



Information Sharing and Confidentiality Protection in School-Based Health Centers

▶ A RESOURCE GUIDE
TO HIPAA AND FERPA

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THE SCHOOL-BASED HEALTH ALLIANCE

Since 1995, the School-Based Health Alliance, a 501(c)(3) nonprofit corporation, has supported and advocated for high-quality healthcare in schools for the nation's most vulnerable children. Working at the intersection of healthcare and education, SBHA is recognized as a leader in the field and a source of information on best practices by philanthropic, federal, state, and local partners and policymakers.

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For more than 50 years, the National Center for Youth Law, www.youthlaw.org, has worked to center the voices and experiences of youth in educational, health, and social well-being opportunities. Our policy, legal and community-based work aims to transform systems – classrooms, courts, the justice system, and health care spaces – to extend equity, dignity, and care for children and youth.

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LEGAL DISCLAIMER

This document provides information and does not provide legal advice or guidance. The guide should be used as a reference only and not as a substitute for advice from legal counsel. The information in this document is current as of March 2023, but laws change. Legal counsel should review materials to ensure they are up to date when used any time after March 2023.

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

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Introduction

Partnerships between schools and community healthcare organizations are a powerful collaboration to support healthy students in achieving their full potential. **School-Based Health Centers (SBHCs)** are an effective and equitable model for providing comprehensive, integrated healthcare in the school setting to improve student education and health outcomes.¹

Working across these two distinct and complex systems—healthcare and schools—can be challenging. A key priority identified by the **School-Based Health Alliance (SBHA)** is to guide the SBHC field on navigating federal privacy laws that apply to both education and healthcare entities: specifically the **Health Insurance Portability and Accountability Act (HIPAA)** and the **Family Educational Rights and Privacy Act (FERPA)**.

SBHA is proud to partner with the **National Center for Youth Law** to offer this resource guide on HIPAA, FERPA, and how they affect information sharing and confidentiality protection in school settings. These resources aim to support efforts to strengthen and expand partnerships between schools and SBHCs, resulting in better care and better futures for all students.

HOW TO USE THIS GUIDE

This guide is intended as a broad overview of the privacy rules under HIPAA and FERPA. Because state and other laws also influence confidentiality and information sharing, this guide cannot answer whether and when information may or may not be shared in every situation. Instead, this guide provides a starting point for general learning and sufficient information so that readers can start important conversations with their legal counsel. We advise any SBHC, education system, or healthcare organization seeking specific legal guidance in their state to contact legal counsel.

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02 Background

1. Why is it important to protect the confidentiality of students' health information?
2. What are the risks of disclosing confidential health information?
3. Why is it important to enable sharing of students' confidential health information?
4. What shapes the balance of information sharing vs. confidentiality?
5. What is the difference between consent for health care, confidentiality, and consent to release information?
6. Which federal laws may protect (or limit) the confidentiality of students' health information?
7. Which state laws may protect (or limit) the confidentiality of students' health information?

02 Background

1. Why is it important to protect the confidentiality of students' health information? Privacy is an essential part of recognizing the unique dignity of patients as persons and a precondition to personal autonomy. Among numerous reasons to protect confidentiality for the healthcare communications and health information of young people (children and adolescents up to age 18 as well as young adults ages 18 or older), one of the most compelling is to encourage young people and their families to seek necessary care on a timely basis and to provide a candid and complete health history when they do so. The overarching goals of confidentiality protection include promoting the health of individual young people and public health. A key element of reaching these goals is ensuring that young people receive needed healthcare services. These factors help form the underlying rationale for federal and state confidentiality laws.

2. What are the risks of disclosing confidential health information? When students' confidential healthcare information is disclosed without their agreement or knowledge, it can lead them and their families not to trust healthcare providers. Decades of research have demonstrated that privacy concerns influence the use of healthcare by young people and their families in many ways.^{2 3 4 5 6 7 8 9}

RESEARCH FINDINGS ABOUT PRIVACY CONCERNS—PRIVACY CONCERNS AFFECT BEHAVIOR AND INFLUENCE

- Whether young people and families seek care
- When young people and families seek care
- Where young people and families seek care
- How openly young people and families talk with healthcare providers



RATIONALE FOR CONFIDENTIALITY PROTECTION

- Protect health of youth and young adults
- Protect public health
- Promote positive health behaviors and outcomes
- Avoid negative health outcomes
- Encourage young people and families to seek needed care
- Increase open communication with healthcare providers

3. Why is it important to enable sharing of students' confidential health information? Sharing a student's health information can be an important means of protecting their health and avoiding potential harm. Sharing can also help to protect the health and safety of others in the school and community and is sometimes necessary for basic healthcare operations. For these reasons, federal and state confidentiality laws allow sharing of information and records, almost always with the permission or release of the young person, the parent, or another authorized person, sometimes without explicit permission or authorization when specific legal exceptions apply.

BALANCING PRIVACY PROTECTION AND SHARING

- Consent laws
- Federal and state confidentiality laws
- Ethical principles
- Licensing requirements
- Contracts
- Best practices and policies of agency

4. What shapes the balance of information sharing vs. confidentiality? Multiple sources of law, ethics, and policy determine the balance between maintaining the confidentiality of health information and sharing it. Understanding each of these and how they intersect is essential.

CONSENT FOR CARE vs CONSENT TO RELEASE INFORMATION

CONSENT FOR CARE

Granting permission to engage in health service



CONFIDENTIALITY ATTACHES TO THE INFORMATION

Services are delivered and information is protected



"CONSENT" TO RELEASE INFORMATION

Granting permission to release otherwise protected information



5. What is the difference between consent for health care, confidentiality, and consent to release information? Although “consent and confidentiality” are often assumed to go hand in hand or to be identical, they refer to distinct legal concepts; even “consent” refers to different legal requirements. **Consent for care means granting permission to a provider to engage in a health test, exam, or service.** A healthcare provider generally must obtain consent before providing care.

