



# HIPAA or FERPA?

## A Primer on Sharing School Health Information in Indiana

Second Edition



**What This Primer Does:**

This Primer provides an overview of the pertinent federal and state confidentiality laws when health care is provided on school sites and addresses a few frequently asked questions regarding sharing information.

**What This Primer Does Not Do:**

This Primer is not legal advice. This document provides legal information and does not provide legal advice or guidance. The document should be used as a reference only and not as policy, a best practice guide or as a substitute for advice from legal counsel.

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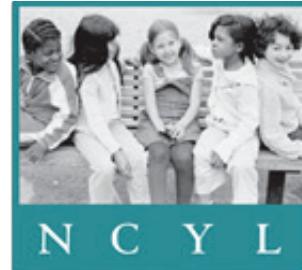
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# Introduction

John is in 3rd grade at Franklin Elementary. He has been distracted and fidgeting in class recently. His teacher refers John and his family to the mental health counselor from a local nonprofit who comes to campus once a week. The counselor discovers that John's aunt recently passed away and that John is 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 is anything she can do to help John. What may the counselor tell John's teacher? Would the answer change if John had been referred to a school nurse instead?

School health programs and providers bring a range of needed health care services to a school campus. Providers may be school employees, such as school nurses, or community based providers, such as employees of a community clinic or local hospital bringing services to the school site. These programs provide an exciting opportunity to increase health care access for youth and improve care coordination and collaboration among health providers and schools.

When developing school health programs, there are several considerations that the health providers and education agencies should address early on. One of the most important is determining which confidentiality laws control access to and disclosure of the health care information created. While there may be multiple laws to consider, the first question to address is whether the program's information is subject to the federal **Family Educational Rights and Privacy Act (FERPA)** or the federal **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**.

Whether HIPAA or FERPA applies and how those interact with state confidentiality law will impact school health service operations in large and small ways – from framing how school staff and health providers collaborate and share information; to shaping policies about how to deal with suicide threats and other emergencies; to determining the content of required notices and consent forms and other administrative issues.

#### HIPAA or FERPA?

*The answer will impact school health operations in large and small ways, from administrative requirements to how collaboration occurs.*

This Primer provides an overview of HIPAA, FERPA, and state law. The goal of the Primer is to provide readers sufficient information so that they may start important conversations with their legal counsel about which law applies to their records and how to apply those laws.

The Primer does not review all aspects of the confidentiality laws it references. It also does not provide legal advice, and for this reason, does not describe how to apply the law to specific situations. As a result, it may raise a number of questions for readers. These questions can and should be directed to legal counsel.

# An Overview of HIPAA and FERPA in Indiana

## HIPAA – The Basics

### **1. What is HIPAA?**

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.”<sup>1</sup>

### **2. What is a “covered entity”?**

HIPAA defines “covered entity” as health plans, health care clearinghouses, and health care providers who transmit health information in electronic form related to certain types of transactions.<sup>2</sup>

### **3. Which “health care providers” must comply with HIPAA?**

Health care providers who “transmit health information in electronic form” are “covered entities” and must comply with HIPAA. “Health care providers” include individual providers such as physicians, clinical social workers, and other medical and mental health practitioners, as well as hospitals, clinics and other organizations.<sup>3</sup> Health care providers are only subject to HIPAA, however, if they transmit health information regarding certain types of health transactions electronically.

The transactions that will make HIPAA applicable include any of the following when done electronically: submitting claims to health insurers, making benefit and coverage inquiries to insurers, making inquiries about submitted claims, and sending health care authorization requests, among others. The fact that a health care provider does not use electronic records onsite does not automatically mean it is exempt from HIPAA. Health care providers may be transmitting health information electronically in another way, for example, by using a billing service that does. That said, there will be providers who are not subject to HIPAA because they do not transmit health information in electronic form related to covered transactions. The U.S. Department of Health and Human Services offers “Covered Entity Guidance” that a provider can use to determine whether the provider is subject to HIPAA.<sup>4</sup>

## 4. What is a HIPAA “business associate”?

Most covered entities work with other organizations and individuals in order to provide health care. Examples include attorneys, data processors, accountants and others. A “business associate” is an individual or organization that receives, creates, maintains, or transmits “protected health information” as part of certain types of work it does on behalf of a “covered entity.” The type of work must be directly related to activities the covered entity does that are regulated by HIPAA, such as claims processing or billing, or services that support that work, such as legal, actuarial, transcription, accounting, consulting, management, accreditation, or financial services.<sup>5</sup> (See endnote 5 for more examples.) In most cases, the covered entity must enter into a business associate contract with this individual or organization in order to share protected health information.

## 5. Must a “business associate” comply with HIPAA?

Indirectly yes. A covered entity cannot share information with a business associate unless the covered entity has received written assurances that the business associate will protect “protected health information” in compliance with HIPAA. HIPAA outlines what this written agreement must include before a covered entity may share health information with the business associate. Health care providers always should consult legal counsel regarding such contracts and whether an organization qualifies as a business associate in the first place.<sup>6</sup>

## 6. What information is protected?

The HIPAA Privacy Rule limits covered health providers from disclosing what HIPAA calls “protected health information” (PHI).<sup>7</sup> “Protected health information” is individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information.<sup>8</sup>

Protected health information does not include information subject to FERPA. *HIPAA explicitly states that health information held in an education record subject to FERPA is not “protected health information.”*<sup>9</sup> In other words, if FERPA applies, HIPAA does not, and FERPA and HIPAA can never apply to the same information at the same time.

**HIPAA and FERPA  
can never apply to  
the same information  
at the same time.**

## 7. What is the HIPAA confidentiality rule?

Generally, health care providers cannot disclose information protected by HIPAA without a signed authorization.<sup>10</sup> An authorization form must include specific elements to be valid under HIPAA.<sup>11</sup> (See Appendix B.) HIPAA also defines who must sign the authorization.<sup>12</sup>

## 8. Who signs an authorization to release health information protected by HIPAA?

A parent, guardian, or other person with authority under the law to make health decisions for an unemancipated minor usually must sign authorizations to release the child's information.<sup>13</sup> However, the unemancipated minor must sign the authorization in any of the following situations:

- (1) the minor consented to the underlying health care,
- (2) 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
- (3) a parent, guardian or person acting in place of a parent assents to an agreement of confidentiality.<sup>14</sup>

Thus, who signs will depend in part on what state and other laws say about who can consent for the minor's care - in other words, when other adults may act on behalf of minors in making health decisions and when minors may obtain care on their own. This is further explored below in the section on Indiana law and some relevant federal and state consent laws are highlighted in Appendix C.

### Who signs the authorization? An example:

Jake, who is 16, homeless, on his own, and managing his own affairs, is authorized to consent to his own health care under Indiana law. Because he can consent to his own care, he can sign authorizations to release the related health information. (See Appendix C for minor consent laws.)

## 9. Do exceptions in HIPAA allow release of information without an authorization?

The default rule in HIPAA is that release of protected health information requires a signed authorization; however, there are many exceptions to this rule. Exceptions in HIPAA allow, and sometimes require, health care providers to share health and mental health information without need of a signed release. Examples of these exceptions include:

- for treatment purposes<sup>15</sup>
- to avert a serious and imminent threat<sup>16</sup>
- for research<sup>17</sup>
- for payment purposes<sup>18</sup>

- for health care operations<sup>19</sup>
- to public health authorities as required by law<sup>20</sup>
- to report child abuse as required by law<sup>21</sup>
- when requested by the individual<sup>22</sup>
- additional exceptions also exist.<sup>23</sup>

Different conditions must be met before information may be shared under each HIPAA exception. State law also may limit their application. For example, HIPAA authorizes health care providers to disclose protected health information for treatment purposes without an authorization. Indiana law also authorizes providers to disclose protected health information without an authorization, but Indiana law limits with whom that information may be shared. Health care providers must follow the more protective state law. So, it is important to understand how state and federal laws work together before relying on a HIPAA exception to disclose protected health information.



## 10. How do HIPAA and Indiana law intersect?

There are several ways that Indiana law intersects with HIPAA. First, HIPAA grants rights to sign authorizations and to access a minor's protected health information based in part on who is authorized to make health decisions for the minor. State law determines who has those consent rights in many situations. Similarly, parental access to records when the parent did not consent for the child's care will depend in part on state law.

Second, Indiana has laws that protect the confidentiality of medical and mental health information.<sup>24</sup> These laws parallel HIPAA in many ways; however, in some situations, they actually provide greater confidentiality protection than HIPAA. When state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law.<sup>25</sup>

Finally, in addition to laws, licensed health professionals may practice under ethical and licensing principles that also include obligations related to confidentiality. These principles may impose greater confidentiality obligations than HIPAA or state laws.

## 11. May parents access their child's protected health information?

Indiana law makes a distinction between health,<sup>26</sup> mental health,<sup>27</sup> and certain other records. Generally, parents have a right to access their minor child's health and mental health records when the parents consented to the underlying care.<sup>28</sup> However, there are exceptions. For example, a parent may not have this right if a court has removed or restricted their legal custody.

In addition, certain other records, such as records related to drug and alcohol

related treatment and Title X funded family planning services, are subject to different confidentiality laws and parental access rules.<sup>29</sup> For example, records regarding Title X funded services provided to a minor cannot be disclosed to parents without the minor's authorization.<sup>30</sup> Depending on the types of services provided by a clinic or provider, it may be important to consult legal counsel for assistance understanding parent access laws.

