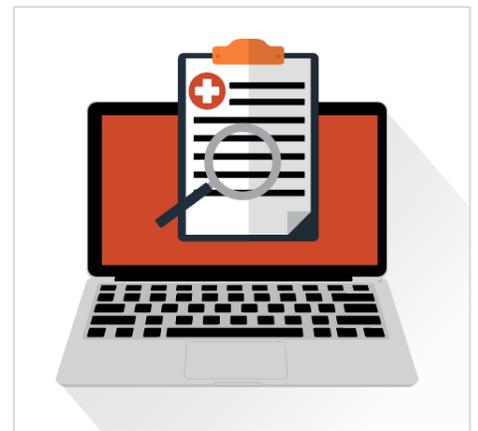




## HIPAA and FERPA Laws: A School Mental Health Navigation Tool for Pacific Southwest States of Hawaii, California, Nevada, and Arizona

Two pieces of legislation policy regulate sharing of student mental health records so that schools and their partners can best respect students and their families' confidentiality while providing necessary care.

- The **Health Insurance Portability and Accountability Act of 1996 (HIPAA)** Privacy Rule is a federal law that protects the privacy of patient health information (mainly relating to student mental health records). HIPAA generally does not apply to public elementary or secondary school settings.
- **The Family Educational Rights and Privacy Act (FERPA)** is a federal law that protects the privacy of public students' personal education records (including certain student health records).



These laws ensure that students secure and school leaders maintain privacy over students' personal health information.

Yet there is persistent confusion about the applicability and limits of these laws. There are many reasons why schools may benefit from sharing these records. To maintain effective referral pathways within schools, or between schools and community-based mental health providers, sharing patient files supports comprehensive and coordinated care plans. Teachers who interact with troubled students are better equipped to meet their social-emotional learning needs if they understand the behavioral health challenges that a student confronts. Choices about appropriate discipline should be shaped by comprehensive knowledge of the whole child. In the case of a crisis, knowledge of students' behavioral health may be critical. For these reasons and many more, there are real impetuses for sharing students' records within the school and with community partners.

Schools can have questions about how to apply them, the differences between the two,<sup>1</sup> and how to navigate state-specific adjustments to these policies. While states are required to adhere to federal HIPAA and FERPA laws at a minimum, they are also empowered to enact additional, more stringent regulations.

All four Pacific Southwest states—Hawaii, California, Nevada, and Arizona—have passed state-specific laws that enhance the federal law.

<sup>1</sup> See "[HIPAA or FERPA? A Primer on School Health Information Sharing in California](#)" (California School Based Health Alliance & the National Center for Youth Law, 2012) for a helpful guide to distinguishing the difference between HIPAA and FERPA law application in California

**This tool offers two supports to help school mental health leaders navigate these laws:**

- 1) An overview of federal HIPAA and FERPA laws and an easy-to-use guide that describes state-level laws.
- 2) Resources for school mental health leadership to use for developing policy that is impacted by HIPAA and FERPA,<sup>2</sup> including: behavioral health referral pathways on campus and to the community; crisis preparedness, response, and recovery policies; student case management and wraparound service approaches; and school discipline reform.



<sup>2</sup> Please note that in order to assure that policies are fully HIPAA and FERPA compliant and that they reflect all local student privacy laws, schools' legal counsel should review policies in advance of finalizing.



**Pacific Southwest** (HHS Region 9)

**MHTTC**

**Mental Health Technology Transfer Center Network**

Funded by Substance Abuse and Mental Health Services Administration

**Contact the Pacific Southwest MHTTC Team for more information.**

Email: [MHTTCPacSWinfo@cars-rp.org](mailto:MHTTCPacSWinfo@cars-rp.org)

Phone: (844) 856-1749

Website: [www.MHTTCnetwork.org](http://www.MHTTCnetwork.org)