Adults (18 years or older) typically consent to their own healthcare. Federal and state laws and court decisions help establish which individuals have the legal authority to provide consent on behalf of minors (young people under 18 years old), sometimes including minors themselves. (See page 30 for more on minor consent laws.)

Once a provider delivers health services, information about the care is confidential. Confidentiality laws control the release of this information. **Confidentiality laws sometimes require consent to release healthcare information** and specify which individuals may or must sign that authorization in a process distinct from obtaining consent for the care. Often, the person with authority to consent for care is the same person with authority to sign for the release of information—but not always.

6. Which federal laws may protect students’ health information? (or limit) the confidentiality of students’ health information? Many federal laws affect the confidentiality of students’ health information, either protecting it from disclosure or requiring it to be shared. The two laws that this document focuses on are the privacy regulations under the **Health Insurance Portability and Accountability Act (the HIPAA Privacy Rule)** and the **Family Educational Rights and Privacy Act (FERPA)**. Numerous other laws are important and may be relevant in specific situations, but a detailed discussion of them is beyond the scope of this resource guide.



FEDERAL HEALTH PRIVACY AND CONFIDENTIALITY LAWS

- HIPAA Privacy Rule
- 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

7. Which state laws may protect (or limit) the confidentiality of students' health information? Many state laws also affect the confidentiality of students' health information, either protecting it from disclosure or requiring it to be shared. These include general state medical confidentiality laws and confidentiality laws that protect information related to services for specific health concerns, such as mental health, substance use, sexually transmitted infection, and HIV; state minor consent laws; state education codes; state funding program requirements; and state insurance laws. This document will not include a complete discussion of these laws but will explain how they are relevant in the interpretation and application of HIPAA and FERPA, including when they supersede state law.

03 HIPAA Basics

1. HIPAA—What is it and when does it apply?
2. Who must comply with HIPAA?
3. What information does HIPAA protect?
4. What does it mean when the HIPAA Privacy Rule applies?
5. Who must sign an authorization to release information under HIPAA?
6. When do unemancipated minors sign their own authorizations under HIPAA?
7. When can a parent access the protected health information of their unemancipated minor child?
8. When is a parent limited from accessing the protected health information of their unemancipated minor child?
9. When can PHI be shared without an authorization or release?
10. How do HIPAA and state laws work together?

Helpful Resources about HIPAA from the U.S. Department of Health and Human Services (HHS)

03 HIPAA Basics

1. HIPAA - What is it and when does it apply? The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule is a federal law that protects the privacy of patient health information held by “covered entities.”¹⁰ HIPAA also has Security, Transactions, and Enforcement Rules, as well as identifiers requirements. This FAQ focuses on the HIPAA Privacy Rule, which will be referred to as HIPAA unless explicitly stated otherwise.

2. Who must comply with HIPAA? Healthcare providers who “transmit health information in electronic form” are “covered entities” and must comply with HIPAA.¹¹ “Healthcare providers” include individual providers such as physicians, nurses, clinical social workers, and other medical and mental health practitioners, as well as hospitals, clinics, and other organizations.¹² **However, healthcare providers are subject to HIPAA only if they electronically transmit health information regarding certain health transactions.** Many covered entities work with other organizations and individuals to provide healthcare. Examples include attorneys, data processors, and accountants. These individuals may be considered “business associates.” When covered entities share protected health information with business associates, they must receive assurances that the business associates will comply with HIPAA.

Protected health information (PHI) includes individually identifiable health information created or received by a healthcare provider, health plan, employer, or health care clearinghouse in any form, including oral communications as well as written or electronically transmitted information.

3. What information does HIPAA protect? The HIPAA Privacy Rule limits covered healthcare providers from disclosing what HIPAA calls “protected health information” (PHI).¹³ The definition of “**protected health information**” is broad, as shown in the sidebar.¹⁴ PHI includes both health and mental health information but has special provisions for “psychotherapy notes.” HIPAA does not limit the disclosure of health information that is not individually identifiable, also known as “de-identified information.”¹⁵



Must a school-employed provider who is a “covered entity” comply with HIPAA?

Not where FERPA applies—if FERPA applies, HIPAA does not.

Even if a healthcare 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.

FOR EXAMPLE if a school-employed therapist bills Medicaid for services provided under the IDEA using an electronic billing system, the school is a HIPAA-covered entity subject to other parts of HIPAA. However, if the school’s provider maintains health information in “education records” subject to FERPA, the school is not required to comply with the HIPAA Privacy Rule, but with FERPA in terms of access and protection.



PHI also does not include information subject to FERPA. HIPAA explicitly states that health information in an education record subject to FERPA is not “protected health information.”¹⁶ In other words, **if FERPA applies, HIPAA does not**, even if the school provider otherwise qualifies as a covered entity under HIPAA. There may be situations in which a school-employed healthcare provider is considered a “covered entity” for HIPAA purposes, but the HIPAA privacy rule does not apply to the records they create because those records are part of the education records and therefore subject to FERPA.

4. What does it mean when the HIPAA Privacy Rule applies? Generally, healthcare providers cannot disclose information protected by HIPAA without a signed authorization.¹⁷ An authorization form must include specific elements and notices to be valid under HIPAA.¹⁸ The resources section on page 17 has information on what a compliant authorization must include. HIPAA also defines who must sign the authorization.¹⁹ There also are some exceptions to this general rule.

5. Who must sign an authorization to release information under HIPAA? HIPAA allows sharing of PHI when there is an authorization, or release, signed by someone legally authorized to do so. Usually, patients sign on their own behalf when they are age 18 years or older, or an emancipated minor, and typically, for an unemancipated minor, a parent, guardian, or other person with authority under the law to make health decisions for the minor (the patient’s personal representative) must sign authorizations to release the minor’s information.²⁰ However, an unemancipated minor must sign the authorization when they are considered the “individual” as described on page 15 on the right side bar.²¹ Thus, who signs will depend in part on what federal, state, and other laws say about when minors may consent to their own care.