## **12. May a health care provider ever withhold a child's health information from the child's parent?**

Yes. Generally when a parent consented for the minor child's health services, the parent generally has a right to access the records unless there is a court order limiting that access.

However, even where a parent has a right of access, HIPAA and Indiana law give the health care professional discretion to withhold the child's health record from the parent where the "health care professional reasonably determines that the information requested ... is: (1) Detrimental to the physical or mental health of the patient; or (2) Likely to cause the patient to harm the patient or another."<sup>31</sup>

Similarly, a health care provider may withhold a child's mental health information from the parent or legal guardian "if the provider that is responsible for the patient's mental health records determines for good medical cause, upon the advice of a physician, that the information requested under this section is detrimental to the physical or mental health of the patient, or is likely to cause the patient to harm the patient or another person, the provider may withhold the information from the [parent or guardian]."<sup>32</sup>

## **13. May a health care provider share protected health or mental health information about a patient with another health care provider without obtaining an authorization?**

Yes. Indiana has separate laws for "health" and "mental health" records, but both allow such disclosure as follows:

- Both HIPAA and Indiana law allow a health care provider to share a patient's health records<sup>33</sup> with another health care provider "if the health records are needed to provide health care services to the patient."<sup>34</sup>
- Both HIPAA and Indiana law allow mental health records to be disclosed to another "health care provider or mental health care provider, if the mental health records are needed to provide health care or mental health services to the patient."<sup>35</sup>

## May a provider share with another provider? An example:

Linnea, 14, has been seeing a therapist to help with anxiety. Her therapist believes Linnea may have a learning disorder and ADHD. The therapist would like to refer Linnea for educational testing and would like to discuss the possibility of ADHD with Linnea's pediatrician. May Linnea's therapist consult with her pediatrician? May the therapist make a referral to the educational psychologist and share relevant information?

Yes. The therapist may do so with a signed authorization, but the therapist also has the discretion to share with other providers for treatment purposes, without need of an authorization.

### 14. May a health care provider share protected health information with a school official, such as a principal or teacher, regarding a student at the school?

Disclosures of protected health information to a principal or teacher require written authorization. Further, if the authorization requests disclosure of mental health information, Indiana law limits what may be shared. Indiana statute allows disclosures of mental health information to a school principal or "school leader"<sup>36</sup> pursuant to an authorization signed by a parent; however, the law describes what information shall be provided and obligates the school principal or school leader to confidentiality constraints.<sup>37</sup>

### 15. What administrative requirements must a health care provider satisfy under HIPAA?

If a health care provider or program is a "covered entity" under HIPAA, it must meet all the administrative requirements in HIPAA and Indiana law. This includes making sure that the provider has a "Notice of Privacy Practices" and a HIPAA-compliant release of information form and that it maintains records with the appropriate security in place for the appropriate number of years, among many other things. Health care providers subject to HIPAA should always consult their legal counsel regarding the many administrative requirements in HIPAA.

## FERPA – The Basics

### 1. What is FERPA?

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.<sup>38</sup>

### 2. What is an educational agency or institution subject to FERPA?

"Educational agencies or institutions" are defined as institutions that receive federal funds under programs administered by the U.S. Department of Education and that either provide direct instruction to students, such as schools; or are educational agencies that direct or control schools, including school districts and state education departments.<sup>39</sup> Almost all public schools and public school districts receive some form of federal education funding and must comply with FERPA. Organizations and individuals that contract with or consult for an educational agency also may be subject to FERPA if certain conditions are met.<sup>40</sup> These conditions are discussed in greater detail later on.

### 3. What information does FERPA protect?

***FERPA limits disclosure of information recorded in an education file.***

***It does not restrict disclosures of all communications that occur in a school.***

FERPA controls disclosure of *recorded* information maintained in the "education record." "Education records" are defined as records, files, documents, or other 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.<sup>41</sup> "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."<sup>42</sup> FERPA does not apply to all

information at a school exchanged by staff. For example, communications that are not recorded in any form, such as the contents of a conversation between a teacher and student in a hallway, are not part of the education record and are not subject to FERPA.

There also are several types of records that are exempted from FERPA. For purposes of school health care, 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 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.<sup>44</sup>

## What is and is not an education record? An Example:

"FERPA does not prohibit a school official from releasing information about a student that was obtained through personal knowledge or observation, rather than from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information from disclosure. Therefore, a school official may disclose what he or she overheard to appropriate authorities, including disclosing the information to local law enforcement officials, school officials, and parents."

*Available at <https://studentprivacy.ed.gov/faq/does-ferpa-permit-school-officials-release-information-they-personally-observed-or-which-they>*

### 4. What are “sole possession” records?

Sole possession records are 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. Sole possession records are not considered part of the education record and are not subject to FERPA.<sup>45</sup>

### 5. When can a school official’s notes be considered a “sole possession” record?

The U.S. Department of Education (DOE) provides this guidance: *“Generally sole possession records are of the nature to serve as a ‘memory jogger’ for the creator of the record. For example, if a school official has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes.”*<sup>46</sup>

However, the DOE also cautions in its guidance: *“Once the contents or information recorded in sole possession records is disclosed to any party other than a temporary substitute for the maker of the records, those records become education records subject to FERPA.”*

### 6. What are the general requirements of FERPA?

Generally, FERPA prohibits educational agencies from releasing any information in the education record unless they have written permission for the release.<sup>47</sup> In most cases, a "parent"<sup>48</sup> must sign that release. FERPA defines parent broadly for this purpose. The requirements for a FERPA-compliant release can be found in Appendix B. When students are eighteen years old or older, they must sign their own release forms.

### 7. Do exceptions in FERPA allow educational agencies to disclose information without a release form?

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"<sup>49</sup> 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.<sup>50</sup> Another exception allows school staff to share information with "school officials"<sup>51</sup> in the same educational agency who have a "legitimate educational interest" in the information.<sup>52</sup> Certain policies must be in place at the district level in

order to implement both of these exceptions. Additional exceptions also exist, including exceptions that allow sharing information in emergency situations and for school transfers, among others.<sup>53</sup>

## **8. How does FERPA intersect with Indiana law?**

To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. 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 U.S. Department of Education's Family Policy Compliance Office.<sup>54</sup>

## **9. May parents access their child's education record?**

Parents of a student under age 18 may access their child's education record.<sup>55</sup> "Parent" includes a parent, guardian or person acting in the role of parent.<sup>56</sup> The only exception is if a court order explicitly limits a parent's right to access the record. The school has a certain amount of time to make the record available after a request.

## **10. May school staff access information in the education record of a student in the same school?**

While FERPA typically requires a signed release, an exception allows schools to share information in an education record with "school officials" in the same educational agency who have a "legitimate educational interest" in the information. The term "school official" includes school staff, such as teachers, counselors, and school nurses. A school or district may define this term 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.<sup>57</sup> The school official must have a "legitimate educational interest" in the information. The U.S. DOE says that this can be defined broadly to mean that the school official needs the information to perform his or her official duties.<sup>58</sup>

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.”

**11. Are treatment or health records in an education file, such as immunization records, treated differently than other types of information in the education file?**

Student health records maintained by a school or school employee, such as treatment records, IEP assessments, or immunization documents, are part of the education file<sup>59</sup> FERPA does not treat health and mental health records in a

minor’s education file differently than it does any other information, such as grades or attendance information, in the file.<sup>60</sup> That said, FERPA generally limits access to all student records, and, for example, only school staff with a “legitimate educational interest” in the information should be able to access it without a release.<sup>61</sup> (See question 10 above.)

**12. What administrative requirements must a school satisfy to comply with FERPA?**

If a school health program has records subject to FERPA, it must meet all the administrative requirements in FERPA. Among other things, this includes: making sure it has a FERPA-compliant release form; providing the appropriate annual notices to parents, including required notices regarding directory information, the school official exception, and inspection and confidentiality rights; ensuring it has local policies in place that address and define important FERPA terms such as “legitimate educational interest” and “parent;” and complying with recordkeeping requirements regarding releases of information. It includes other considerations as well. The National Forum on Education Statistics has a guide to implementing FERPA; requirements for a compliant release form can be found in Appendix B; and the U.S. Department of Education provides several model notices for educational agencies, a link to which can be found in Appendix D.