## HIPAA AND FERPA COMPARISON TOOL

Guiding Question or Key Aspect	HIPAA	FERPA
What is it? What are the general requirements?	The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule is a federal law that protects the privacy of patient health information. <sup>i</sup>	The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of students' personal records. <sup>ii</sup>
Who is subject to the law?	"Covered entities" and at times those who contract with covered entities. <sup>iii</sup>	"Educational agencies or institutions" and at times those who act as an agent of an educational agency. <sup>iv</sup>
What information is covered?	"Protected health information" (PHI) - individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information. <sup>v</sup>	"Education records" - 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>vi</sup> This includes health information in an education record.
What information is not subject to this law?	Examples include: <ul style="list-style-type: none"> <li>De-identified health information.<sup>vii</sup></li> <li>Health information held in an "education record" subject to FERPA.<sup>viii</sup></li> </ul>	Examples include: <ul style="list-style-type: none"> <li>Communications that are not recorded in any form, such as the contents of a conversation between a teacher and student in a hallway.<sup>ix</sup></li> <li>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>x</sup></li> <li>Treatment records of a student 18 and older when used only in connection with treatment.<sup>xi</sup></li> </ul>
Does the law usually require a signed release to disclose protected information?	Yes. <sup>xii</sup>	Yes. <sup>xiii</sup>
Who signs an authorization to release a minor's information?	A parent, guardian or other person with authority under the law to make health decisions for an unemancipated minor signs in most cases. <sup>xiv</sup>	In most cases, a parent <sup>xv</sup> must sign that release. FERPA defines "parent" to include "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian."
May a youth under age 18 sign a release?	Yes, in some cases a minor must sign the release. <sup>xvi</sup>	No.
Does it prescribe what the release must include to be legally valid?	Yes, but note state laws. <sup>xvii</sup>	Yes. <sup>xviii</sup>
May an agency ever limit or withhold information from parents?	Yes. For example, if state law restricts parent access or in situations of endangerment. <sup>xix</sup> See endnote.	Only if there is a court order or other legal document specifically revoking the right. <sup>xx</sup>
Does the law allow disclosures without need of a signed release?	Yes. Exceptions in HIPAA allow and sometimes require disclosures without a release. <sup>xxi</sup> Some examples include: <ul style="list-style-type: none"> <li>For treatment purposes.<sup>xxii</sup></li> <li>For payment purposes.<sup>xxiii</sup></li> <li>For research purposes.<sup>xxiv</sup></li> <li>To comply with mandated child abuse and public health reporting requirements.<sup>xxv</sup></li> <li>Additional exceptions also exist.<sup>xxvi</sup></li> </ul>	Yes. Exceptions allow disclosures. <sup>xxvii</sup> Some examples include: <ul style="list-style-type: none"> <li>Sharing de-identified information.<sup>xxviii</sup></li> <li>Sharing "directory information."<sup>xxix</sup></li> <li>Sharing with "school officials"<sup>xxx</sup> in the same educational agency who have a "legitimate educational interest" in the information<sup>xxxi</sup></li> <li>Additional exceptions also exist.<sup>xxxii</sup></li> </ul>