6. When do unemancipated minors sign their own authorizations under HIPAA? HIPAA treats minors as “individuals” with rights related to their own PHI in three situations as described in the side bar on page 15.²² When a minor is an “individual” under HIPAA, HIPAA grants them most of the same rights as adult individuals, such as the right to sign authorizations to release their own PHI. In these situations, their parent or guardian does not necessarily have such rights. Thus, federal and state laws allowing minors to consent for their own care are critical in determining when minors may sign their own authorizations (see page 33 below).

Q Must a school employed provider comply with HIPAA?

Not if they are not “covered entities.”

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,” such as billing a health plan electronically for their services.

A

7 • When can a parent access the protected health information of their unemancipated minor child? When they consented for the minor’s care, a parent, guardian, or other person with legal authority to make health decisions for an unemancipated minor generally has a right to access the minor child’s protected health information.²³ However, even in such cases, **a provider may choose not to disclose** in cases where the provider reasonably believes the minor has been subjected to abuse or that the minor could be endangered by disclosure and the provider concludes that disclosure to the parent is not in the minor’s best interest.²⁴

Where a minor is considered to be “the individual” under HIPAA, either because they have authority to consent to their own care under state or other law or meet one of the other criteria, their parents’ access to their PHI will depend in part on what federal, state, and other laws say.²⁵

MINOR CONSIDERED THE “INDIVIDUAL” UNDER HIPAA WHEN

- The minor consented to the underlying healthcare,
- 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



8. When is a parent limited from accessing the protected health information of their unemancipated minor child? In two situations, a parent may be limited from accessing the protected health information of their unemancipated minor child. First, where a minor has authority to consent to their own care under federal, state, or other law, or parents have agreed to confidentiality, and the minor is considered “the individual” under HIPAA, parent access will depend in part on what state and other laws say. For example, certain information, such as records related to substance use disorder treatment or Title X family planning services, may be subject to federal confidentiality laws that prohibit disclosure to parents without the minor patient’s consent.²⁶

Second, even where a parent otherwise may have a right to access information, 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 the right to access to 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.²⁷

PARENT ACCESS TO MINOR’S PHI MAY BE LIMITED WHEN

- Minor has rights as “the individual” under HIPAA
- In situations involving domestic violence, abuse, neglect, or endangerment

EXAMPLES OF HIPAA EXCEPTIONS THAT ALLOW OR REQUIRE SHARING WITHOUT A RELEASE

- For treatment, payment, and healthcare operations
- To avert a serious and imminent threat
- For research
- To public health authorities as required by law
- To report child abuse as required by law

9. Can PHI be shared without an authorization or release? HIPAA allows, and sometimes requires, healthcare providers to share health and mental health information without need of a signed release. For example, disclosure without an authorization is allowed for “treatment, payment, and healthcare operations.”²⁸ HIPAA defines these terms and with whom the information may be shared under this exception; however, state laws may further define and sometimes limit application of this HIPAA exception. It is important to consult legal counsel to understand how this exception applies in your state. Additional examples of important exceptions in HIPAA are in the sidebar. These also may require or allow disclosure without an authorization, if the conditions specified by HIPAA are met and if state law does not limit their application.^{29 30 31 32} Examples of how such exceptions might apply in practice can be found in Section 04 on page 21.

10. How do HIPAA and state laws work together? HIPAA and state laws intersect in several ways. First, HIPAA grants rights to sign authorizations and to access a minor's PHI based in part on who is authorized to make healthcare decisions for the minor. State law usually determines who has those rights to consent for care. Similarly, parent access to records when the parent did not consent for the minor's care will depend in part on state law. Second, states often have laws that protect the confidentiality of health and mental health information, which may be more protective than HIPAA. When state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law.³³ For example, HIPAA allows release of PHI without an authorization for treatment purposes. In several states, applicable state confidentiality laws also authorize providers to disclose protected health information for treatment purposes without an authorization, but limit with whom that information may be shared under the exception. In these states, providers must follow the more protective state law.



When state law provides greater confidentiality protections than HIPAA, providers usually must follow state law.

HELPFUL RESOURCES ABOUT HIPAA FROM THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

Covered Entity Decision Tool

<https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf>

Transactions Overview

<https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Transactions/TransactionsOverview>

Business Associates

<https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/-business-associates/index.html>

HIPAA Privacy Rule and Sharing Information Related to Mental Health

<https://www.hhs.gov/sites/default/files/hipaa-privacy-rule-and-sharing-info-related-to-mental-health.pdf>

Permitted Uses and Disclosures: Exchange for Treatment

https://www.hhs.gov/sites/default/files/exchange_treatment.pdf

RESOURCES FROM OTHER SOURCES

45 C.F.R. section 164.508

(Describing the core elements and other requirements for authorization forms to be valid)
<https://www.law.cornell.edu/cfr/-text/45/164.508>

Valid HIPAA Authorizations: A checklist

(from Holland & Hart)
<https://www.hollandhart.com/valid-hipaa-authorizations-a-checklist>

04 FERPA Basics

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8. When does FERPA allow sharing of education records without a release?
9. How do FERPA and state laws work together?

Helpful Resources about FERPA from the Department of Education (DOE)

04 FERPA Basics

1. FERPA—What is it and when does it apply? The Family Educational Rights and Privacy Act (FERPA) protects the privacy of students’ personal records held by “educational agencies or institutions” that receive federal funds under programs “administered by the U.S. Secretary of Education.”³⁴ FERPA also assures access to educational records by a student’s parents or by a student 18 years or older.