## Comparing HIPAA and FERPA

<p>In many ways, the two federal laws are similar; however, there are some important differences. A few of these similarities and differences are highlighted below.</p>		
	FERPA	HIPAA
<b>Does the law usually require a signed release to disclose protected information?</b>	Yes	Yes
<b>Who signs the release?</b>	"Parent" signs authorization for minor student.	Parent signs authorization in most cases, but minor must sign in some situations.
<b>Does it prescribe what the release must include?</b>	Yes	Yes
<b>What must be included in the release?</b>	34 CFR 99.30	45 CFR 164.508 Ind. Code 16-39-1-4 Ind. Code 16-39-2-5
<b>May the agency or provider limit a parent's access to their child's records?</b>	In most all cases, parents have a right to access all information in the education record unless a court order limits their access.	Parents generally have a right to access information regarding services they consented to for their child; however providers have discretion to limit that access when the provider believes access could be detrimental or dangerous.
<b>Does the law allow disclosures without need of a signed release?</b>	Yes	Yes
<b>Does the law allow disclosures of health information to teachers without a signed release?</b>	Yes, if the teacher is in the same educational agency and has a "legitimate educational interest" in the information as defined in school policy.	No
<b>Does the law allow disclosures of health information to other health providers without a signed release?</b>	Yes, if the health provider is in the same educational agency and has a "legitimate educational interest" in the information as defined by district policy.	Yes, providers may share health information with other providers of health care for treatment purposes.
<b>Does the law allow disclosures in order to prevent danger or harm?</b>	Yes	Yes
<b>Are there administrative requirements?</b>	Yes, including but not limited to: <ul style="list-style-type: none"> <li>• Annual notices of rights</li> <li>• Required local policies</li> <li>• Record retention rules</li> <li>• Documenting access to record</li> <li>• Required forms</li> </ul>	Yes, including but not limited to: <ul style="list-style-type: none"> <li>• Notice of Privacy Practices</li> <li>• Document retention requirements</li> <li>• Documenting access to records</li> <li>• Required forms</li> <li>• Record security requirements</li> </ul>



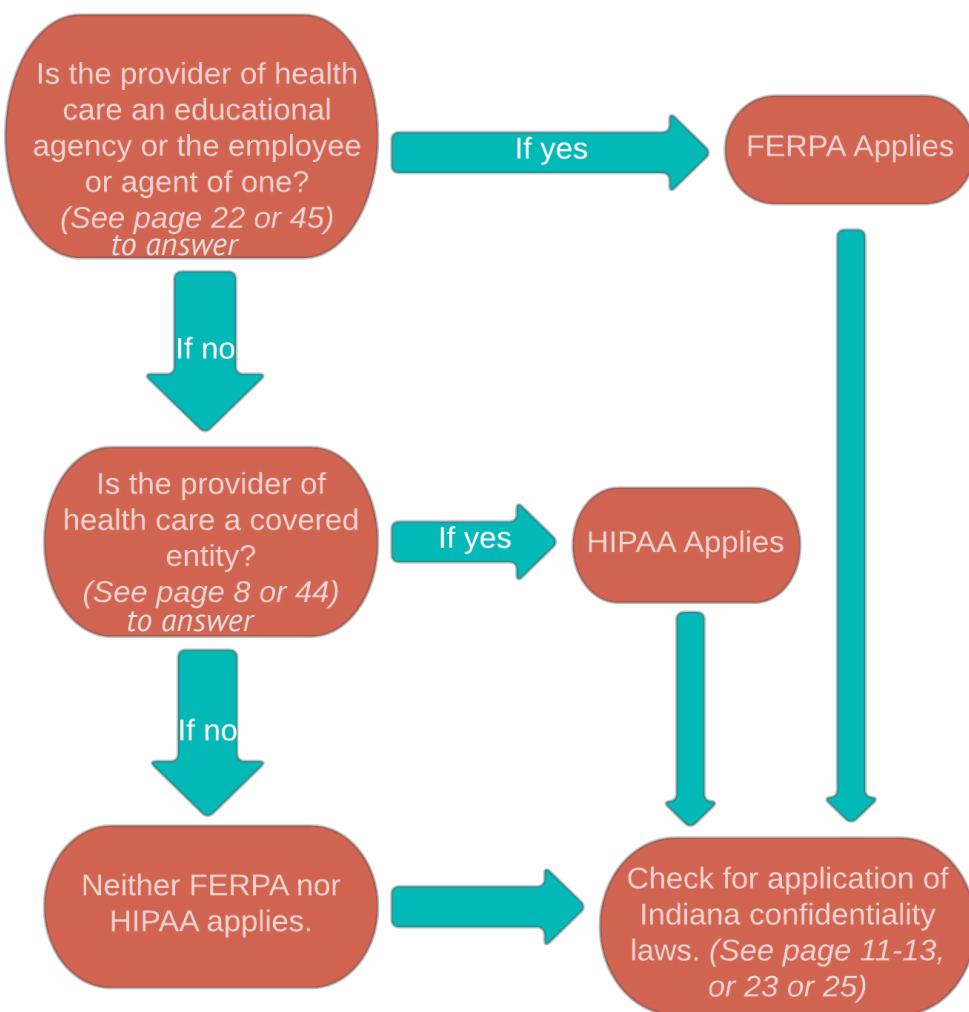


# HIPAA, FERPA, Both, or Neither?

## Is it possible for FERPA and HIPAA to both apply at the same time?

No. The two laws cannot apply to the same records at the same time. HIPAA explicitly states that its rules *do not apply* to health information held in an education record subject to FERPA.<sup>62</sup> Therefore, if FERPA applies, HIPAA does not. So the question really is whether the records are subject to FERPA, HIPAA, or neither one. The following series of questions helps answer that. Health care providers and agencies should work through these questions in collaboration with their legal counsel, as application to a specific situation or set of facts may require legal interpretation or advice.

## HIPAA, FERPA or Neither: An Algorithm



## Is the provider of health care an "educational agency" or employee of one?

Health records are subject to FERPA if the person or agency creating the records is an educational institution (see pg 14 for definition) or the employee or agent of one. The U.S. Department of Education (DOE) and the U.S. Department of Health and Human Services (DHHS) provide case examples that suggest factors these agencies would look at to determine whether a provider of care is an employee or agent of an educational institution. These factors include financing and administrative and operational control. Below are some case examples from DOE and DHHS that demonstrate how these factors come into play:

FERPA applies:	<p>Joint Guidance from DOE and DHHS suggests that a health provider or program's records will be subject to FERPA if the program is <b>administered by and under the direct control of an educational agency and providing what can be considered "institutional services"</b> – even if those services are funded entirely by an outside agency. <i>"Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired as a school official (or a contractor), the records maintained by the nurse or clinic are 'education records' subject to FERPA."</i><sup>63</sup></p>
FERPA applies:	<p>Another example reiterates the importance of <b>administrative control</b>. The University of New Mexico asked DOE for guidance regarding records held at its campus health center. In its response, the DOE addressed, as a preliminary matter, whether a university health center's records are "education records" subject to FERPA. The letter says that the records of a campus health center are subject to FERPA when the <i>"health services are provided to students by, on behalf of, and under the control of the University, and not a separate health agency or health care provider."</i><sup>64</sup></p>
FERPA does not apply:	<p>By contrast, in the letter to the University of New Mexico, the DOE said that the health records of a campus based health center <i>"would not be subject to FERPA if the center is funded, administered and operated by or on behalf of a public or private health, social services, or other non-educational agency or individual...."</i><sup>65</sup></p>
FERPA applies:	<p><b>Administrative control</b> appears to be more important than where services are provided physically. In their Joint Guidance, DOE and DHHS wrote: <i>"If a person or entity acting on behalf of a school subject to FERPA, such as a school nurse that provides services to students under contract with or otherwise under the direct control of the school, maintains student health records, these records are education records under FERPA, just as they would be if the school maintained the records directly. This is the case regardless of whether the health care is provided to students on school grounds or off-site."</i><sup>66</sup></p>
FERPA does not apply:	<p>By contrast, the Joint Guidance provides this example: <i>"Some outside parties provide services directly to students and are not employed by, under contract to, or otherwise acting on behalf of the school. In these circumstances, these records 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. For example, the records created by a public health nurse who provides immunization or other health services to students on school grounds or otherwise in connection with school activities but who is not acting on behalf of the school would not be "education records" under FERPA."</i><sup>67</sup></p>

## Is the provider of health care a "covered entity"?

If FERPA does not apply to student health records, the next question is whether HIPAA applies. HIPAA applies if the health provider who created the record is a "covered entity" as defined by HIPAA. A provider is a "covered entity" if the provider is (1) a health care provider who (2) transmits health information in electronic form as part of certain types of transactions covered by HIPAA.<sup>68</sup>

### (1) Is the provider a "health care provider" as defined by HIPAA?

The scope of "health care providers" covered by HIPAA includes individual providers as well as institutions. It includes but is not limited to:

- physicians,
- nurses,
- clinical social workers,
- other medical and mental health practitioners,
- hospitals,
- clinics and
- any other organization that furnishes, bills, or is paid for health care in the normal course of business.<sup>69</sup>

### (2) Does the provider transmit health information in electronic form?

Individual providers are only subject to HIPAA if they transmit health information in electronic form as part of conducting certain types of transactions covered by HIPAA. The transactions that will make HIPAA applicable include but are not limited to doing any of the following things electronically: submitting billing claims to health insurers, making benefit and coverage inquiries to insurers, making inquiries about submitted claims, and sending health care authorization requests. The fact that a health care provider may not use electronic records onsite does not automatically mean it is exempt from HIPAA. Providers may be transmitting electronic health information in another way, for example, by using a billing service that does. Transmission of health information in electronic form includes electronic billing or using a billing service that transmits information electronically, among other things.<sup>70</sup> The U.S. Department of Health and Human Services offers "Covered Entity Guidance" with more detail that a provider can use to determine if the provider is subject to HIPAA.<sup>71</sup> Health care providers should consult with legal counsel in making this assessment.