Guiding Question or Key Aspect	HIPAA	FERPA
Does the law allow disclosures in order to prevent danger or harm?	Yes, to lessen a serious and imminent threat based on criteria in HIPAA. <sup>xxxiii</sup> See endnote.	Yes, in a health or safety emergency based on criteria in FERPA. <sup>xxxiv</sup> See endnote.
Does the law allow disclosures of health information in a file to teachers or principals without a signed release?	Not usually. There is no exception in HIPAA that generally allows health care providers to share information with school officials; however, there may be specific scenarios in which such release would be allowed under another exception, such as the “imminent threat” exception described in endnote 34.	Yes, sometimes. <sup>xxxv</sup> There are several exceptions that might apply to allow such release in a given scenario, such as the “legitimate educational interest” exception described in endnote 32.
Does the law allow disclosures of health information to other health providers?	HIPAA permits 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>xxxvi</sup>	No exception generally allows release of health information in an education record to health care providers; however, there may be specific scenarios in which such release would be allowed under another exception, such as the health or safety emergency exception described in endnote 35.
Effect or interaction with State law	States may have their own confidentiality laws. Covered entities must attempt to comply with both federal and state law. When state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law. <sup>xxxvii</sup>	States may have their own confidentiality laws. Educational agencies must attempt to comply with both. To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. <sup>xxxviii</sup>
What to look for in state law	<ul style="list-style-type: none"> <li>• Who has health consent rights, which in turn impacts who may sign HIPAA authorizations to release information.</li> <li>• Laws that describe what information parents may or may not access in their minor child’s records.</li> <li>• Additional requirements for authorization to release forms.</li> <li>• Limits and clarification on exceptions.</li> </ul>	<ul style="list-style-type: none"> <li>• Local district and agency policies.</li> <li>• Definitions in state law or local policy that add further clarification. For example, district policy may include definitions of “school official” and “directory information” that impact application of FERPA.</li> <li>• Implementation policies.</li> </ul>
Are there administrative requirements?	Yes, including but not limited to: <ul style="list-style-type: none"> <li>• Notice of Privacy Practice.</li> <li>• Document retention requirements.</li> <li>• Documenting access to records.</li> <li>• Required forms.</li> <li>• Security requirements.</li> </ul>	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>



## FERPA AND HIPAA BY STATE

<b>FERPA by State</b>		
<b>What is it?</b> The <b>Family Educational Rights and Privacy Act (FERPA)</b> is a federal law that protects the privacy of students' personal records.		
<b>Who is subject to the law?</b> "Educational agencies or institutions" and, at times, those who act as an agent of an educational agency.		
<b>What information is covered?</b> "Education records" - 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. This includes health information in an education record.		
<b>Arizona</b>		
Link to AZ Educational Code regarding Privacy <a href="https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/00141.htm">https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/00141.htm</a>		
<p><b>SB 1450 -2013</b> For school districts that release directory information to educational and occupational/military recruiters, they must provide students with the opportunity to opt-out of that release. Student transcripts can't be released unless the student consents in writing.</p>	<p><b>SB1430 -2016</b> An Act Relating to School Accountability: Requires the Department to compile an annual achievement profile – any disclosure of educational records compiled by the department of education must comply with FERPA.</p>	<p><b>HB2088 -2016</b> HB 2088 prohibits public schools from administering specified assessments or surveys to students without notifying and obtaining written informed consent from parents and prescribes penalties for violations.</p>
<p><b>SB1131 -2017</b> This bill relates to pupil assessments: it requires the State Board to adopt and implement a statewide assessment to measure pupil achievement in the state. The State Board must also survey teachers, principals and superintendents on achievement related non-test indicators, including information on graduation and dropout rates by ethnicity for each grade level. In conducting this survey, the state board shall not violate the provisions of FERPA nor disclose personally identifiable information. This privacy limitation similarly applies to the local school district governing boards when conducting the surveys and collecting data as required by the state board.</p>	<p><b>SB1314 -2017</b> Relates to the Student Accountability Information System: this is a general student privacy bill that prohibits operators from engaging in targeted advertising, using information to creates profiles about students, sell or rent student's information, or disclose covered information, with several exceptions.</p>	

## California

The California Department of Education Data Privacy site stipulates how the privacy of student records are ensured  
<https://www.cde.ca.gov/ds/ed/dataprivacy.asp>

Student Records – Confidentiality and Preservation Under Federal and State Law

[A guide developed by the Orange County Office of Education https://www.ocde.us/LegalServices/Documents/Student%20Records%20-%20Confidentiality%20and%20Preservation%20Workbook%20June%202015.pdf](https://www.ocde.us/LegalServices/Documents/Student%20Records%20-%20Confidentiality%20and%20Preservation%20Workbook%20June%202015.pdf)

A site for school staff and school health personnel responsible for maintaining patient confidentiality. Contains information and resources to help school-based health clinics and other school health providers meet these complex legal obligations.