2. Who must comply with FERPA? Educational agencies and school officials are required to follow FERPA. Organizations and individuals that contract with, or volunteer or consult for, an educational agency also may need to follow FERPA if certain conditions are met and they can be considered a “school official.”³⁵

“Educational agencies or institutions” are defined as institutions that receive federal funds under programs administered by the U.S. Department of Education (DOE) and that either provide direct instruction or educational services to students, such as schools; or are educational agencies that direct or control schools, including school districts and state education departments.³⁶

The term “school official” includes school staff, such as teachers, counselors, and school nurses. It also can include a “board member, trustee, registrar, ... attorney, accountant, human resources professional ... and support or clerical personnel.”³⁷ A school or district may define this term even more broadly in its school policies so that it also includes outside consultants, contractors, or volunteers to whom a school has outsourced a school function if certain conditions are met.³⁸

3. What information does FERPA protect? FERPA controls disclosure of information maintained in the “education record.” “Education records” are defined as records, files, documents, or other recorded materials that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or

institution.³⁹ “Information directly related to a student” means any information “that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community ... to identify the student with reasonable certainty.”⁴⁰ Education records may include health information.

FERPA does not apply to all information at a school. For example, communications that are not recorded in any form, such as personal knowledge or the contents of a conversation between a teacher and student in a hallway that is not recorded, are not part of the education record and are not subject to FERPA.

There also are several types of records that are exempt from FERPA. For purposes of school healthcare, the most relevant exemptions include:

- Records that are kept in the “sole possession” of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record,
- Treatment records of a student 18 years and older when used only in connection with treatment and not made available to anyone other than those providing treatment, and
- Law enforcement unit records.⁴¹

Education Record:
Records, files, documents, or other recorded materials that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution.

4. Does FERPA treat health or mental health information differently than other information in an education file?

Student health records maintained by a school or school employee, such as treatment records, Individualized Education Plan (IEP) assessments, or immunization documents, are part of the education file.⁴² FERPA does not treat health and mental health records in a minor's education file differently than it does any other information in the file, such as grades or attendance information.⁴³ Information related to services provided as part of the Individuals with Disabilities Education Act (IDEA) additionally is subject to the confidentiality protections in the IDEA.⁴⁴

5. What does it mean when FERPA applies?

Generally, FERPA prohibits educational agencies from releasing any "personally identifiable information"⁴⁵ in the education record unless they have written permission for the release.⁴⁶ Releases must include specific elements to be valid. There are exceptions that allow disclosure without a release in some cases.

6. Who must sign a release of records under FERPA?

In most cases, a "parent" must sign that release. FERPA defines parent broadly for this purpose to include a parent, guardian, or "person acting in the role of parent."⁴⁷ FERPA does not define what it means to be a "person acting in the role of a parent" for this purpose; however, state law or local educational agency policy may. When students are 18 years or older, they must sign their own release forms.⁴⁸

7. What are the rights of parents and students to education records under FERPA?

Parents of a student under age 18 may access their child's education record.⁴⁹ FERPA defines "parent" to include a parent, guardian, or person acting in the role of parent.⁵⁰ The only exception is if a court order explicitly limits a parent's right to access the record. "Eligible students"—those 18 or older—have access to their

Personally Identifiable Information (PII): Identifiable information maintained in an education record, including direct identifiers, such as a student's name, as well as indirect identifiers, such as date of birth or other information that can be used to trace an individual's identity through linkage to other information.

own education records. Parents' access to the records of an eligible student are restricted and may require the agreement of the eligible student. However, it is important to note that, under FERPA, parents may have access to the education records of eligible students when they are claimed as dependents on the parents' most recent tax returns.⁵¹ See the resource entitled "A Parent Guide to FERPA," on page 21, for more on eligible students.

8. When does FERPA allow sharing of education records without a release?

FERPA contains exceptions that allow agencies and schools to disclose information absent a written release in some circumstances. For example, schools may share "directory information"⁵² about students with the public generally if the school and district have given public notice to parents about the types of information the school and district consider directory information, the parents' right to refuse directory disclosures, and how long parents have to inform the school or district about their intent to opt out.⁵³ Typically, directory information includes name, address, and date of birth. It does not include grades or attendance records. Additional exceptions also exist.⁵⁴ Some of them are described in more detail in Section 05 on page 22 and in the resources on page 21. Certain policies must be in place at the district level to implement many of these exceptions.

9. How do FERPA and state laws work together? States may also have laws that protect the confidentiality of education, as well as medical and mental health information. Whenever possible, educational agencies must comply with both FERPA and state law, even where state law may provide greater protection. To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. However, if an educational agency believes there is an actual conflict between obligations under state law and its ability to comply with FERPA, the educational agency must notify the DOE's Family Policy Compliance Office.⁵⁵

FERPA does not treat health records in a minor's education file differently than it does any other information in the file, such as grades or attendance information.

EXAMPLES OF FERPA EXCEPTIONS THAT ALLOW SHARING WITHOUT A RELEASE

- To "school officials" with "legitimate educational interests" in the information
- To avert imminent danger to health or safety
- For research
- To report child abuse as required by law

HELPFUL RESOURCES ABOUT FERPA FROM THE DEPARTMENT OF EDUCATION (DOE)

FAQs about FERPA

<https://studentprivacy.ed.gov/frequently-asked-questions>

Model Forms and Annual Notices

<https://studentprivacy.ed.gov/annual-notices>

A Parent Guide to the Family Educational Rights and Privacy Act (FERPA)

[https://studentprivacy.ed.gov/sites/default/files/resource_document/file/A parent guide to ferpa_508.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/A%20parent%20guide%20to%20ferpa_508.pdf)

FERPA Exceptions-Summary

[https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA Exceptions_HANDOUT_portrait_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20Exceptions_HANDOUT_portrait_0.pdf)

When is it Permissible to Use FERPA's Health or Safety Emergency Exception for Disclosures?