## Does Indiana confidentiality law apply?

Whether or not FERPA or HIPAA applies, the provider records may be subject to Indiana state law. For example, Indiana statute allows disclosures of mental health information to a school principal or "school leader" pursuant to authorization; however, the law describes what information shall be provided and obligates the school principal and "school leader" to confidentiality constraints.<sup>72</sup> Several of these state laws are discussed in the "HIPAA – Basics" section of this Primer. These laws must be taken into consideration as well.



# Frequently Asked Questions

# School Nurse Records and Communications

*For purposes of this section, "school nurse" means a licensed professional providing health services on behalf of a school corporation pursuant to 511 I.A.C. 4-1.5-6, and who is considered "school services personnel" as that term is defined in 511 I.A.C. 4-1.5-1.<sup>74</sup>*

## 1. Does FERPA or HIPAA apply to a school nurse's records?

Student health records maintained by a school nurse typically are part of the education record subject to FERPA. Indiana law also may apply to health information held by a school nurse.

Education records are covered by FERPA. Education records are records that contain information directly related to a student and are maintained by a school or school employee. In general, a school nurse's records fall into this category, because the school nurse is a school employee and the nurse's records contain information related to a student.<sup>73</sup> These records are not covered by HIPAA because HIPAA specifically exempts from its coverage health information in an education record. Indiana confidentiality law, including licensing rules, also may apply to some information held by the nurse. If FERPA and Indiana law provide conflicting obligations regarding disclosure or protection, school nurses should seek guidance from their legal counsel about which rule to follow.

## 2. May a school nurse maintain a separate confidential health file at school?

Generally, treatment records created by a school nurse are subject to FERPA, even if the records are kept in a separate file cabinet or file. Thus, while a school nurse may maintain a separate file as a means to limit accidental disclosures, the file still would be subject to FERPA in most cases. There are certain types of records that are not considered part of an education record, though, and would not be subject to FERPA. These 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<sup>74</sup> and
- Treatment records of a student 18 and older when used only in connection with treatment and not made available to anyone other than those providing treatment.<sup>75</sup>

More information about the "sole possession" exception can be found on page 15 of this Primer. Whether and when either of these two exceptions applies is something to address with legal counsel. If FERPA does not apply, HIPAA may.

School nurses and their legal counsel should evaluate whether the nurse can ever be considered a "covered entity" subject to HIPAA (see page 23).

### **3. Does FERPA still apply if a school nurse is hired with funds from an agency not subject to FERPA, such as a foundation or the Department of Health?**

Yes, FERPA still applies. Joint Guidance from the U.S. Departments of Education and Health and Human Services addresses this question: "Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired *as a school official (or a contractor [of the educational agency])*, the records maintained by the nurse or clinic are 'education records' subject to FERPA."<sup>76</sup> (Emphasis added.)

### **4. May a health care provider operating under HIPAA, such as a student's pediatrician, disclose protected health information to the school nurse?**

In most cases, yes. The information may be disclosed pursuant to a HIPAA-compliant written authorization. Alternatively, HIPAA and Indiana law also permit health care providers to disclose protected health information to other health care providers for "treatment" purposes. HIPAA defines "treatment" broadly in this context to include coordination or management of health care, consultation and referral as well as direct treatment.<sup>77</sup> Indiana law includes a similar exception described in more detail on page 12 of this Primer. Providers also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain medical emergencies. It is important to note that once disclosed to the school nurse, if the school nurse places the information in the education record, FERPA likely will apply when determining access to the information in the file not HIPAA.<sup>78</sup>

### **5. May a school nurse disclose information to a student's pediatrician?**

In limited circumstances, yes. The information may be disclosed pursuant to a FERPA-compliant written authorization. If there is no authorization in place, information can only be disclosed in a few circumstances. For example, the school could provide the health provider access to directory information about a specific student absent parental consent. 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. (See question 7 on page 15 for more on the "directory information" exception.) In addition, the school nurse also may disclose to the pediatrician information that is not contained in the education record, such as information from personal observation that have not been recorded, as long as the disclosure does not violate professional codes of conduct or contract obligations.<sup>79</sup> (See example in box on page 15.) In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the emergency exception (described in question 6 below).

## 6. May a school nurse disclose information from the education record in an emergency?

Yes. FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>80</sup> This exception allows disclosure in response to a specific situation that poses an imminent danger. The release may occur “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.”<sup>81</sup> The information may be disclosed to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals” as determined by the educational agency.

“In making [this] determination”, FERPA goes on to say, “an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department [of Education] will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>82</sup>

Providers also should consult their ethical and licensing rules for applicable guidance.



*For more questions relevant to school nurses, see the section in this Primer entitled “**More FERPA Questions.**”*

# Records of School Services Personnel Providing Psychological and Counseling Services

*For purposes of this section, "school services personnel" means "school services personnel" as defined in 511 I.A.C. 4-1.5-1 who are providing "health services" on behalf of a school corporation pursuant to 511 I.A.C. 4-1.5-6. This includes professionals who hold credentials in school counseling, school psychology, and school social work.<sup>74</sup>*

## **1. Does FERPA or HIPAA apply to the records created by school services personnel when they provide assessment, therapy or counseling to students?**

Student health records maintained by school services personnel typically are part of the education record subject to FERPA. Indiana law also may apply to health information held by a school mental health provider.

Education records are covered by FERPA. In general, the records created by school services personnel become part of the school's education record, as they contain information related to a student and are maintained by a school employee or agent.<sup>83</sup> These records are not covered by HIPAA because HIPAA specifically exempts from its coverage health information in an education record. Indiana confidentiality law, including licensing rules, also may apply to some information. If FERPA and Indiana law provide conflicting obligations regarding disclosure or protection, school services personnel should seek guidance from their legal counsel about which rule to follow.

## **2. May school services personnel maintain a confidential file separate from the education file?**

Generally, records created by school services personnel are subject to FERPA, even if the records are kept in a separate file cabinet or file. Thus, while school services personnel may maintain a separate file as a means to limit accidental disclosures, the file still would be subject to FERPA in most cases. There are certain types of records that are not considered part of an education record, though, and would not be subject to FERPA. These 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<sup>84</sup> and
- Treatment records of a student 18 and older when used only in connection with treatment<sup>85</sup>

More information about the "sole possession" exception can be found on page 15 of this Primer. Whether either of these two exceptions applies to exempt files from FERPA is something to address with legal counsel. If FERPA does not apply, HIPAA

may. School services personnel and their legal counsel should evaluate whether he or she can be considered a “covered entity” subject to HIPAA (see page 23).



### **3. Does FERPA apply if school services personnel are hired by the district with funds from an agency not subject to FERPA, such as a community-based mental health agency?**

Yes, FERPA most likely still applies, though it may depend on whether the school services personnel are acting as school employees. The Joint Guidance from the U.S. Departments of Education and Health and Human Services addressed this question in relation to school nurses: “Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired *as a school official (or a contractor [of the educational agency])*, the records maintained by the nurse or clinic are ‘education records’ subject to FERPA.”<sup>86</sup> (Emphasis added.) The same rule laid out above for hiring school nurses applies to other health providers employed by a school district. If the providers are employed by the district and hired to fill an institutional position, then their records would most likely be considered ‘education records’ subject to FERPA. School services personnel in this type of situation should consult legal counsel for advice.

### **4. May a community based health care provider share confidential health information subject to HIPAA with school services personnel?**

In some cases, yes. The information may be disclosed pursuant to a HIPAA-compliant written authorization. In addition, HIPAA and state medical confidentiality law permit health care providers to share information related to outpatient care with other health and mental health care professionals for purposes of treatment. The health care provider has discretion to determine what disclosures are appropriate in these cases.<sup>87</sup> (See page 12 of this Primer for more information on this exception.) Providers also are allowed to disclose information to other health care providers without first obtaining patient or parent authorization in a few other circumstances, such as in certain medical emergencies pursuant to an emergency exception (described below). It is important to note that once disclosed to a school employee, if the school employee places the information in the education record, FERPA likely will apply when determining access to the information in the file not HIPAA.<sup>88</sup>

## 5. May school services personnel share information from the education record with a community-based health care provider?

In limited circumstances, yes. The information may be disclosed pursuant to a FERPA-compliant written authorization. If there is no authorization in place, information can only be disclosed in a few circumstances. For example, the school could provide the health care provider access to directory information about a specific student absent parental consent. 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. (See question 7 on page 15 of this Primer for more on the “directory information” exception.) In addition, the school also may disclose information to the provider that is not contained in the education record, such as information from oral communications or personal observation that have not been recorded.<sup>89</sup> (See example in box on page 15.) In an emergency, information in the education record may be disclosed to “appropriate persons” pursuant to the emergency exception (described in question 6 below).

## 6. May school services personnel share information from the education record in an emergency?

Yes, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>90</sup> This exception allows disclosure in response to a specific situation that poses an imminent danger. The release may occur “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.”<sup>91</sup>

“In making [this] determination”, FERPA goes on to say, “an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>92</sup>

Providers also should consult their ethical and licensing rules for applicable guidance.

*For more questions relevant to school counselors, see the section in this Primer entitled “**More FERPA Questions**.”*

## More FERPA Questions

### 1. If a school health program operates under FERPA, what administrative requirements must it satisfy?

If a school health program operates under FERPA, it must meet all the administrative requirements in FERPA. Among other things, this includes:

- Making sure it has a FERPA-compliant release of information form;
- Providing the appropriate annual notices, including required notices regarding directory information, the school official exception, and inspection and confidentiality rights;
- Ensuring it has local policies in place that address and defines important FERPA terms such as “legitimate educational interest”, “parent”, and “directory information”; and
- Complying with recordkeeping requirements regarding releases of information.