<https://www.schoolhealthcenters.org/start-up-andoperations/student-records-consent-and-confidentiality/>

This toolkit is a resource guide on navigating the complex interactions of HIPAA and FERPA in school health programs, including school health centers, school-based mental health programs, school nursing services, and other types of health services delivered on school campuses.

[http://www.achealthyschools.org/schoolhealthworks/assets/148\\_hipaa-or-ferpa-a-primer-on-school-health-information-sharing-in-california.pdf](http://www.achealthyschools.org/schoolhealthworks/assets/148_hipaa-or-ferpa-a-primer-on-school-health-information-sharing-in-california.pdf)

Legal brief from Schools Legal Service providing FERPA updates

<http://schoolslegalservice.org/wp-content/uploads/sites/15/2016/02/FERPA-Update-May-2016-ABH.pdf>

**CALIFORNIA EDUCATION CODE §§ 49060-49079.9** California has its own version of FERPA. Largely, it is aligned with the federal version except that many of the various requirements with which school districts must comply are more stringent. The California Department of Education administers Education Code §§ 49060-49079.9

In California, the Legislature has adopted statutory provisions which set forth the rights of parents with respect to pupil records including access and the right to copy such records. Access must be granted no later than five business days following the date of the request. Where the parents are divorced, either parent is entitled to access, regardless of who has physical custody of the child. School districts may charge a reasonable fee for copying student records.

State law does allow school districts to share student records with law enforcement officers when there is an emergency if knowledge of the information is necessary to protect the health or safety of the student or other persons. In addition, school districts are required to release information regarding a pupil's identity or location to a designated peace officer when there is an ongoing police investigation and probable cause that the pupil has been kidnapped or that the student's abductor may have enrolled the pupil in a school. However, peace officers are not listed as appropriate recipients of student records pursuant to criminal investigation or an investigation regarding declaring a person a ward of the court or involving a violation of a condition of probation. Only probation officers or deputy district attorneys are permitted access in situations involving a criminal investigation, an investigation declaring a person a ward of the court, or an investigation involving a violation of a condition of probation.

<p><b>Assembly Bill 143</b>, effective January 1, 2012, made several changes to Education Code sections 49061 and 49076 regarding pupil records in K-12 education. The definition of “directory information” was modified to no longer include a pupil’s place of birth and to include a pupil’s e-mail address. Education Code section 49061(c) now provides: “‘Directory information’ means one or more of the following items: pupil’s name, address, telephone number, date of birth, e-mail address, 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 public or private school attended by the pupil.”</p> <p>Assembly Bill 143 also modifies Education Code section 49076, which requires school districts to allow access to pupil records without written parental consent under certain circumstances. Section 49076(a)(1)(I) now provides access to education records for the counsel of record for a minor in regard to a criminal investigation or probation violation, or in regard to proceedings to declare the person a ward of the court. Probation officers and district attorneys continue to have access for these purposes as well.</p>	<p><b>SB 568</b></p> <p>Prohibits vendors of websites, online services, and applications from using a minor’s information or disclosing it to a 3rd party for the purposes of marketing or advertising specific products. It also prohibits an advertising service from continuing to do so once a vendor has notified it of such. Vendors have to allow minors to request removal of their information unless that information was posted by a 3rd party.</p>	<p><b>AB 1584</b></p> <p>Mandates inclusion of certain provisions in an LEA’s contract with a cloud service, data management, or education software vendor: that student records are property and under control of LEA; how vendor will ensure security of student records; a prohibition against the vendor’s using student data for any purpose other than what is in contract; a stipulation that vendor must train individuals in charge of student records; and notification procedures to parents in event of unauthorized disclosure.</p>
<p><b>SB 1177- 2013</b> Prohibits K-12 website/application vendors from using, sharing, disclosing, or compiling student information for any purpose other than educational purpose and improving their service; they can’t sell the information and must delete the information if the school or district requests. They have to protect the information in a reasonable manner. They can disclose info for legitimate research purposes as required by state or federal law. They may share aggregated deidentified student information to improve their service.</p>	<p>Enacted in 2014, <b>California's Student Online Personal Information Protection Act ("SOPIPA")</b> is a comprehensive student privacy law. SOPIPA applies to K-12 websites and mobile applications. SOPIPA:</p> <ol style="list-style-type: none"> <li>1. Prohibits K-12 mobile and online service operators from using student information to target advertisements to students;</li> <li>2. Prohibits online service providers from creating K-12 student profiles for commercial purposes; and</li> <li>3. Forbids companies from selling student information.</li> </ol>	<p><b>AB 2799 -2015</b> This bill extends SOPIPA’s protections that restrict the use of information about elementary/secondary school students by operators of websites, online services, and applications to preschool and prekindergarten purposes.</p>