<https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures>

Who is a "school official" under FERPA?

<https://studentprivacy.ed.gov/faq/who-%E2%80%99school-official%E2%80%9D-under-ferpa>

Defining "Legitimate Educational Interests"

https://nces.ed.gov/pubs2004/privacy/section_4b.asp

05 HIPAA, FERPA, and/or State Law: Confidentiality and Sharing in School Health Settings

A. Which one applies and how do they work together?

1. How do HIPAA, FERPA, and state laws intersect?
2. Are the records of a healthcare provider on a school campus subject to FERPA or HIPAA?
3. Are records from healthcare services provided on a school campus always subject to FERPA?
4. When are records from healthcare services provided on a school campus subject to FERPA?

B. Communication Between Healthcare Providers Who Are School Employees, Agents, or Officials and Those Who Are Not

1. Does HIPAA allow a healthcare provider or SBHC whose information is subject to the HIPAA Privacy Rule to disclose protected health information to a school-employed healthcare provider?
2. Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to an SBHC that is not a school employee or official?

C. Communication between SBHCs that qualify as “School Officials” and Schools

1. Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to an SBHC acting as a “school official”?
2. May an SBHC acting as a “school official” prohibit school personnel from accessing SBHC health records unless they have a release?

Helpful Resources on HIPAA, FERPA and School Health from HHS and DOE

05 HIPAA, FERPA, and/or State Law: Confidentiality and Sharing in School Health Settings

A. Which one applies and how do they work together?

1. How do HIPAA, FERPA, and state laws intersect? Some general rules of construction help with understanding how HIPAA, FERPA, and state laws intersect. For example, FERPA and the HIPAA Privacy Rule can never apply at the same time because HIPAA excludes education records from the definition of PHI. However, both HIPAA and state laws can apply at the same time. Also, FERPA and state law may apply at the same time. In the latter two situations, it is important to understand which law is more protective, which law is permissive, and which law takes precedence. There may be situations in which neither HIPAA nor FERPA apply

HOW HIPAA, FERPA, AND STATE LAWS INTERSECT

- If FERPA applies, HIPAA does not.
- FERPA and state law can apply at the same time. FERPA generally preempts, but where FERPA is permissive and it is possible to comply with both FERPA and state law, follow more protective law.
- HIPAA and state law can apply at the same time. HIPAA defers to more protective state laws.
- State law can apply where neither HIPAA nor FERPA apply.

2. Are the records of a healthcare provider on a school campus subject to FERPA or HIPAA? How do you know whether HIPAA, FERPA, and/or state laws apply?

Ask the following three questions:

1 Is the provider of health care an “educational agency,” an employee or agent of one, or a “school official”?

- If **YES**, then FERPA applies. Go to question 3.
- If **NOT**, go to the next question.

2 Is the healthcare provider a “covered entity?”

- If **YES**, then the HIPAA Privacy Rule applies.
- If either **YES** or **NO**, go to the next question.

3 Do state laws apply?

- Whether FERPA applies, HIPAA applies, or neither, it is still possible for state confidentiality laws to apply.

3. Are records from healthcare services provided on a school campus always subject to FERPA? No. Health records are subject to FERPA if they are part of an education record. This will not always be the case. HHS and DOE issued Joint Guidance in 2008 and 2019, addressing questions about the application of HIPAA and FERPA in school settings. The 2008 Joint Guidance provides this explanation: *“Some outside parties provide services directly to students and are not employed by or otherwise acting on behalf of the school. In these circumstances, the records created are not ‘education records’ subject to FERPA, even if the services are provided on school grounds, because the party creating and maintaining the records is not acting on behalf of the school.”*⁵⁶ In the 2019 Joint Guidance provides this example: *“The records created and maintained by a public health nurse who provides immunizations to students on a FERPA-covered elementary or secondary school’s grounds, but who is not acting for the school, would not qualify as ‘education records’ under FERPA.”*⁵⁷

4. When are records from healthcare services provided on a school campus subject to FERPA? Health records are subject to FERPA if they are part of an education record. They become part of an education record if the person or agency that created the record is an education institution or the employee or agent or contractor of one and can be considered a school official.

A contractor, consultant, or volunteer could be considered a “school official” whose records would be subject to the use and disclosure requirements of FERPA if the contractor, consultant, or volunteer:

- Performs an institutional service or function for which the agency or institution would otherwise use employees;
- Is under the direct control of the agency or institution with respect to the use and maintenance of education records;

- Is subject to the requirements of FERPA governing the use and redisclosure of personally identifiable information from education records; and
- Meets the criteria for being a school official with a legitimate educational interest in the records as specified in the school or local educational agency (LEA)’s annual notification.⁵⁸

The existence of a contract between an educational agency and a healthcare provider on its own is not determinative.⁵⁹ The above criteria must be demonstrated as well. DOE provides case examples that suggest factors that these agencies would look at to determine whether a provider of care meets the above criteria and could be considered a school official. These factors include administrative and operational control as well as financing.⁶⁰

If FERPA does not apply, the healthcare provider should evaluate whether HIPAA does. HIPAA applies if the healthcare provider can be considered a “covered entity.” The 2008 and 2019 Joint Guidance addressed questions about the application of HIPAA and FERPA in school settings. The 2019 Joint Guidance includes this reminder:

“HIPAA would apply to student records maintained by a healthcare provider that are not subject to FERPA only if the provider transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, e.g., healthcare claims, and the records contain PHI.”⁶¹

B. Communication between Healthcare Providers who are School Employees, Agents, or Officials and those Who are Not

1. Does HIPAA allow a healthcare provider or SBHC whose information is subject to the HIPAA Privacy Rule to disclose protected health information to a school-employed healthcare provider?

