before the information can be disclosed in a court setting.

HIPAA: Exceptions that allow disclosure even absent signed release



Some exceptions to confidentiality **allow, but do not require**, providers to release information. Examples include but are not limited to:

- For treatment, payment, and healthcare operations
- To avert a serious and imminent threat
- For research

BIG TAKE AWAY: STATE LAW MATTERS!!!!

Case Example: Janice

Pediatrician whose records are subject to HIPAA assesses 14-year-old Janice. Believes Janice may have anxiety and would like to refer Janice to a therapist.

May the pediatrician make a referral to the recommended therapist and share relevant information?



Treatment Exception

HIPAA allows health records to be disclosed to another provider for treatment purposes.

HIPAA defines “treatment” for this purpose to mean “the provision, coordination, or management of healthcare and related services by one or more healthcare providers, including the coordination or management of healthcare by a healthcare provider with a third party; consultation between healthcare providers relating to a patient; or the referral of a patient for healthcare from one healthcare provider to another.”

But what does state law say?



Federal and state education confidentiality law

Federal and State Confidentiality Laws

Family Educational Rights and Privacy Act (FERPA)

Individuals with Disabilities Education Act (IDEA)

State laws



Who must comply with FERPA?

Educational agencies and institutions:

Any public or private agency or institution which is the recipient of funds administered by the federal Sec'y 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.

Also can include:

Organizations that contract with or consult with an educational agency or a person acting for such agency when they can be called a school official

What is protected?

“Education Record”

Records, files, recordings, other documents, which:

- Contain information directly related to a student; and
- Are maintained by an educational agency or institution or by a person acting for such agency or institution

Does FERPA apply to health information?

Education Record governed by FERPA may include some health information. Examples:

- Immunization records
- Sports physicals
- IEP, including testing and evaluation records

What is not an “education record”?

Education records do not include:

- Oral communications, personal impressions
- 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—aka “**sole possession**” records
- 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