**ACR 120 -2016** Recognizes that the Legislature supports the development of safe and secure data sharing between public education, social service, and research entities through the Silicon Valley Regional Data Trust as it pertains specifically to at-risk, foster, homeless, and justice-involved children and youth and their families. Requires the SVRDT to strictly adhere to existing state and federal law requiring the protection of personal information and data pertaining to students and at-risk youth and follow data security industry best practices in the interest of protecting California’s most vulnerable youth while allowing appropriate data access and sharing.

## Hawaii

**Chapter 34** provides for the following rights relating to the educational records of students:

1. Parents may inspect, review, challenge or obtain copies thereof; allow others to review them; and grant permission for their release.
2. The rights of parents shall be transferred to the student who has attained eighteen years of age.
3. Students under 18 years of age shall have the right to receive all educational data pertinent to facilitate instruction, guidance, and counseling.

## Nevada

**SB 463** requires school service providers to provide clear info on the student data they collect and how the data are maintained and used; maintain a privacy policy and provide notice before making any changes; maintain a security program; facilitate access and correction of student personal data; and collect and use student data with parental consent or for teacher/school authorized purposes. SB 463 would prevent a school service provider from using data for behaviorally targeting advertisements to students, creating a student profile without consent or authorization, or retaining information except as authorized or with consent. Would require annual professional development on services and their data security.

**AB 221** Would require the state and districts to create public data inventories and would require certain provisions in contracts with service providers. Would require state and district reporting on changes to data collection or management. Would instruct the state to develop a security policy and charge districts with complying. Would instruct the state to create rules around teacher use of online services.

**AB 7 -2015** This bill amends existing statute to provide that a “school service” is an internet website, online service, or mobile application that: collects or maintains personally identifiable information concerning a pupil, is used primarily for educational purposes, is designed and marketed for use in public schools, and is used at the direction of teachers and other educational personnel. It does not include anything designed or marketed for use by a general audience; an internal database, system, or program maintained or operated by a school district, charter school, or university school for profoundly gifted pupils; or a school service for which a school service provider has been designated as a school official under FERPA.

## HIPAA by State

**What is it?** The **Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule** is a federal law that protects the privacy of patient health information.

**Who is subject to the law?** “Covered entities” and at times those who contract with covered entities.

**What information is covered?** “Protected health information” (PHI) - individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information.

## Arizona

### **Your Medical Record Rights in Arizona (A Guide to Consumer Rights under HIPAA)**

This guide is intended to help you understand how to see, get a copy of, and amend (correct) medical records from Arizona health care providers who have to follow the HIPAA Privacy Rule. <https://des.az.gov/sites/default/files/legacy/dl/DES-1077A.pdf>

### **Consent and Confidentiality in Adolescent Healthcare: A Guide for Arizona Healthcare Clinicians**

[http://www.azaap.org/resources/Documents/ArMA\\_GuideFINAL.PDF](http://www.azaap.org/resources/Documents/ArMA_GuideFINAL.PDF)

### **Arizona Medical Records Laws**

<https://statelaws.findlaw.com/arizona-law/arizona-medical-records-laws.html>

**36-664** outlines exceptions to medical confidentiality, including cases of communicable diseases.

**13-3620** and **46-454** describe mandatory reporting requirements related to children and abused or incapacitated adults. Incidents of non-accidental injuries, malnourishment, physical neglect, sexual abuse, or other deprivation with intent to cause or allow injury or death of minor child must be reported to peace officer or child protective services. Such reports to a peace officer or child protective services are confidential and may be used only in authorized judicial or administrative proceedings; reports and records about abused or incapacitated adult may only be used in authorized judicial or administrative proceedings.