CASE SCENARIOS

Does HIPAA allow information to be released in these cases?

- Primary care physician wants to share medication treatment plan with the school nurse.
- School-based health center operating under HIPAA wants to refer a patient to the school counselor.
- County health agency with a satellite clinic on the school campus wants to share immunization records with the school.

In most of the above examples, the answer is probably yes, the healthcare provider may disclose individually identifiable health information to the school-employed healthcare provider, but it is important to look at the specific facts and also look at whether this disclosure would be allowed under applicable state law. The information always may be disclosed if a written authorization compliant with HIPAA (and any applicable federal and state law) is in place. If no authorization is in place, the answer in each of the above scenarios may depend on whether or not an exception in HIPAA and applicable state law allows or requires the release. Examples of several such exceptions are described below. It is important to remember that even if the disclosure is allowed under HIPAA, it also must be allowed under any applicable state law before it can be shared.

Protected health information subject to HIPAA always may be disclosed if a written authorization compliant with HIPAA (and any applicable federal and state law) is in place. If no authorization is in place, HIPAA also permits healthcare providers to disclose protected health information with certain exceptions. For example, HIPAA allows providers to disclose information to other healthcare providers

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.”⁶² The DOE and HHS provide this example of the HIPAA treatment exception in application:

*“[A] student’s primary care physician may discuss the student’s medication and other healthcare needs with a school nurse who will administer the student’s medication and provide care to the student while the student is at school.”*⁶³

It is important to make sure that such a disclosure also complies with any applicable state or other law. Some state or other laws are more restrictive and will not allow disclosures for treatment purposes without a release or will narrow when this exception can be used. For example, federal regulations protecting some substance use treatment records (42 CFR Part 2) are much more



restrictive and would greatly limit what could be shared without a written release.

Providers whose records are subject to HIPAA also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain emergencies using the HIPAA emergency exception. Under this exception, according to HHS guidance, “healthcare providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider’s standards of ethical conduct.”⁶⁴ (emphasis added).

The Joint Guidance from 2019 provides this example of the emergency exception in practice:

*“A parent tells their child’s therapist they are worried because the child threatened to kill a teacher and has access to a weapon. HIPAA permits the therapist to contact school officials if, based on a credible representation by the parent, the therapist believes the disclosure to school officials is necessary to prevent or lessen a serious and imminent threat to the teacher.”*⁶⁵

It is important to talk to legal counsel about possible application of state and other confidentiality laws before relying on the above examples, as other laws may be more protective and limit such disclosure. Further, some states have laws that specifically limit disclosure of health information, or certain types of health information, to schools.

It also is important to note that once disclosed to the school or school-employed healthcare provider, if the information is placed in the education record, FERPA, not HIPAA, likely will apply when determining access to the information in the file.⁶⁶

2. Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to an SBHC that is not a school employee or official?

CASE SCENARIOS

Does FERPA allow information to be released in these cases?

- Care coordinator working for SBHC, not a school official, asks for online access to students' school schedules to coordinate appointments.
- Clinical provider from the SBHC wants to sit in on a school attendance meeting where school staff will discuss the student's absence history and its impact on grades.
- A student is suicidal, and teacher wants to refer to the SBHC to protect the health and safety of the student.

The answer in the above case scenarios depends on whether there is a FERPA-compliant written authorization in place or one of the limited exceptions to FERPA otherwise allow the disclosure. Examples of several such exceptions are described below. It is important to remember that even if the disclosure is allowed under FERPA, it also must be allowed under any applicable state law before the information can be shared.

The information may always be disclosed pursuant to a FERPA-compliant written authorization. If there is no authorization in place, information from the education record can only be disclosed following an exception in FERPA, and these are very limited situations. For example, the school could provide the healthcare provider with access to directory information. What that would include will depend on how directory information has been defined by that school district in its annual notice to parents and whether parents have opted out of directory information disclosures. Typically, directory information includes information like name, address, and date of birth. It does not include attendance, grades, class schedules, or other sensitive information.

School staff also may disclose information that is not contained in the education record, such as information from personal observations that have not been recorded, as long as the disclosure does not violate any applicable state confidentiality law, professional code of conduct, or contract obligation.

In an emergency, information in the education record may be disclosed to appropriate people pursuant to the FERPA health or safety exception, and that may include a healthcare provider if the school official believes disclosure to that healthcare provider is necessary to protect the health or safety of the student or other people. According to DOE guidance, "this exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student's education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease."⁶⁷ It is important to ensure any disclosure meets the specific requirements of the emergency exception in FERPA. In all cases, it is important to discuss the application of these rules with legal counsel.

C. Communication between SBHCs that qualify as “School Officials” and Schools

1. Does FERPA allow a school or school employee to disclose information from a FERPA-protected education record to an SBHC acting as a “school official”?

CASE SCENARIOS

Does FERPA allow information to be released in these cases?

- Care coordinator working for SBHC acting as a school official asks for online access to students’ school schedules to coordinate appointments.
- Clinical provider from the SBHC wants to sit in on a school attendance meeting where school staff will discuss the student’s absence history and its impact on grades.
- A student is suicidal, and teacher wants to refer to the SBHC to protect the health and safety of the student.

The answer in the above case scenarios depends on whether there is a FERPA-compliant written authorization in place or one of the limited exceptions to FERPA otherwise allows the disclosure. Of critical note are the “school official” and “health and safety” exceptions, described below. It is important to remember that even if the disclosure is allowed under FERPA, it also must be allowed under any applicable state law before the information can be shared.

