

Healthy Students  
Promising Futures

**Legal Guide to  
School Health Information and Data Sharing  
in Colorado**

# Contributors

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# I. Introduction / How to Use this Guide

## What this Guide does

This Guide addresses common questions from the Colorado school health community regarding how to comply with applicable law when state and local health and education agencies and individual providers wish to share information and/or data. The Guide addresses the applicable laws, highlighting the often multiple mechanisms available within the law to facilitate sharing information and data for different purposes and in different scenarios.

Among the sharing mechanisms allowed by applicable law, the Guide does not provide specific guidance on which one to adopt. The sharing strategy a community adopts should be shaped first by the specific goals of the participating agencies and the community it serves. The decision should also be based on professional, ethical, and practical considerations. What works for one partnership may not meet the needs of another.

The goal of this Guide is to provide sufficient information about applicable law to allow state and local agencies, community health providers, schools, and school professionals to understand the options available within the applicable law and use that to start conversations, in partnership with their legal counsel, about the right practice for them and their community.

## Who should use this Guide

This Guide is for those persons in charge of developing data and information sharing protocols between school and health systems. All agencies that will be asked to participate in the sharing protocol should be involved in the discussion along with their legal counsel.

## What this Guide does not do

The Guide does not review all aspects of the confidentiality laws it references. It also does not provide specific legal advice, and in most cases, does not describe how to apply the law to specific situations. These questions are best left to legal counsel. The document should be used as a reference only and not as a substitute for advice from legal counsel.

# II. The Basics:

## 1. What are HIPAA and FERPA?

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule is a federal law that protects the privacy and controls release of a patient's protected health information.<sup>1</sup> "Protected health information"<sup>2</sup> is individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information, held by "covered entities"<sup>3</sup> or the business associates of covered entities. States may have their own confidentiality laws. Covered

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<sup>1</sup> 45 C.F.R. § 160.103.

<sup>2</sup> See 45 C.F.R. § 160.103 for definition of protected health information.

<sup>3</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.

entities must attempt to comply with both federal and state law. When state law provides greater confidentiality protection than HIPAA, health providers usually must follow the state law.<sup>4</sup>

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy and controls release of information in students' "education records."<sup>5</sup> "Education records" are records, files, documents, or other materials that contain information directly related to a student and are maintained by an "educational agency or institution,"<sup>6</sup> or a person acting for such agency or institution.<sup>7</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>8</sup>

## **2. HIPAA and FERPA cannot apply to the same information at the same time.**

HIPAA explicitly states that health information held in an education record subject to FERPA is not "protected health information" subject to HIPAA.<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.

This means that health information in an education record, such as immunization records, school nurse records, or special education related health evaluations, is not subject to HIPAA.<sup>10</sup>

It is important to note that once health information is disclosed from a community health provider to a school, if the school places the information in the pupil file, FERPA likely will apply when determining access to the information in the file, not HIPAA.

## **3. Health records in an education file are subject to FERPA disclosure rules and are not treated differently than other types of information in the 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 and subject to FERPA. FERPA does not establish different disclosures rules for personally identifiable health information in an education record. That means that for the purposes of disclosure, personally identifiable health and mental health

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<sup>4</sup> 45 C.F.R. §§ 160.203, 164.202.

<sup>5</sup> 20 U.S.C. § 1232g.

<sup>6</sup> "Educational agencies or institutions" are defined as institutions that receive federal funds under programs administered by the U.S. Secretary of Education and either provide direct instruction to students, such as schools; or 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. 34 C.F.R. § 99.31(a)(1)(i)(B); Co. Rev. Stat. §§ 22-1-101, 22-1-123(1).

<sup>7</sup> 20 U.S.C. § 1232g (a)(4)(A); Co. Rev. Stat. § 22-1-123(1)(education record in state law has same meaning as in FERPA).

<sup>8</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.

<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> Colorado law says that for the purposes of FERPA, "education records" shall include an individualized education program. Col. Rev. Stat. § 22-1-123. Some records related to special education also may be protected by IDEA. This chart from the U.S. Department of Education provides a comparison of FERPA and IDEA.

<https://studentprivacy.ed.gov/resources/ferpaidea-cross-walk>

records in a minor's education file are treated the same as most other information in the file, such as grades or attendance information.

#### **4. A school nurse's records are subject to FERPA in most cases.**

Education records are covered by FERPA. In general, a school nurse's records become part of the student's education record, as they contain information related to a student and are maintained by a school employee or agent.<sup>11</sup> This holds true even if they are kept in a separate file or location. These records are not covered by HIPAA because HIPAA specifically exempts from its coverage personally identifiable health information in an education record.