See Primer for more information

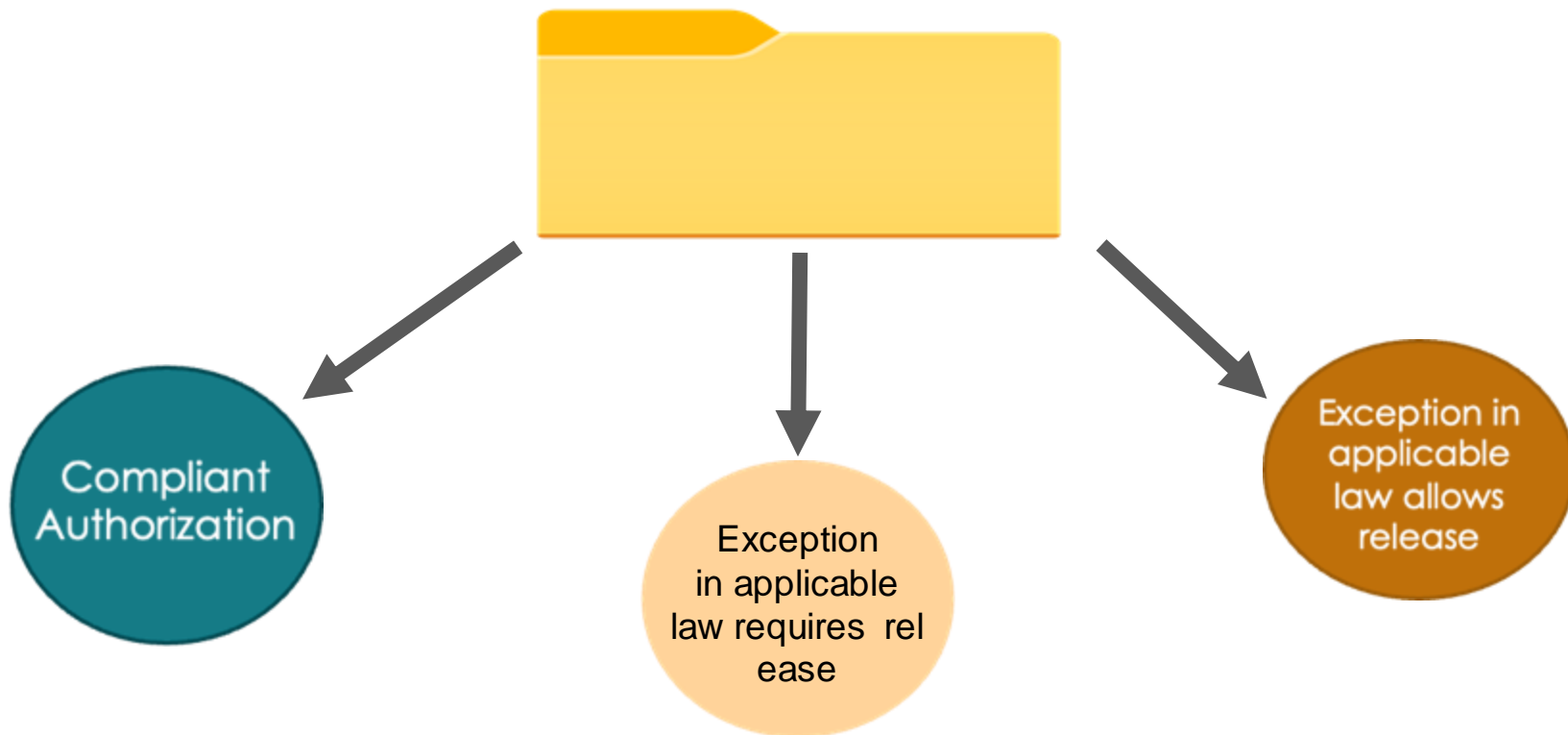
General Rule under FERPA

Generally, FERPA prohibits educational agencies from releasing any personally identifiable information (PII) in the education record without written consent.

A written consent must include certain elements to be valid.

There are some exceptions.

When can protected information be shared?



Who signs the release?

“Parent” for students under 18 years old

“Student” if student is 18 or older



Who is a parent for this purpose?

Parent “includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.”
(See definition in local education policy).

Exceptions that allow disclosure absent signed authorization



Some exceptions in FERPA allow or require education agencies to release PII without need of signed release.

Examples:

- To school officials with legitimate educational interests
- Juvenile Justice exception
- Research exception
- Child Abuse Reporting exception
- Court Order
- Others

Case Example: Shawn

Shawn has been diagnosed with diabetes by his pediatrician. His parents bring this information to the school nurse. The nurse puts a diabetes management plan in place.

- **May the school nurse share information about his diabetes with others at the school?**



Legitimate Educational Interests Exception

School officials may share PII with other school officials in the same educational agency or institution, who have “legitimate educational interests” in the information

“Legitimate educational interest” can be defined to mean simply that the “official needs to review the education record in order to fulfill his or her professional responsibility.”

Important: How is this defined in local policy?

Example: Shawn part 2

Shawn's blood sugar is very low one day, and he passes out at school.

May the school call 911? May the school nurse share Shawn's diabetes diagnosis with paramedics?



Health or Safety Exception – FERPA

Schools may disclose information to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.

“if the agency or institution determines, on a case-by-case basis, that a specific situation presents imminent danger or threat to students or other members of the community, or requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”



HIPAA, FERPA, Both or Neither?

Is it possible for health information created by a SBHC or school to be subject to FERPA and HIPAA at the same time?

NO! HIPAA explicitly states that its rules do not apply to health information held in an education record subject to FERPA.

If FERPA applies, HIPAA does not.