In many cases, a school whose records are subject to FERPA may disclose information from the education record to an SBHC acting as a “school official,” but it is important to also look at applicable state law and local policy. The information may always be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information from the education record can be disclosed only following an exception in FERPA. One such exception allows school staff to share information from the education record with “school officials” in the same educational agency who have a “legitimate educational interest” in the information being

shared. The DOE says that “legitimate educational interest” can be defined broadly to mean that the school official needs the information to perform their official or professional duties.⁶⁸ FERPA requires schools to include in their annual notices to parents a statement indicating whether the school has a policy of disclosing information from the education file to school officials and, if so, which parties are considered school officials for this purpose as well as what the school considers to be a legitimate educational interest. Section 05.A.4 on page 24 of this guide discusses when an SBHC may qualify as a “school official.”

In addition, the school could provide the SBHC with access to directory information. What that would include will depend on how directory information has been defined by that school district in its annual notice to parents and whether parents have opted out of directory information disclosures. Typically, directory information includes information like name, address, and date of birth. It does not include attendance, grades, or other sensitive information.

School staff also may disclose information that is not contained in the education record, such as information from personal observations that have not been recorded, as long as the disclosure does not violate any applicable state confidentiality law, professional code of conduct, or contract obligation.

In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the FERPA health or safety exception, and that may include a healthcare provider if the school official believes disclosure to that healthcare provider is necessary to protect the health or safety of the student or other people. It is important to ensure such disclosures meet the

specific requirements of the emergency exception in FERPA. In all cases, it is important to discuss the application of these rules with legal counsel.

2. May an SBHC acting as a “school official” prohibit school personnel from accessing SBHC health records unless they have a release? For the most part, no. When an SBHC is acting as a school official, its records are subject to the requirements of FERPA governing the use and redisclosure of personally identifiable information. There are several exceptions in FERPA, including the “school official” and “health or safety” exception, that might allow school personnel to access information in the education record, including SBHC records, without a release. That said, DOE encourages educational institutions to remember that most of these FERPA exceptions are “permissive” rather than “mandatory” and to take this into consideration when determining disclosure policies so that students and families feel encouraged to fully realize the benefits of healthcare at a school site.

HELPFUL RESOURCES ON HIPAA, FERPA AND SCHOOL HEALTH FROM HHS AND DOE

HHS and DOE

Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records, *December 2019*

HHS and DOE

Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records, *November 2008*

Department of Education

Dear Colleague Letter to School Officials at Institutions of Higher Learning, *August 2016*

06 Minor Consent Laws - The Basics

1. What are minor consent laws?
2. Why do states have minor consent laws?
3. Do parents have access to information and records when minors consent for their own care?
4. What is the role of minor consent laws in the application of federal and state confidentiality laws?

06 Minor Consent Laws - The Basics

1. What are minor consent laws? Every state has some laws that allow adolescent minors to consent for their own healthcare in specific circumstances. These laws are generally based either on the status or the living situation of the minor or on the specific service being sought or provided. The laws vary from state to state. Each state has one or more laws in each category; some states' laws are comprehensive, including most categories, while other states' laws are more limited.

2. Why do states have minor consent laws? States have minor consent laws to enable young people in need of essential healthcare to receive it even in circumstances when it would not be possible to obtain parent or guardian consent. An overarching dual goal of doing so is to protect health: the health of the young people who need care as well as public health.

3. Do parents have access to information and records when minors consent for their own care? In thinking about the role of "minor consent" laws, it is important to remember the distinction between consent for healthcare and consent to release information about the healthcare (also often referred to as permission or authorization). These two types of consent sometimes, but not always, go hand in hand. It is also important to distinguish between "consent" and "confidentiality" because they also are distinct legal concepts that apply in different ways. Whether parents have access to



information and records when minors have consented to their own care may vary depending on which confidentiality law takes precedence: HIPAA, FERPA, 42 CFR Part 2, other federal laws (see page 16), or state laws. Depending on the applicable law, parents may have a right of access; the provider may have discretion whether to share information with parents; or the parent will have no right of access, and the provider no discretion to share, unless the minor explicitly authorizes the disclosure.

Even where the law prohibits disclosure without explicit authorization from the minor, healthcare providers routinely encourage adolescents to communicate with their parents and support them in doing so. However, it is important to remember that many adolescents are concerned about disclosure to their parents of information they feel is particularly sensitive and sometimes delay or entirely avoid seeking care if it is necessary to involve their parents in advance to obtain consent. This is true even though many adolescents voluntarily share all or most of their health information with their parents and other trusted adults. Voluntary communication can be very helpful in supporting adolescents' health; mandated communication and disclosure can be counterproductive unless necessary to protect the health of a young person or the public.

WHAT ARE YOUR STATE'S MINOR CONSENT LAWS?

Each state has one or more laws that allow minors to consent for care either based on their status or the specific health service they are seeking. Below are common examples of such laws.

Minors sometimes authorized to consent for care when they have the following status or living situation:

- Minors legally emancipated by court order
- Minors living apart from their parents
- Married minors
- Minors in the armed services
- Minors who are the parent of a child
- High school graduates
- Minors who have attained a certain age
- “Mature minors” who are explicitly authorized by statute to consent for care

Services for which minors are sometimes authorized to consent:

- Contraceptive care
- Pregnancy-related care
- Outpatient mental health care
- Counseling and treatment related to substance use
- Diagnosis and treatment (and sometimes prevention) for sexually transmitted infections, sometimes referred to in statutes as venereal disease
- Diagnosis and treatment (and sometimes prevention) of either human immunodeficiency virus, or acquired immunodeficiency syndrome
- Diagnosis and treatment (and sometimes prevention) of reportable or communicable diseases
- Examination and treatment related to sexual assault

4. What is the role of minor consent laws in the application of federal and state confidentiality laws?

Laws that allow minors to consent for their own healthcare play an important role in the application of state and federal confidentiality laws, including HIPAA and FERPA. Neither HIPAA nor FERPA alter whether and when minors are allowed to consent for their own care. That said, who has access to the minor's health information and whose authorization is required to release it does vary depending on which law takes precedence.