There are certain types of records that are not considered part of the education record, though, and would not be subject to FERPA. These include, among others:

- 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>12</sup> and
- Treatment records of a student 18 and older when used only in connection with treatment.<sup>13</sup>

It would be unusual for a school nurse's record, or portion of a record, to fall in either of these exceptions; when and whether they do is something to address with legal counsel. If FERPA does not apply, HIPAA may. Providers and their legal counsel should evaluate whether the nurse can be considered a "covered entity" subject to HIPAA if FERPA does not apply.

#### **5. Consent to treatment is different than consent to release information.**

Consent to care means granting permission to a provider to engage in a health test, exam, or treatment. A health provider generally must obtain consent before the provider may engage in delivering services. While an adult typically consents for their own health care, federal, state, and common law help establish which individuals have the legal authority to provide consent on behalf of minors.

Once a provider engages in delivery of health services, this interaction creates protected health information. HIPAA and FERPA are both confidentiality laws that control the release of certain protected information. Each law requires written authorization to disclose protected information at times and lays out which individuals may or must sign that authorization.

Often, the person with authority to consent to care is the same person with authority to sign for release of information, -- but not always. For example, Colorado state law allows a minor to consent to their own mental health therapy in some cases. If a minor obtains mental health therapy based on their own consent, and the records are subject to HIPAA, the minor must sign the release of information form (pursuant to HIPAA).<sup>14</sup> By contrast, if the minor obtains mental health therapy based on their own consent, and the records are subject to FERPA, then a "parent" (as that term is defined by FERPA) must sign the release of information form.<sup>15</sup>

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<sup>11</sup> 20 U.S.C. § 1232g (a)(4)(A); 34 C.F.R. § 99.3.

<sup>12</sup> 34 C.F.R. § 99.3(b)(1).

<sup>13</sup> 34 C.F.R. § 99.3(b)(4).

<sup>14</sup> See "Who must sign an authorization to release information under HIPAA?", *infra*.

<sup>15</sup> See "Who must sign an authorization to release information under FERPA?" *infra*.

***Guidance from the U.S. Department of Education U.S. Department of Health and Human Services:***

- 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, <https://studentprivacy.ed.gov/resources/joint-guidance-application-ferpa-and-hipaa-student-health-records>

### **III. Disclosing Information from a School File:**

#### **1. Who must sign an authorization to release information under FERPA?**

FERPA controls disclosure of personally identifiable information from an education record. In many cases, a signed release is necessary to share information from the record. A “parent” must sign the release for students age 17 and younger. Under FERPA, “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>16</sup> For the purpose of understanding when another individual can be considered to be “acting as a parent in the absence of a parent or guardian,” the U.S. Department of Education has determined that a natural parent can be considered “absent” if the natural parent is “not present in the day-to-day home environment of the child.”<sup>17</sup> Thus, for example, a stepparent has rights under FERPA “where the stepparent is present on a day-to-day basis with the natural parent and child and the other parent is absent from that home.”<sup>18</sup> The term “parent” for purposes of signing release forms also is typically defined in local school district policy, which may provide more specific guidance and examples regarding who qualifies as an “individual acting as a parent” for this purpose. For example, in some districts, local policy will explicitly list foster parents as “parents” who can sign release forms. FERPA also requires educational agencies to allow a “parent” to access their minor children’s education records. There is no exception in FERPA that allows a minor student to sign their own release forms before age 18. Questions about unique custody situations not addressed in local policy should go to legal counsel.

Once a student turns eighteen years old or older, they must sign the FERPA release to disclose personally identifiable information in their education records.

#### **2. What must a FERPA compliant authorization include?**

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. These requirements are also summarized in *Appendix A*.

#### ***Resources:***

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<sup>16</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>17</sup> U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Kay Hastings,” August 20, 2004.

<sup>18</sup> *Id.*

- [Model Authorization to Release](#): Here is an example of a form created for Colorado that complies with both FERPA and HIPAA and allows both schools and health care providers to disclose information in the juvenile justice context.

### 3. What does “de-identified information” and “de-identified data” mean in FERPA?

FERPA controls disclosure of personally identifiable information from an education record. If information is de-identified, then FERPA no longer limits its release. In order to be considered “de-identified,” all personally identifiable information must be removed, including any information that alone or in combination is linkable to an individual student and would allow a reasonable person in the school community to identify the student with reasonable certainty.<sup>19</sup> The risk of identification increases when reporting out aggregate data on small subpopulations in a school or system. The cumulative effect of multiple disclosures also can increase risk of identification as information from prior disclosures may be used in combination with information from later disclosures. There are certain techniques that a school or school system can adopt to help ensure that aggregate data cannot be used to identify an individual. Such techniques include “suppression,” “perturbation,” and “blurring,” among others. Once information has been de-identified, it is possible to attach a re-identification code to it to allow for matching back to the source and adding additional information later on. There are certain requirements for selecting re-identification codes.<sup>20</sup>

***Guidance from the U.S. Department of Education on de-identification and creating re-identification codes:***

- *SLDS Technical Brief: Basic Concepts and Definitions for Privacy and Confidentiality of Student Education Records*, <https://nces.ed.gov/pubs2011/2011601.pdf>

### 4. May school staff disclose information held in an individual student’s education file to an individual or agency outside the school?