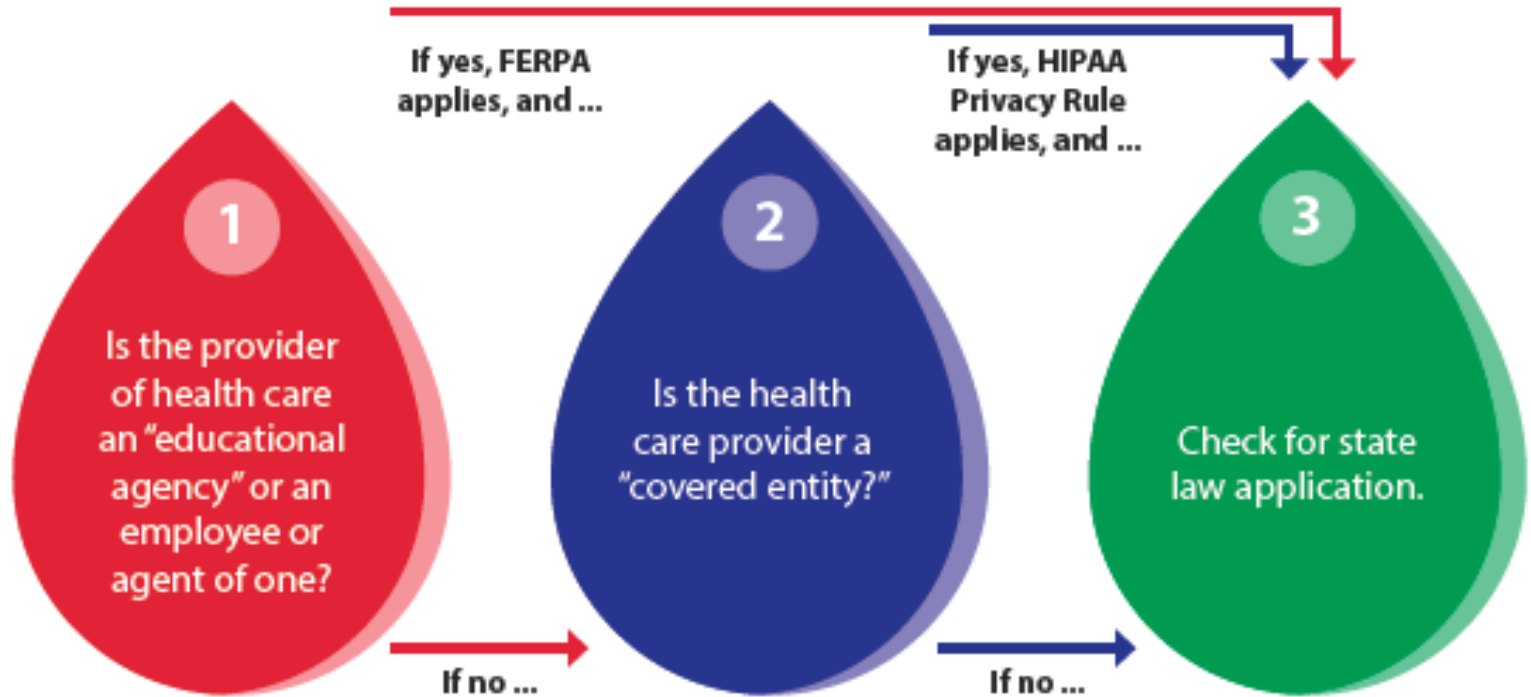
Is it possible for health information created by a SBHC to be subject to either FERPA or HIPAA and also subject to state law at the same time?

YES!

Information may be subject to:

- HIPAA and state law
- FERPA and state law
- state law

Which law(s) apply?



Is a school employed provider a “covered entity” subject to HIPAA?

Health care providers are not subject to HIPAA when they do not transmit health information in electronic form related to covered transactions.

For example, even though a school employs a nurse or physician, the school will not be a covered entity subject to HIPAA if the provider does not engage in any of the covered “transactions.”

“[E]ven though a school employs school nurses, physicians, psychologists, or other health care providers, the school is not generally a HIPAA covered entity because the providers do not engage in any of the covered transactions, such as billing a health plan electronically for their services. It is expected that most elementary and secondary schools fall into this category.”

-DOE and HHS, Joint Guidance, 2019

Why do we ask if the SBHC can be considered a “school official” first?

Because even if a health care provider is a covered entity for purposes of HIPAA, the health information they create will not be subject to the HIPAA Privacy Rule if that information is part of an education record subject to FERPA.