It includes other considerations as well. The National Forum on Education Statistics has a guide to implementing FERPA.<sup>93</sup> Requirements for a compliant release form can be found in Appendix B, and the U.S. Department of Education provides several model notices for educational agencies.<sup>94</sup>

### 2. May a school or district share information from the education record, such as the student’s schedule, attendance, or grades, with school services personnel for purposes of service provision?

It depends. This information can always be disclosed with parental consent. Absent parental consent, FERPA permits a school to disclose information in the education record to other school officials as long as they have a legitimate educational interest in the information.<sup>95</sup> 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 and what the school considers to be a “legitimate educational interest.”<sup>96</sup> Thus, the school may share the information with school services personnel if that individual has a

legitimate educational interest in accessing the information, as legitimate educational interest is defined by the district.<sup>97</sup>

In addition, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals”<sup>98</sup> in response to a specific situation that poses an imminent danger. The release may occur “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.”<sup>99</sup> The person receiving the information will be required to protect the information subject to FERPA.<sup>100</sup>

### **3. May a school let a teacher know about a student’s medical condition, such as a chronic disease, documented in the education file?**

It depends. This information can always be disclosed with parental consent. Absent parental consent, FERPA permits a school to disclose information in the education record to other school officials as long as they have a legitimate educational interest in the information.<sup>101</sup> 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 and what the school considers to be a “legitimate educational interest.”<sup>102</sup> Thus, the school may share the information with the teacher if the teacher has a legitimate educational reason in needing the information, as legitimate educational interest is defined by the district.<sup>103</sup>

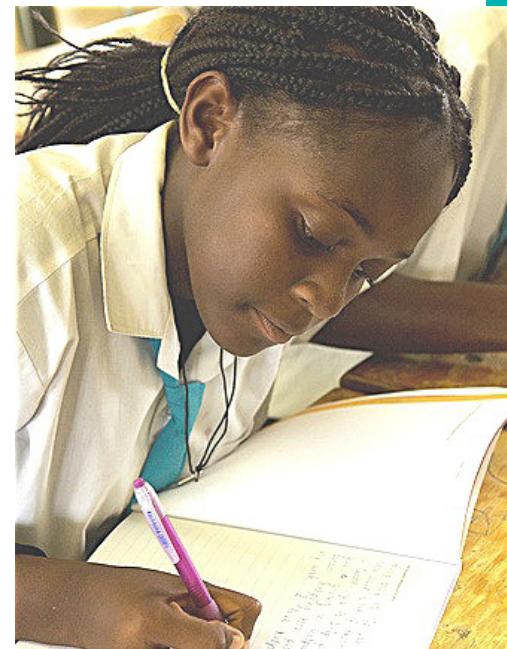
In addition, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals”<sup>104</sup> in response to a specific situation that poses an imminent danger. The release may occur “if the agency or 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.”<sup>105</sup>

### **4. May a school disclose information from the education record to an outside contractor?**

It depends. The information can always be disclosed with a FERPA-compliant parental consent. If there is no consent in place, the information can be shared in some cases depending on the contractor’s role and the services being provided. According to guidance from the U.S. Department of Education, “*agencies and institutions subject to FERPA are not precluded from disclosing education records to parties to whom they have outsourced services so long as they do so under the same conditions applicable to school officials who are actually employed.*” The guidance reminds schools and educational agencies that “*an educational agency or institution may not disclose education records without prior written consent merely because it has entered into a contract or agreement with an outside party. Rather, the*

*agency or institution must be able to show that 1) the outside party provides a service for the agency or institution that it would otherwise provide for itself using employees; 2) the outside party would have “legitimate educational interests” in the information disclosed if the service were performed by employees; and 3) the outside party is under the direct control of the educational agency or institution with respect to the use and maintenance of information from educational records.”*

The guidance reminds districts that they remain completely responsible for their contractor’s compliance with FERPA requirements in these situations and states “[f]or that reason, we recommend that these specific protections be incorporated into any contract or agreement between an educational agency or institution and any non-employees it retains to provide institutional services.” The U.S. Department of Education adds that if the school has not “*listed contractors and other outside service providers as ‘school officials in its annual § 99.7 FERPA notification, then it is required to record each disclosure to a qualifying contractor in accordance with § 99.32(a).*”<sup>106</sup>



## 5. May school services personnel assure students that parents will not have access to their health records?

For the most part, no. The records of school services personnel are part of the education record, and parents have a right to inspect the education record of their minor child if they choose to do so.<sup>107</sup> There is no exception under FERPA that limits parent inspection rights simply because the information in the record pertains to health care services, with one caveat. Parents usually do not have the right to inspect health information in the education record of students eighteen and older, though there are exceptions to this rule as well.<sup>108</sup>

# Community Based Provider Records and Communication

## **1. If a community based health care provider operates under HIPAA, what administrative requirements must it satisfy?**

If a health care provider operates under HIPAA, it must meet all the administrative requirements in HIPAA. This includes but is not limited to making sure the provider has a “Notice of Privacy Practices” and a HIPAA-compliant release form and is maintaining records for the appropriate number of years,<sup>109</sup> among many other things. Providers subject to HIPAA should always consult their legal counsel regarding the many administrative requirements in HIPAA.

## **2. May a school or district share information from the education record with a community based health care provider for purposes of service provision?**

In limited circumstances, yes. The information may be disclosed pursuant to a FERPA-compliant written authorization. If there is no authorization in place, information can only be disclosed in a few limited circumstances. For example, the school could provide the health provider access to directory information about a specific student absent parental consent. 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. In addition, the school also may disclose information to the provider that is not contained in the education record, such as information from oral communications or personal observation that have not been recorded and do not need to be recorded.<sup>110</sup> In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the FERPA health and safety exception (described in question 6 on page 30).

### 3. May a community based health care provider share information with school employees in an emergency?

HIPAA allows a health care provider to disclose otherwise protected health information in order to avert a serious threat to health or safety. Specifically, HIPAA says that a provider may disclose information, consistent with applicable law and ethical principles, if the provider in good faith believes the disclosure:

- (1) is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
- (2) is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.

There is a presumption that a provider acted in good faith in making such a disclosure if the provider's belief is based on actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.<sup>111</sup> Mental health providers are permitted to disclose psychotherapy notes without authorization under emergency circumstances.<sup>112</sup>

It is important also to review which Indiana law may apply to the records in question and under what circumstances disclosure absent written authorization is allowed in an emergency under the applicable law.

### 4. May a community based health care provider, such as a student's pediatrician, disclose protected health information to the school nurse?

In most cases, yes. The information may be disclosed pursuant to a HIPAA compliant written authorization. Alternatively, HIPAA and Indiana law also permit health care providers to disclose protected health information to other health care providers for "treatment" purposes. HIPAA defines "treatment" broadly in this context to include coordination or management of health care, consultation, and referral, as well as direct treatment.<sup>113</sup> Providers also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain medical emergencies. It is important to note that once disclosed to the school nurse, if the school nurse places the information in the education record, FERPA likely will apply when determining access to the information in the file not HIPAA.<sup>114</sup>

### 5. May a community based health care provider disclose health information to let a teacher know how a student is progressing in treatment?

The health care provider can share information pursuant to a signed authorization. Otherwise, there is no exception under HIPAA that would allow a provider to share protected health information with a teacher for this purpose absent authorization.



# APPENDICES

# Appendix A:

## KEY POINTS about FERPA and HIPAA in Indiana

### Basics

- FERPA and HIPAA can never apply to the same records at the same time.
- FERPA and Indiana medical confidentiality law can apply to the same records at the same time.
- HIPAA and Indiana medical confidentiality law can apply to the same records at the same time.
- HIPAA or FERPA may apply to the health records created when health services are provided on a school campus.

### FERPA or HIPAA?

- A school health program's records are subject to FERPA if the program is funded, administered, and operated by, or on behalf of, a school or educational institution.
- A school health program's records are subject to HIPAA if the program is funded, administered, and operated by, or on behalf of, a public or private health, social services, or other non-educational agency or individual.

### Why does it matter?

- A parent's right to access health records is different under HIPAA and FERPA.
- The individuals and agencies with whom a school health provider can exchange protected health information without a release differ under HIPAA and FERPA.
- The administrative rules, including requirements for release of information forms, differ under HIPAA, FERPA and Indiana law.

## **Appendix B: Requirements for Release of Information Forms**

If records are subject to any of the following laws, a release form must include all the elements described to be valid. Please consult legal counsel to determine which of these laws apply in your situation.

### **I. Requirements under FERPA: 34 C.F.R 99.30**

To comply with FERPA, a written consent to release education records must:

- (1) Specify the records that may be disclosed;
- (2) State the purpose of the disclosure;
- (3) Identify the party or class of parties to whom the disclosure may be made; and
- (4) Be signed and dated.

“Signed and dated written consent” under this part may include a record and signature in electronic form that (1)Identifies and authenticates a particular person as the source of the electronic consent; and (2)Indicates such person’s approval of the information contained in the electronic consent.