**12-2293** describes in what instances a doctor may deny a request for medical records, such as: when releasing records would endanger the life or physical safety of a patient or other person; or if the records would cause substantial harm to the patient or another person; or if they reveal information obtained under promise of confidentiality with someone other than healthcare professional.

## California

### **Your Medical Record Rights in California (A Guide to Consumer Rights under HIPAA)**

This guide is intended to help you understand how to see, get a copy of, and amend (correct) medical records from California health care providers who have to follow the HIPAA Privacy Rule.

<https://www.disabilityrightsca.org/system/files/file-attachments/CM4701.pdf>

## Rights and Requirements: A Guide to Privacy and Security of Health Information in California

<https://www.chcf.org/wp-content/uploads/2017/12/PDF-PrivacySecurityGuide.pdf>

## California Minor Consent and Confidentiality Laws

<https://www.aapca1.org/articles/california-minor-consent-confidentiality-laws>

## The Confidentiality of Medical Information Act (CMIA), Consumer Federation of California

<https://consumercal.org/about-cfc/cfc-education-foundation/cfceducation-foundationyour-medical-privacy-rights/confidentiality-of-medical-information-act/>

**The Confidentiality of Medical Information Act (CMIA)** is a state law that adds to the federal protection of personal medical records under HIPAA. It prohibits providers, health care service plans, or contractor from disclosing medical information from a patient without first obtaining authorization. It stipulates that medical records must be managed in such a way that preserves confidentiality. [Cal. Civ. Code §§ 56-56.37](#)

CMIA's primary purpose is to protect an individual's medical information, in electronic or paper format, from unauthorized disclosure. <https://www.privacyrights.org/consumer-guides/how-your-medical-information-used-and-disclosed-and-without-consent-california>

## Hawaii

### Your Medical Record Rights in Hawaii (A Guide to Consumer Rights under HIPAA)

This guide is intended to help you understand how to see, get a copy of, and amend (correct) medical records from Hawaii health care providers who must follow the HIPAA Privacy Rule.

<http://in.cyrss.com/docs/hipaa/StateHIP/hi.pdf>

### Hawaii Medical Records Laws

<https://statelaws.findlaw.com/hawaii-law/hawaii-medical-records-laws.html>

### Who Has Access to Records?

**Hawaii Revised Statutes 622-57:** Patient or his attorney, but doctor may require patient's authorization to make them available to attorney if release of the patient's records would be detrimental to patient's health.

### Mandatory Reporting Requirements

**Hawaii Revised Statutes 325-2:** Every physician or health care professional who has a client affected by or suspected of being affected by a disease or condition that is declared to be communicable or dangerous to the public health must report the disease or condition to the department of health.

## Nevada

### Understanding Health Information Policy, Nevada Division of Health Care Financing and Policy

<http://dhcfp.nv.gov/About/HIPAA/HIPAAMain/>

### **Nevada Medical Records Laws**

<https://statelaws.findlaw.com/nevada-law/nevada-medical-records-laws.html>

**Nevada Revised Statute 629.061** stipulates in what cases health care providers must make a patient's health care records available.

**Nevada Revised Statute 433.332** allows health care facilities to forward a patient's medical record to a new facility, if a patient is being transferred. The patient's consent is not required.

**49.207-49.254** describes privacy privileges between patients and psychologists, doctors, marriage and family therapists, clinical professional counselors, and social workers. It includes definitions, general rules of privilege, who may claim privilege, and exceptions.

**Nevada Statutes 441A.150, et seq.: Reporting Infectious Diseases** requires that health care providers must submit a report to the health authority in cases where a person has or is suspected of having a communicable disease.



