

## FERPA/HIPAA/Part 2 Summaries and Application

Included below are brief overviews of the FERPA, HIPAA, and Part 2 confidentiality protections. These summaries are meant to create a baseline of knowledge for further discussion and research in preparation for training to be provided to school nurses and pediatricians. Preparation of this memo did not include a review of New Hampshire state law to see whether there were more restrictive state laws pertaining to student education records.

### Family Educational Rights and Privacy Act (FERPA)<sup>1</sup>

FERPA is a Federal law that protects the privacy of students' "education records" maintained by educational agencies and institutions that receive federal funds and their agents to which FERPA applies.

Under FERPA, parents have 1) the right to access their children's education records, 2) the right to seek to have these records amended, and 3) the right to provide consent for the disclosure of personally identifiable information (PII) from these records, unless an exception to consent applies. These rights are transferred to the student upon reaching age 18 or when the student attends a postsecondary institution at any age, thereby becoming an "eligible student" under FERPA.

Education records are records that are directly related to a student and maintained by an educational agency or by a party acting for the agency or institution. Records include, but are not limited to,

- Grades
- Transcripts
- Class lists
- Student course schedules
- **Health records (at the K-12 level)**, and (emphasis added)
- Student discipline files.

The information may be recorded in any way, including handwriting, print, computer media, videotape, audiotape, film, and email.

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<sup>1</sup> This section is adapted from the US DHHS and US 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 (Dec. 2019), <https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records>

“[A] student’s health records, including immunization records, maintained by an education agency or institution (such as by an elementary or secondary school nurse) would generally constitute education records subject to FERPA.”

Because FERPA gives parents the right to consent to the disclosure of PII from education records, an education agency or institution subject to FERPA may not disclose a student’s education records or PII from education records **without prior written consent** of a parent (or of the student if the student is an “eligible student,”) unless an exception applies.

FERPA includes an emergency exception that permits educational agencies and institutions to disclose PII from a student’s education records without prior written consent. This emergency exception only allows disclosure to the appropriate parties in connection with an emergency if these parties’ knowledge of the information is necessary to protect the health or safety of the student or other individuals.

## Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>2</sup>

HIPAA and its regulations, known as the “Privacy Rule” establish privacy requirements for individually identifiable protected health information (PHI). Entities subject to HIPAA are known as “covered entities,” and include health care providers that generate and receive standard electronic transactions.

The HIPAA Privacy Rule requires covered entities to protect individuals’ PHI by requiring appropriate safeguards to protect privacy and setting limits and conditions on the uses and disclosures that may be made of such information without patient consent. Covered entities may, however, disclose PHI for purposes of **treatment, payment and health care operations** without patient consent.

Schools may be ‘covered entities’ under HIPAA if they employ or contract with a health care provider that delivers health services and engages in covered transactions in the school setting. Nevertheless, health information maintained by a school or a provider acting on behalf of the school is considered part of the educational record. For example, a school could be a HIPAA entity by virtue of billing Medicaid for covered services, however, these records are still subject to FERPA.

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<sup>2</sup> This section is adapted from the US DHHS and US 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 (Dec. 2019), <https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records> and The Network for Public Health Law “Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws (Part 1) (Jun. 19, 2019), <https://www.networkforphl.org/resources/data-privacy-in-school-nursing-navigating-the-complex-landscape-of-data-privacy-laws-part-i/>

Schools, therefore, must typically comply with FERPA’s privacy requirements *unless* the school accepts no funding under any program of the U.S. Department of Education and qualifies as a covered entity under HIPAA. In those circumstances, HIPAA would apply.

## 42 CFR Part 2

The 42 CFR Part 2 regulations (Part 2) protect patient records created by federally assisted programs for the treatment of substance use disorders. Generally, providers who must comply with Part 2, known as Part 2 Programs, may not disclose records related to a patient’s treatment for substance use disorder without the patient’s prior written consent, unless an exception applies. Part 2 also prohibits the redisclosure of any substance use disorder patient records, or information from those records. Unlike HIPAA, Part 2 does not permit the disclosure of patient identifying information for purposes of treatment, payment and health care operations without patient consent.<sup>3</sup>

In New Hampshire, it is important to remember that a minor age 12 or older may consent to treatment for drug dependency or any problem related to the use of drugs without the consent of a parent or legal guardian.

### Application

| From         | To                 | Purpose                                   | Consent Required?   |
|--------------|--------------------|---|---|
| Pediatrician | School Nurse       | Treatment purposes                        | No, HIPAA applies to the disclosure of PHI from a pediatrician to a school nurse, and consent would not be a requirement if the information is being shared for “treatment purposes.” |
| School Nurse | Pediatrician       | Clarification of physician recommendation | No, a school nurse may contact the physician to clarify the physician’s recommendations without first obtaining consent.  |
| School Nurse | Physical Therapist | Management of Student Health Condition    | Yes, FERPA would require a consent form signed by the parent or guardian that allows schools to share health information with other health care providers.                            |

<sup>3</sup> For helpful information about 42 CFR Part 2 and the confidentiality of substance use disorder treatment records in New Hampshire, see Hodder, Lucy et al at [https://chhs.unh.edu/institute-health-policy-practice/focal-areas/health-law-policy#collapse\\_2907](https://chhs.unh.edu/institute-health-policy-practice/focal-areas/health-law-policy#collapse_2907) ; and English, Abigail et al, “Adolescent and Young Adult Care in New Hampshire” at [https://nahic.ucsf.edu/wp-content/uploads/2019/01/New-Hampshire-AYAH-Confidentiality-Guide\\_Final.pdf](https://nahic.ucsf.edu/wp-content/uploads/2019/01/New-Hampshire-AYAH-Confidentiality-Guide_Final.pdf)

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