### **II. Requirements under HIPAA: 45 C.F.R. 164.508(c)**

1. A valid authorization under this section must contain at least the following elements:

- A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
- The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
- The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
- A description of each purpose of the requested use or disclosure. The statement “at the request of the individual” is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement “end of the research study,” “none,” or similar language is sufficient

if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

- Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

2. In addition to the core elements, the authorization must contain statements adequate to place the individual on notice of all of the following:

- The individual's right to revoke the authorization in writing, and either:
  - The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or
  - To the extent that the information in paragraph (c)(2)(i) (A) of this section is included in the notice required by § 164.520, a reference to the covered entity's notice.
- The ability or inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization by stating either:
  - The covered entity may not condition treatment, payment, enrollment or eligibility for benefits on whether the individual signs the authorization when the prohibition on conditioning of authorizations in paragraph (b)(4) of this section applies; or
  - The consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization.
- The potential for information disclosed pursuant to the authorization to be subject to redisclosure by the recipient and no longer be protected by this subpart.

3. The authorization must be written in plain language.

4. If a covered entity seeks an authorization from an individual for a use or disclosure of protected health information, the covered entity must provide the individual with a copy of the signed authorization.

### **III. Requirements under Indiana Code 16-39-1-4 (health records)**

Except as provided in IC 16-39-5, a patient's written consent for release of the patient's health record must include the following:

- (1) The name and address of the patient.
- (2) The name of the person requested to release the patient's record.
- (3) The name of the person or provider to whom the patient's health record is to be released.

- (4) The purpose of the release.
- (5) A description of the information to be released from the health record.
- (6) The signature of the patient, or the signature of the patient's legal representative if the patient is incompetent.
- (7) The date on which the consent is signed.
- (8) A statement that the consent is subject to revocation at any time, except to the extent that action has been taken in reliance on the consent.
- (9) The date, event, or condition on which the consent will expire if not previously revoked.

#### **IV. Requirements under Indiana Code 16-39-2-5 (mental health records)**

A patient's written request for the release of the patient's mental health record under this section must include the following:

- (1) The name of the patient.
- (2) The name of the person requested to release the patient's mental health record.
- (3) The name of the person, provider, or organization to whom the patient's mental health record is to be released.
- (4) The purpose of the release.
- (5) A description of the information to be released from the mental health record.
- (6) The signature of the patient.
- (7) The date the request is signed.
- (8) A statement that the patient's consent to release of mental health records is subject to revocation at any time, except to the extent that action has been taken in reliance on the patient's consent.
- (9) The date, event, or condition on which the patient's consent to release of mental health records will expire if not previously revoked.

Unless otherwise specified in a written request under this section, a request for release of records is valid for one hundred eighty (180) days after the date the request is made.

A request for release of records under this section may be revoked by the patient at any time, except to the extent that action has been taken in reliance on the consent.

Mental health records requested by the patient to be released under this section may be released by the provider receiving the request, regardless of whether the patient is still receiving services from the provider.

## Appendix C: Consent to Treatment Laws

*Indiana law authorizes minors (persons under age 18) to consent to their own health care in certain circumstances. Relevant statutes are listed below, current as of July 2019:*

### Indiana Code 16-36-1-3:

“(a) Except as provided in subsections (b) through (d), unless incapable of consenting under section 4 [IC 16-36-1-4] of this chapter, an individual may consent to the individual’s own health care if the individual is:

- (1) an adult; or
- (2) a minor and:
  - (A) is emancipated;
  - (B) is:
    - (i) at least fourteen (14) years of age;
    - (ii) not dependent on a parent for support;
    - (iii) living apart from the minor’s parents or from an individual in loco parentis; and
    - (iv) managing the minor’s own affairs;
  - (C) is or has been married;
  - (D) is in the military service of the United States; or
  - (E) meets the requirements of section 3.5 of this chapter;
  - (F) is authorized to consent to the health care by any other statute.
- (b) A person at least seventeen (17) years of age is eligible to donate blood in a voluntary and noncompensatory blood program without obtaining parental permission.
- (c) A person who is sixteen (16) years of age is eligible to donate blood in a voluntary and noncompensatory blood program if the person has obtained written permission from the person’s parent.
- (d) An individual who has, suspects that the individual has, or has been exposed to a venereal disease is competent to give consent for medical or hospital care or treatment of the individual.”

### Indiana Code 16-36-1-3.5:

- “(a) This section does not apply to the provision of an abortion or completion of a POST form.
- (b) A minor who:
  - (1) is at least sixteen (16) years of age; and (2) is:
    - (A) pregnant;
    - (B) in labor; or
    - (C) postpartum for a sixty (60) day period after the birth;

is competent to give consent for the minor’s medical care and treatment with respect to the pregnancy, delivery and postpartum care of the minor.

(c) Before a health care provider may provide care to a minor described in subsection (b), the health care provider shall, before or at the initial appointment, make a reasonable effort to contact the minor's parent or guardian for consent to provide the treatment and document in writing each attempt the health care provider made to contact the parent or guardian of the minor. If, after the health care provider has made a reasonable attempt to contact the minor's parent or guardian before or at the initial appointment for treatment, either: (1) the health care provider is unable to make contact; or (2) the parent or guardian refuses to provide consent for treatment: the health care provider shall act in the manner that is in the best interests of the minor and the fetus.

(d) If, after the initial appointment or treatment, the health care provider determines that additional care is in the best interests of the minor and fetus, the health care provider shall make one (1) additional attempt to contact the parent or guardian of the minor for consent, if applicable, before: (1) the provision of prenatal care; (2) the delivery of the baby; and (3) the provision of postpartum care.

### **Indiana Code 16-36-1-5:**

“(b) Consent to health care for a minor not authorized to consent under section 3 [IC 16-36-1-3] of this chapter may be given by any of the following:

- (1) A judicially appointed guardian of the person or a representative appointed under section 8 of this chapter.
- (2) A parent or an individual in loco parentis if:
  - (A) there is no guardian or other representative described in subdivision (1);
  - (B) the guardian or other representative is not reasonably available or declines to act; or
  - (C) the existence of the guardian or other representative is unknown to the health care provider.
- (3) An adult sibling of the minor if:
  - (A) there is no guardian or other representative described in subdivision (1);
  - (B) a parent or an individual in loco parentis is not reasonably available or declines to act; or
  - (C) the existence of the parent or individual in loco parentis is unknown to the health care provider.

(c) A representative delegated authority to consent under section 6 [IC 16-36-1-6] of this chapter has the same authority and responsibility as the individual delegating the authority.

(d) An individual authorized to consent for another under this section shall act in good faith and in the best interest of the individual incapable of consenting.”

(e) If there are multiple individuals at the same priority level under this section, those individuals shall make a reasonable effort to reach consensus on the health care decisions on behalf of the individual...If the individuals at the same priority level disagree as to the health care decisions on behalf of the individual...the majority of the available individuals at the same priority level controls.”

### **Other important consent laws that impact minors access to care in Indiana:**

- **42 CFR 59.5(a)(4)** (Minors consent for Title X funded family planning services on their own accord.)
- **Indiana Code 34-18-12-9** (Emergency services do not require consent to care.)
- **Indiana Code 16-21-8-1** (The Indiana Attorney General has concluded that a parent's consent is not required prior to rendering emergency hospital medical treatment to a minor who is an alleged victim of a sex crime under this statute. See 1978 Op. Ind. Atty Gen. No. 19.)

## Appendix D: References and Resources

### From Indiana:

1. *Delegation Guidelines for Indiana School Nurses* (Jan. 2016), from the Indiana Association of School Nurses, Indiana State Nurses Association, and Indiana Department of Education, available at: [www.doe.in.gov/sites/default/files/health/delegation-guidelines-12-9-16.pdf](http://www.doe.in.gov/sites/default/files/health/delegation-guidelines-12-9-16.pdf)
2. Indiana Codes, available at: <http://iga.in.gov/legislative/laws/2018/ic/titles/001>
3. Indiana School Health Network, available at <http://www.ckfindiana.org>

### From the U.S. Department of Education:

1. *Data-Sharing Tool Kit for Communities: How to Leverage Community Relationships While Protecting Student Privacy* (March 2016), available at: <http://www2.ed.gov/programs/promiseneighborhoods/datasharingtool.pdf>
2. *Checklist for Developing School District Privacy Programs* (August 2015), available at: <http://studentprivacy.ed.gov/resources/checklist-developing-school-district-privacy-programs>
3. *FERPA for School Officials - Model Notices and Guidance*, available at <http://www2.ed.gov/policy/gen/guid/fpcos/ferpa/leas-officials.html>

### From the U.S. Department of Health and Human Services and the Centers for Medicare and Medicaid:

1. *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, available at: <http://www2.ed.gov/policy/gen/guid/fpcos/doc/ferpa-hipaa-guidance.pdf>
2. *HIPAA for Professionals*, available at: <http://www.hhs.gov/hipaa/for-professionals/index.html>
3. *HIPAA – General Information*, available at: <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>

### Other Resources:

U.S. Code of Federal Regulations, available at <http://www.ecfr.gov/cgi-bin/ECFR?page=browse>

## Appendix E: Glossary of Key Terms from HIPAA and FERPA

### HIPAA

*Authorization:* Written document that grants permission to a covered entity to disclose protected health information. An authorization must contain certain elements outlined in HIPAA to be valid. 45 C.F.R. 164.508.