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<sup>i</sup> 45 C.F.R. § 160.103.

<sup>ii</sup> 20 U.S.C. § 1232g.

<sup>iii</sup> 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. 45 C.F.R. § 160.103.

<sup>iv</sup> “Educational agencies or institutions” are defined as institutions that provide direct instruction to students, such as schools; as well as educational agencies that direct or control schools, including school districts and state education departments. 34 C.F.R. § 99.1(a). 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. 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>v</sup> See 45 C.F.R. § 160.103 for definition of protected health information.

<sup>vi</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>vii</sup> 45 C.F.R. § 160.103.

<sup>viii</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>ix</sup> 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.

<sup>x</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>xi</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>xii</sup> Generally, health care providers cannot disclose information protected by HIPAA without a signed authorization. 45 C.F.R. §§ 164.502(a), 164.508.

<sup>xiii</sup> 34 C.F.R. § 99.30.

<sup>xiv</sup> 45 C.F.R. §§ 164.508, 164.502(g)(1)&(3).

<sup>xv</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>xvi</sup> An 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 loco parentis, and the minor, a court, or another person authorized by law consented for the care, or (3) a parent, guardian or person acting in loco parentis assents to an agreement of confidentiality. 45 C.F.R. § 164.502(g)(i). Thus, who signs will depend in part on what other laws, including state law, say about when other adults may act on behalf of minors in making health decisions and when minors may obtain care on their own.

<sup>xvii</sup> 45 C.F.R. § 164.508(c). It also is important to check state law as state law may impose additional requirements for a release to be valid.

<sup>xviii</sup> 34 CFR § 99.30.

<sup>xix</sup> When a parent consented for the child’s health services, the parent, as personal representative, generally has a right to access the records unless there is a court order limiting that access. However, even where a parent otherwise has a right of access under HIPAA, there are some exceptions. For example, HIPAA defers to state law if state law limits access and HIPAA gives the health care professional discretion to withhold the child’s health record in some cases, such as when the health provider in their professional judgment believes disclosure may put a patient in danger. See 45 C.F.R. §§ 164.502(g)(3)&(5) for more details. It also is important to check state law.

<sup>xx</sup> 34 C.F.R. § 99.4.

<sup>xxi</sup> 45 C.F.R. §§ 164.506, 164.512.

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

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

<sup>xxiv</sup> 45 C.F.R. § 164.512(i).

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

<sup>xxvi</sup> For example, see exceptions in 45 C.F.R. §§ 164.502(a)(1), 164.512.

<sup>xxvii</sup> 34 C.F.R. § 99.31.

<sup>xxviii</sup> 34 C.F.R. § 99.31(b).

<sup>xxix</sup> Directory information may be shared with the public if the school and district have given public notice to parents and the opportunity to opt out. 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>. The scope of the term ‘directory information’ will depend on district policy, but can include the

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

<sup>xxxii</sup> See 34 C.F.R § 99.31.

<sup>xxxiii</sup> 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. 45 CFR § 164.512(j)(1), (4). It is important to assess whether any state law applies in these situations as well, and if so, how it intersects with HIPAA.

<sup>xxxiv</sup> 34 C.F.R §§ 99.31(a)(10), 99.36. FERPA authorizes disclosures to "appropriate parties" 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." 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>; U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.", Feb. 25, 2004.

<sup>xxxv</sup> While FERPA typically requires a signed release, an exception allows school staff to share information 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. The school official must have a "legitimate educational interest" in the information. This has been defined to mean that the school official needs the information to perform his or her official duties. 20 U.S.C. § 1232g (b)(1); 34 C.F.R. § 99.31(a)(1)(i)(A).

<sup>xxxvi</sup> 45 C.F.R. § 164.501.

<sup>xxxvii</sup> 45 C.F.R. §§ 160.203, 164.202.

<sup>xxxviii</sup> 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. 34 C.F.R. § 99.61.