“If a public high school employs a health care provider that bills Medicaid electronically for services provided to a student under the IDEA, the school is a HIPAA covered entity and would be subject to the HIPAA requirements concerning transactions. However, if the school’s provider maintains health information only in what are education records under FERPA, the school is not required to comply with the HIPAA Privacy Rule. Rather, the school would have to comply with FERPA’s privacy requirements with respect to its education records.” Joint Guidance 2008

What are the implications for access and confidentiality?

Whether information is subject to HIPAA or FERPA implicates, among other things:

- Parent access
- Minor consent and confidentiality laws
- Access by other school staff or other medical providers
- When a release form may be necessary to share information between professionals
- School nurse/counselor/staff's ability to coordinate care
- Public health reporting
- Administrative obligations (notices, record storage etc)

Where can I find more guidance and examples?

Always best to speak to your own legal counsel for help with this analysis but to understand the issue more:

1. Joint Guidance issued by the federal Departments of Health and Human Services and of Education in 2008 and updated in 2019.
1. *Information Sharing and Confidentiality Protection in School-Based Health Centers: A Resource Guide to HIPAA and FERPA*, issued by the School Based Health Alliance in 2023.

And don't forget to review application of state law!

What happens if mental health records are subject to both FERPA and more protective state medical confidentiality laws?

DOE has clarified that many of the exceptions in FERPA are permissive rather than mandatory, meaning the educational institution can choose to disclose pursuant to the exception or not. In such cases, DOE states that educational institutions must take state law into account and attempt to honor both FERPA and state law:

“[M]any states have privacy laws that protect the confidentiality of medical and counseling records. FERPA's permissive exceptions to the requirement of consent do not preempt any state laws that may provide more stringent privacy protections for this information.”

This is hard. Can't we just designate an SBHC's records as subject to HIPAA or FERPA in an MOU or contract?

Not really. If all the legal factors align to make clear that FERPA (or HIPAA) applies to a set of records, this cannot be changed by contract. For example, a school can't just contract its pupil records out of FERPA.

But it can be helpful to address confidentiality in an MOU. This is why it is so important to work with legal counsel.



Case Scenarios

Example: Mental health therapist provides screenings to students at a local high school.

- Licensed therapist at a SBHC provides screenings to interested students at the high school.
- **May the school share student schedules with the therapist to help them coordinate appointments? What do you need to know in order to answer this question?**



Example: Mental health therapist provides screenings to students at a local high school.

Let's assume this is a school employed therapist whose records are subject to **FERPA**. **May the school share student schedules with the therapist to help them coordinate appointments?**

The therapist wants to consult with an outside expert, such as a provider from the local pediatric mental health care access program, to better coordinate referral and treatment. **May the therapist share individually identifiable information with an outside specialist?**



Example: Mental health therapist provides screenings to students at a local high school.

Let's assume this is a therapist whose records are subject to **HIPAA**. **May the school share student schedules with the therapist to help them coordinate appointments?**

The therapist wants to consult with an outside expert, such as a provider from the local pediatric mental health care access program, to better coordinate referral and treatment. **May the therapist share individually identifiable information with an outside specialist?**



Coming up with Confidentiality and Information Sharing Policies: Tips and Best Practices

Best Practice Principles

Autonomy

- Obtain consent for disclosures whenever possible, even if authorization is not necessary under the applicable law.
- Empower youth and their families to decide what is “sensitive”

Transparency

- Inform students and parents about confidentiality and its limits
- Explain purpose for disclosure

Trust

- Tailor disclosures narrowly
- Share fact of disclosure as soon as possible

Key Take Aways

1

Review the comprehensive guide to understand HIPAA and FERPA

2

Consult your own legal counsel to understand their application

3

Whether HIPAA, FERPA or state law, you can always share information if there is a valid written authorization to release.

4

It's about more than just the law!

Best practices grounded in an understanding of confidentiality and your community

Questions?!?

The logo consists of two white circular arcs, one above and one below the text, forming a partial circle around the words "National Center for Youth Law".