*Business Associate:* Individual or organization that receives, creates, maintains or transmits protected health information as part of certain types of work it does on behalf of a covered entity. 45 C.F.R. 160.103.

*Covered Entity:* Health plans, health care clearinghouses, and health care providers who transmit health information in electronic form related to certain types of transactions. 45 C.F.R 160.103.

*Disclosure:* Release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information. 45 C.F.R. 160.103.

*Health care provider:* Health care provider means a provider of medical or health services and any other person or organization who furnishes, bills or is paid for health care in the normal course of business. It includes individual providers such as nurses, physicians, and mental health practitioners, as well as clinics and other organizations. 45 C.F.R. 160.103.

*Protected Health Information:* Individually identifiable health information in any form, including oral communications. It does not include information subject to FERPA. 45 C.F.R. 164.103.

*Psychotherapy Notes:* Notes or records 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. This 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. 45 C.F.R. 164.501.

*Treatment:* Provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another. 45 C.F.R. 164.501.

## FERPA

<i>Directory Information:</i>	Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended. 34 C.F.R. 99.3.
<i>Disclosure:</i>	To permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record. 34 C.F.R. 99.3.
<i>Educational Agency or Institution:</i>	Institutions that receive federal funds under programs administered by the U.S. Department of Education and that either provide direct instruction to students, such as schools; or are educational agencies that direct or control schools, such as school districts and state education departments. 34 C.F.R. 99.1.
<i>Education Record:</i>	Records, files documents, or other materials recorded in any way 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. 34 C.F.R. 99.3.
<i>Parent:</i>	A natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 C.F.R. 99.3.
<i>Personally Identifiable Information:</i>	The term includes, but is not limited to: the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. 34 C.F.R. 99.3.
<i>Sole Possession Record:</i>	Records kept in the sole possession of the maker, used only as a personal memory aid, and that are not accessible or revealed to any other person except a temporary substitute for the maker of the record. 34 C.F.R. 99.3.
<i>Treatment Record:</i>	Records of a student 18 and older, or who is attending a postsecondary institution, that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity, made or maintained only in connection with treatment of the student and disclosed only to individuals providing the treatment. 34 C.F.R. 99.3.

## Endnotes

<sup>1</sup> 45 C.F.R. § 160.103. (The U.S. Government Publishing Office makes the Code of Federal Regulations available online at [http://www.ecfr.gov/cgi-bin/text-idx?SID=ffea9a9ccdd79672b39852004d69ffe1&mc=true&tpl=/ecfrbrowse/Title45/45cfrv1\\_02.tpl#0](http://www.ecfr.gov/cgi-bin/text-idx?SID=ffea9a9ccdd79672b39852004d69ffe1&mc=true&tpl=/ecfrbrowse/Title45/45cfrv1_02.tpl#0))

<sup>2</sup> 45 C.F.R. § 160.103.

<sup>3</sup> 45 C.F.R. § 160.103 ("Health care provider means a provider of services ... a provider of medical or health services ... and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business".)

<sup>4</sup> U.S. Dept. of Health and Human Services, "Covered Entity Guidance," available at <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf>

<sup>5</sup> 45 C.F.R. § 160.103 ("Except as provided in paragraph (4) of this definition business associate means, with respect to a covered entity, a person who: (i) On behalf of such covered entity or of an organized health care arrangement (as defined in this section) in which the covered entity participates, but other than in the capacity of a member of the workforce of such covered entity or arrangement, creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing; or (ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation (as defined in § 164.501 of this subchapter), management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person. (2) A covered entity may be a business associate of another covered entity. (3) Business associate includes: (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information. (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity. (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate. (4) *Business associate* does not include: (i) A health care provider, with respect to disclosures by a covered entity to the health care provider concerning the treatment of the individual. (ii) A plan sponsor, with respect to disclosures by a group health plan (or by a health insurance issuer or HMO with respect to a group health plan) to the plan sponsor, to the extent that the requirements of § 164.504(f) of this subchapter apply and are met. (iii) A government agency, with respect to determining eligibility for, or enrollment in, a government health plan that provides public benefits and is administered by another government agency, or collecting protected health information for such purposes, to the extent such activities are authorized by law. (iv) A covered entity participating in an organized health care arrangement that performs a function or activity as described by paragraph (1)(i) of this definition for or on behalf of such organized health care arrangement, or that provides a service as described in paragraph (1)(ii) of this definition to or for such organized health care arrangement by virtue of such activities or services.")

<sup>6</sup> 45 C.F.R. § 164.502(a)(3)&(4). See U.S. Dept. of Health & Human Services, "Business Associates" for more information, available at <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/>

<sup>7</sup> 45 C.F.R. § 160.103 ("Definitions: *Health information* means any information, whether oral or recorded in any form or medium, that: (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. *Individually identifiable health information* is information that is a subset of health information, including demographic information collected from an individual, and: (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

*Protected health information* means individually identifiable health information: (1) Except as provided in paragraph (2) of this definition that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium.....").

<sup>8</sup> *Id.*

<sup>9</sup> 45 C.F.R. § 164.103 ("Protected Health Information...Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. §1232g; ....").

<sup>10</sup> 45 C.F.R. §164.502(a).

<sup>11</sup> 45 C.F.R. § 164.508(c).

<sup>12</sup> *Id.*

<sup>13</sup> 45 C.F.R. § 164.502(g)(i).

<sup>14</sup> 45 C.F.R. § 164.502(g)(i).

<sup>15</sup> 45 C.F.R. §§ 164.502(a)(1)(ii);164.506.

<sup>16</sup> 45 C.F.R. § 164.512(j)(1) ("(1) Permitted disclosures. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure: (i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat").

<sup>17</sup> 45 C.F.R. § 164.512(j).

<sup>18</sup> 45 C.F.R. §§ 164.502(a)(1)(ii);164.506.

<sup>19</sup> 45 C.F.R. §§ 164.502(a)(1)(ii);164.506.

<sup>20</sup> 45 C.F.R. § 164.512(b)(1)(i).

<sup>21</sup> 45 C.F.R. § 164.512(b)(1)(ii).

<sup>22</sup> 45 C.F.R. §§ 164.502(a)(1)(i)&(2)(i); 164.524.

<sup>23</sup> See 45 C.F.R. §§ 164.502(a)(1); 164.512.

<sup>24</sup> See e.g. Ind. Code § 16-39-2-3 (confidentiality of mental health records), available at <http://iga.in.gov/legislative/laws/2018/ic/titles/001>

<sup>25</sup> 45 C.F.R. §§ 160.203; 164.202.

<sup>26</sup> Ind. Code § 16-18-2-168(a) ("Health records... means written, electronic, or printed information possessed or maintained by a provider concerning any diagnosis, treatment, or prognosis of the patient, including such information possessed or maintained on microfiche, microfilm or in a digital format. The term includes mental health records and alcohol and drug abuse records").

<sup>27</sup> Ind. Code § 16-18-2-226 ("Mental health records...means recorded or unrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services or developmental disability training. The term does not include alcohol and drug abuse records").

<sup>28</sup> See Ind. Code § 16-39-1-1(c)(patient right to request health record); § 16-39-1-3(emancipated minor requests, or parent, guardian or custodian of patient); § 16-39-1-7; see Ind. Code 16-39-2-9 (If patient is a minor, the minor's parent, guardian, or other court appointed representative exercises the rights of patient on the minor's behalf vis a vis mental health records).

<sup>29</sup> See e.g. Ind. Code § 16-39-1-1 ("(a) This section applies to all health records except mental health records, which are governed by IC 16-39-2, IC 16-39-3, and IC 16-39-4. (b) This article applies to all health records, except: (1) records regarding communicable diseases, which are governed by IC 16-41-8-1; or (2) records regarding alcohol and other drug abuse patient records, which are governed by 42 CFR, Part 2").

<sup>30</sup> For information on the confidentiality laws that apply to Title X and drug treatment services, see Gudeman, Madge, "The Federal Title X Family Planning Program: Privacy and Access Rules for Adolescents," *Youth Law News* Jan-Mar. 2011 and see Gudeman, "Federal Privacy Protection for Substance Abuse Treatment Records: Protecting Adolescents," *Youth Law News*, July-Sep. 2003.

<sup>31</sup> Ind. Code §§ 16-39-1-5(right to limit patient access), 16-39-1-3(when patient is a minor, parent, guardian or court appointed legal representative exercise rights of patient); see 45 C.F.R. §§ 164.502(a)(1)(ii),164.506.

<sup>32</sup> Ind. Code §§ 16-39-2-4(right to limit patient access), 16-39-2-9(when patient is a minor, parent, guardian or court appointed legal representative exercise rights of patient); see 45 C.F.R. §§ 164.502(a)(1)(ii),164.506.

<sup>33</sup> Ind. Code § 16-18-2-168(a) ("Health records"... means written, electronic, or printed information possessed or maintained by a provider concerning any diagnosis, treatment, or prognosis of the patient, including such information possessed or maintained on microfiche microfilm or in a digital format. The term includes mental health records and alcohol and drug abuse records.").

<sup>34</sup> Ind. Code § 16-39-5-1.

<sup>35</sup> Ind. Code § 16-39-2-6(a)(1)(A)(iii).