If HIPAA applies, parents' access when a minor has consented depends on what state and other laws say regarding parent access. These laws may require disclosure to the parent when a minor consents for care, with or without the minor's permission. They may require the minor's permission for disclosure to the parent. They may give discretion to the healthcare provider to grant or withhold parent access; or they may be silent on parents' access, in which case the provider has discretion to decide. That discretion may be exercised based on the terms of state law or may be exercised based on specific provisions of HIPAA (see page 16 above).

If FERPA applies, parents generally have access to a minor's health information if it is contained in an education record. This is true whether or not the minor consented to the underlying care. In situations in which neither HIPAA nor FERPA applies, state law or other federal laws may determine whether parents have access.



07

Best Practices: Policies that Promote Autonomy, Transparency, and Trust - and the Power of Consent

Policies that Promote Autonomy, Transparency, and Trust - and the Power of Consent

07 Best Practices: Policies that Promote Autonomy, Transparency, and Trust - and the Power of Consent

Privacy is a “prerequisite for trust,”⁶⁹ and trust is essential to the therapeutic alliance between a provider and patient. Transparency about when information will be protected and when a provider may want or need to share information fosters trust as does empowering patients with as much autonomy (control and decision-making authority) as possible related to disclosures. It is critical to ensure that the protection and sharing of health information complies with all applicable

“Many institutions offer their students on-campus access to medical services, including mental health services. These services can help comprehensively promote campus safety and health; improve academic achievement; and assist those who experience sexual violence, other violence, or harassment. These benefits cannot be fully realized in an environment where trust between students and the institution is undermined. Students should not be hesitant to use the institution's medical services out of fear that information they share with a medical professional will be inappropriately disclosed to others. The Department urges that institutions inform students at the time they receive treatment of the privacy protections afforded to their medical records pursuant to Federal and State law as well as institutional policy..”



confidentiality laws, but in developing confidentiality and information-sharing policies and practices for a school health program, it also is important to consider what policies and practices will help ensure the best health outcomes by supporting autonomy, transparency, and trust.

In 2016, the DOE issued what it deemed “significant guidance” to institutions of higher learning regarding confidentiality and disclosure related to campus healthcare services where records created are subject to FERPA. Although this guidance explicitly applies to postsecondary institutions, it states many principles that are highly relevant to development of confidentiality and disclosure practices and the application of FERPA and HIPAA in elementary and secondary school settings. The guidance states:

“Most disclosures under FERPA are permissive, rather than mandatory, meaning that institutions choose when to share education records, including medical records without consent under the exceptions set forth in [FERPA]. When institutions choose to disclose PII [personally identifiable information] from education records, including medical records, without consent, they should always take care to consider the impact of such sharing, and only should disclose the minimum amount of PII necessary for the intended purpose. When making these decisions involving student medical records, the Department recommends that institutions give great weight to the reasonable expectations of students that the records generally will not be shared, or will be shared only in the rarest of circumstances, and only to further important purposes, such as assuring campus safety. Failure to meet those expectations could deter students from taking advantage of critical campus resources, and could undermine the integrity of the patient-doctor/provider relationship as well as trust between students and the institution.”⁷⁰

The principles stated in this guidance emphasize both the importance and the usefulness of obtaining consent to share health information, especially when students may have an expectation that it will be protected as confidential and will not be shared without their knowledge or agreement, and of informing students and families about confidentiality and disclosure parameters before care is provided.

In this light, the following may serve to promote best outcomes, no matter which federal or state confidentiality laws apply. These confidentiality and disclosure policies and practices support transparency, autonomy, and trust in the provider-patient relationship.

AUTONOMY

- Obtain consent for disclosures whenever possible, even if authorization is not necessary under the applicable law. HIPAA, FERPA, and most confidentiality laws allow sharing when a release form is in place.
- Do not condition services on the agreement to share information or sign a release.
- Authorizations can be tailored to meet the specific disclosure needs of the situation by shaping what, why, where, when and with whom information will be shared in a way that no exception to confidentiality law can. This benefits the provider and the patient.
- Ensure the release is user friendly and can be understood.
- Ensure that any release contains all the elements and notices required by applicable law.
- Even when a written release is not required, consider obtaining verbal consent in the interest of autonomy.

TRANSPARENCY

- Inform students and parents about confidentiality protections and the limits of confidentiality before engaging in care.
- Explain the purpose for disclosure when seeking permission to share.

TRUST

- When it is not possible to obtain a release, consider whether one of the exceptions in HIPAA, FERPA, or state laws that allow sharing without authorization apply.
- Tailor disclosures narrowly to the minimum necessary to serve the purpose of disclosure.
- If prior permission is not obtained, share the fact of disclosure as soon as possible, either before or after it occurs, whenever safe and appropriate to do so.



08 Conclusion

Protecting the confidentiality of health information and sharing it when appropriate are both important goals of healthcare in schools and school-based settings. When sharing information is appropriate, it is always possible with the required authorization, regardless of what laws apply. Review of the intersection of state laws with HIPAA and FERPA is essential; consultation about this with counsel is advisable. The laws provide a baseline but when developing policies for school-based health centers and schools, it is equally important to consider ethics and best practices. Trust, partnership, and transparency are key; centering consent helps us achieve those important goals.

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- ¹⁰ See 45 C.F.R. §160.102. ("CFR" means the Code of Federal Regulations.)
- ¹¹ 45 C.F.R. § 164.104.
- ¹² 45 C.F.R. § 160.103.
- ¹³ 45 C.F.R. § 164.502(a).
- ¹⁴ 45 C.F.R. § 160.103.
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- ¹⁶ 45 C.F.R. § 164.103.
- ¹⁷ 45 C.F.R. §164.502(a).
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- ²⁸ 45 C.F.R. §§ 164.502(a)(1)(ii),164.506.
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