National Center for Youth Law

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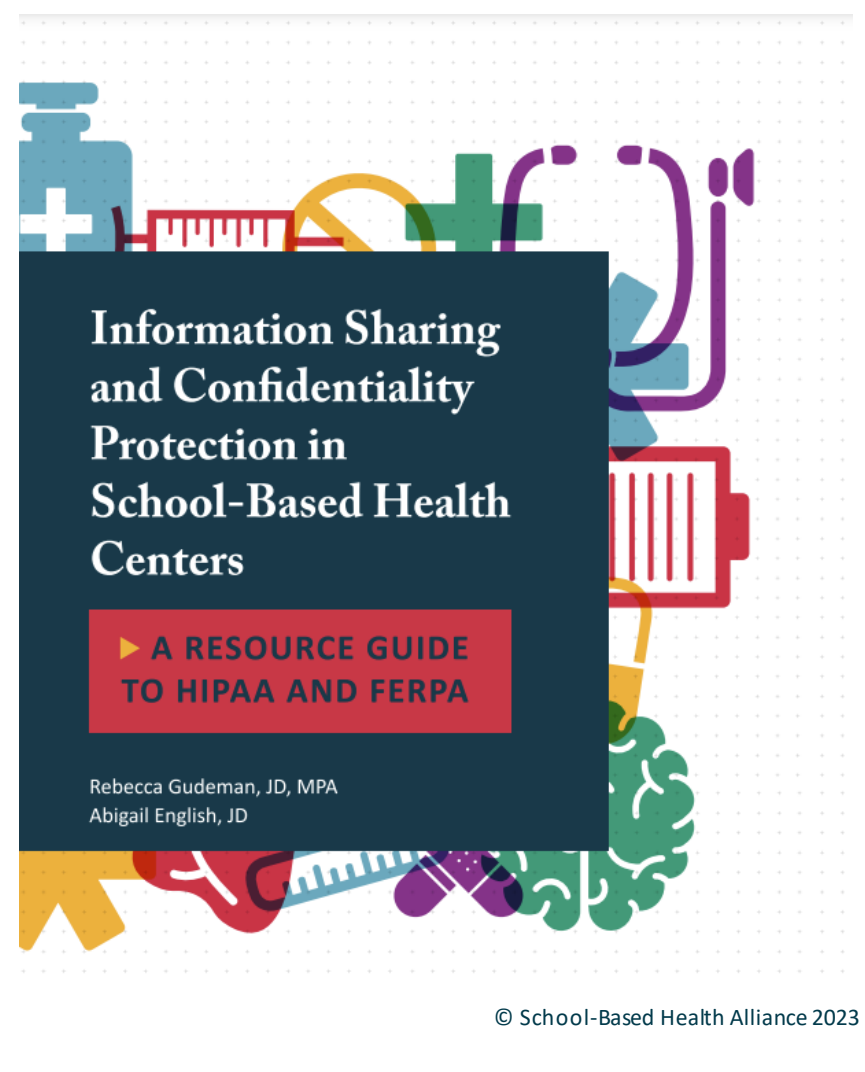
Post-Presentation Survey Poll!



HIPAA & FERPA Resources

Information Sharing and Confidentiality Protection in School-Based Health Centers: A Resource Guide to HIPAA and FERPA

<https://www.sbh4all.org/2023/06/information-sharing-and-confidentiality-protection-in-school-based-health-centers/>



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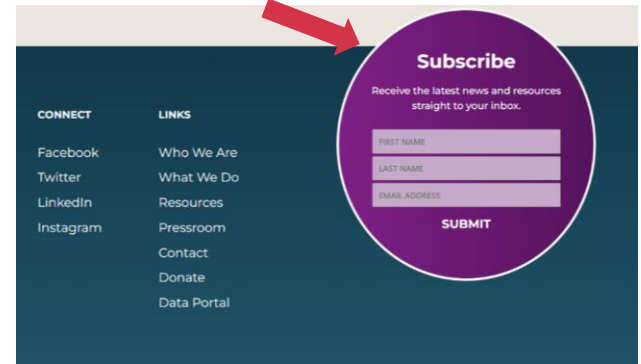
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