<sup>36</sup> The statute does not explicitly define "school leader." Please consult legal counsel for assistance.

<sup>37</sup> Ind. Code § 16-39-4-3 ("(a) If a provider has received a written request from the [patient's parent, guardian or court appointed special guardian who is involved in the planning, provision, and monitoring of a child enrolled in a school], the provider shall provide the following information to the individual who made the request or the patient's school principal or school leader: (1) A summary of the patient's diagnosis. (2) A summary of the information required to be given to the patient under IC 12-27-6-2 and IC 12-27-6-3. (3) The types of medication that have been prescribed for the patient. (4) A summary of the patient's prognosis.. If the information is provided after a request is made under section 2(c) of this chapter, the provider shall limit the information provided to information concerning the patient's mental health. The school principal or school leader shall keep the information the principal or school leader receives under this section confidential (b) A school principal or school leader who receives information and mental health records under this chapter shall sign a confidentiality agreement prescribed by the provider confirming that the information and mental health records released by the provider may not be disclosed by the principal except to the minimum necessary extent required to: (1) inform necessary school staff of the principal's or school leader's decision regarding the student's fitness or school attendance and participation in services; or (2) satisfy duties imposed upon the principal or school leader by law. (c) A school principal or school leader who receives information and mental health records under this chapter is immune from civil, criminal, and administrative liability for disclosures made pursuant to this chapter.").

<sup>38</sup> 20 U.S.C. § 1232g.

<sup>39</sup> 34 C.F.R. § 99.1(a) ("Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if—(1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.").

<sup>40</sup> See e.g. 34 C.F.R. § 99.31(a)(1)(i)(B) ("A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party— (1) Performs an institutional service or function for which the agency or institution would otherwise use employees; (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.").

<sup>41</sup> 20 U.S.C. § 1232g (a)(4)(A) ("... the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.").

<sup>42</sup> 34 C.F.R. § 99.3.

<sup>44</sup> 34 C.F.R. § 99.3 ("Education Records"... (b) The term does not include: (1) 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. (2) Records of the law enforcement unit....(3) Records relating to an individual....(4)Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are: (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii)Made, maintained, or used only in connection with treatment of the student; and (iii)Disclosed only to individuals providing the treatment. For the purpose of this definition "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution").

<sup>45</sup> 34 C.F.R. § 99.3(b)(1).

<sup>46</sup> U.S. Dept. of Educ., *"What Records are Exempted from FERPA?"* available at: <https://studentprivacy.ed.gov/faq/what-records-are-exempted-ferpa>

<sup>47</sup> 34 C.F.R. § 99.30.

<sup>48</sup> 34 C.F.R. § 99.3 ("Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.").

<sup>49</sup> The scope of the term 'directory information' will depend on district policy, but can include the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. §1232g(a)(5)(A).

<sup>50</sup> 34 C.F.R. § 99.37. The U.S. Department of Education provides a Model Notice for Directory Information, available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html>

<sup>51</sup> The term "school official" includes school staff, such as teachers, counselors, and school nurses. A school or district may define this term more broadly in its School Board 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. See 34 C.F.R. § 99.31(a)(1)(i).

<sup>52</sup> 20 U.S.C. §1232g (b)(1): 34 C.F.R. § 99.31(a)(1)(i)(A).

<sup>53</sup> See 34 C.F.R. §§ 99.31.

<sup>54</sup> 34 C.F.R. § 99.61.

<sup>55</sup> 34 C.F.R. § 99.31(a)(8).

<sup>56</sup> 34 C.F.R. § 99.3 ("Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.").

<sup>57</sup> See 34 C.F.R. § 99.31(a)(1)(i).

<sup>58</sup> 20 U.S.C. § 1232g (b)(1): 34 C.F.R. § 99.31(a)(1)(i)(A).

<sup>59</sup> U.S. Dept. of Health and Human Services & U.S. Dept. of Educ. *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, [hereinafter *Joint Guidance*], at page 2; see also U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2004.

<sup>60</sup> See U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>

<sup>61</sup> *Id.*

<sup>62</sup> 45 C.F.R. § 160.103 ("Protected Health Information...Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. §1232g; ....").

<sup>63</sup> *Joint Guidance*, *supra* note 59, at page 4

<sup>64</sup> U.S. Dept. of Educ., Family Policy Compliance Office, Letter to Ms. Melanie P. Baise, University of New Mexico, November 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 45 C.F.R. § 160.103.

<sup>69</sup> 45 C.F.R. § 160.103 ("Health care provider means a provider of services ... a provider of medical or health services ... and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.").

<sup>70</sup> See 45 C.F.R. Part 164; U.S. Dept. of Health and Human Services, "Covered Entity Guidance," available at <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf>

<sup>71</sup> See e.g. Ind. Code § 16-39-4-3.

<sup>72</sup> See 45 C.F.R. Part 162; see Privacy Rights Clearinghouse, HIPAA Basics, available at <http://www.privacyrights.org/fs/fs8a-hipaa.htm#3>; see also Dept. of Health & Human Services, Covered Entity Guidance, *supra*, note 70.

<sup>73</sup> 20 USC § 1232g(a)(4)(A).

<sup>74</sup> 511 I.A.C. §4-1.5-1 "(e)'Health services' means programs and services that promote and protect the health, safety, and well-being of students to assure a healthy environment that nurtures academic growth... (i)'Student services personnel' means persons who provide... health services and who hold credentials in the areas of: (1) school counseling for educational and career services; (2) school counseling, school psychology, or school social work (master's level) for student assistance services; or (3) registered nursing for health services."). See also 511 I.A.C. §§ 4-1.5-2, 4-1.5-3, 4-1.5-6.

<sup>75</sup> 34 C.F.R. § 99.3(b)(4) "(b) The term does not include... (4)Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are: (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) Made, maintained, or used only in connection with treatment of the student; and (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution".

<sup>76</sup> *Joint Guidance* at page 4.

<sup>77</sup> 45 C.F.R. §164.501.

<sup>78</sup> *Joint Guidance* at page 2.

<sup>79</sup> 34 C.F.R. § 99.8(b).

<sup>80</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

<sup>81</sup> U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2004.

<sup>82</sup> 34 C.F.R. § 99.36(c).

<sup>83</sup> 20 USC § 1232g(a)(4)(A).

<sup>84</sup> 34 C.F.R. § 99.3(b)(1) ("Education Records"... (b) The term does not include: (1) 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.").

<sup>85</sup> 34 C.F.R. § 99.3(b)(4) "(b) The term does not include... (4)Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are: (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) Made, maintained, or used only in connection with treatment of the student; and (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution".

<sup>86</sup> *Joint Guidance* at page 4.

<sup>87</sup> See 45 C.F.R. § 164.506.

<sup>88</sup> *Joint Guidance* at page 2.

<sup>89</sup> 34 C.F.R. 99.8(b).

<sup>90</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, "Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

<sup>91</sup> U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2004.

<sup>92</sup> 34 C.F.R. § 99.36(c).

<sup>93</sup> NFHCS, "Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies," NCES 2004-330, Washington, DC: 2004. Available at <http://nces.ed.gov/pubs2004/2004330.pdf>.

<sup>94</sup> U.S. Dept. of Educ., "FERPA for School Official Guidance and Notices," available at <http://familypolicy.ed.gov/content/fer-pa-school-officials-guidance-and-notices?src=fpco>.

<sup>95</sup> 20 USC § 1232g(b)(1).

<sup>96</sup> U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>.

<sup>97</sup> 20 USC § 1232g(b)(1).

<sup>98</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, "Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements," Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

<sup>99</sup> U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2000.

<sup>100</sup> 34 C.F.R. § 99.33(a)(1).

<sup>101</sup> 20 USC § 1232g(b)(1).

<sup>102</sup> U.S. Dept. of Educ., Office of Management, "Letter to the Honorable Suzanne Bonamici U.S. House of Representatives," June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>.

<sup>103</sup> 20 USC § 1232g(b)(1).

<sup>104</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, "Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements," Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

<sup>105</sup> U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2004.

<sup>106</sup> U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Clark County School District (NV) re: Disclosure of Education Records to Outside Service Providers," June 28, 2006, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html>.

<sup>107</sup> 34 C.F.R. § 99.10.

<sup>108</sup> 34 C.F.R. § 99.5.

<sup>109</sup> For example, Indiana law requires "providers" as defined by the law to maintain original health records for at least seven years. (See Ind. Code § 16-39-7-1.)

<sup>110</sup> 34 C.F.R. § 99.8(b).

<sup>111</sup> 45 C.F.R. § 164.512(j)(1), (4).

<sup>112</sup> 45 C.F.R §§ 164.508(a)(2)(ii); 45 CFR 164.501 ("Psychotherapy notes means notes 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.").

<sup>113</sup> 45 C.F.R. § 164.501.

<sup>114</sup> *Joint Guidance* at page 2.

The Indiana School Health Network (ISHN) is a statewide organization that advocates for and provides resource information to promote school health initiatives across Indiana.

Covering Kids & Families of Indiana (CKF-IN) is a statewide non-profit organization committed to ensuring all Hoosiers have accessible healthcare coverage. CKF-IN is proud to be the lead agency for the Indiana School Health Network.

For more information, visit [www.ckfindiana.org](http://www.ckfindiana.org)

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