*Typical scenarios:*

- *A community health clinic asks the school to share the attendance history of a particular student so that the clinic can evaluate whether its services are improving school outcomes for this youth.*
- *School nurse wants to share student’s seizure action plan with the student’s primary care physician, regional accountable entity (RAE) care coordinator, or local hospital.*
- *School nurse wants to share names of students who are missing certain immunizations with the local health authority.*

Information recorded in an education file, including attendance and health information in that file, is protected by FERPA. The information can always be disclosed pursuant to a valid FERPA-compliant written authorization. If there is no authorization in place, personally identifiable information can only be disclosed if the disclosure meets an exception in FERPA. The relevant exceptions, including legal citations, are summarized in the Colorado information sharing grid at *Appendix C*, but a few examples of such exceptions include:

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<sup>19</sup> 34 C.F.R. § 99.31(b)(1), Co. Rev. Stat. § 22-1-123.

<sup>20</sup> U.S. Dept. of Educ., *De-identified data*, available at: <https://studentprivacy.ed.gov/content/de-identified-data>.

- **DIRECTORY INFORMATION:** The school may be able to provide the health provider access to directory information. Whether and what “directory information” can be shared will depend on whether the district provided the appropriate annual notice to parents regarding directory information, how directory information was defined in that annual notice, and whether the parents opted out of directory information disclosures that year.
  - *Example of a directory information disclosure: School shares list of all students enrolled in the school and their dates of birth with the local Medicaid agency, with no additional identifiable information about the students made available. The school included notice about directory information in its annual notice to parents, including a definition that makes clear the school considers names and dates of birth as directory information, and gave parents an opportunity to opt out. No parent in fact opted out.*
  - *Not a directory information disclosure: School shares list of all students enrolled in the school, along with their dates of birth and whether they have an IEP, with the local Medicaid agency. IEP status cannot be disclosed as directory information. This disclosure is not allowed under the directory information exception.*
  
- **PERSONAL KNOWLEDGE:** School staff may disclose any information not contained in the education record, such as information from oral communications or personal observation that have not been recorded.
  - *Example of personal knowledge disclosure: Teacher witnesses one student bully another and is concerned. Teacher may let victim’s parent, school-based health center or another person know, because this personal observation, not recorded and not based on information in a file, is not subject to FERPA.*
  
- **OUTSIDE AGENCY ACTING AS SCHOOL OFFICIAL:** Information may be disclosed to an outside agency if the agency is a consultant or contractor with the school and (1) qualifies as a “school official,” (2) has a “legitimate educational interest” in the information it is receiving, and (3) the appropriate administrative steps have been put in place, including the appropriate notices in district policy regarding the definitions of school official and legitimate education interests, as well as in the notice of rights to parents. A consultant or contractor may be considered a “school official” for this purpose if the consultant or contractor “(1) Performs an institutional service or function for which the [school] would otherwise use employees; (2) Is under the direct control of the [school] 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>21</sup> While FERPA does not explicitly require the school to enter a contract with this outside agency, the U.S. Department of Education strongly encourages use of contracts.
  - *Example of contractor/school official disclosure: The school shares all its educational records with a private company that is helping them digitize the records and make them available online to parents. This is allowed under the school official exception as long as the appropriate steps described above were followed, because this is an institutional service the school otherwise would have used an employee for and the contractor needed access to the records in order to digitize them.*

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<sup>21</sup> 34 C.F.R. § 99.31(a)(1)(i)(B). See 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>.

- **HEALTH AND SAFETY EMERGENCY:** Where there is an imminent threat to the health or safety of a student or students, and knowledge of information in an education record may be necessary to protect the health or safety of the student or students, information may be disclosed to appropriate persons pursuant to the health and safety exception.
  - *Example of emergency disclosure: Student has a seizure at school and falls. The school calls 911 and parents. When the ambulance arrives, the school nurse shares that the student has epilepsy with the emergency medical technicians, after determining that this disclosure is necessary to protect the student’s health or safety from imminent threat.*

**Guidance from the U.S. Department of Education:**

- **SHARING IMMUNIZATION INFORMATION FROM A SCHOOL FILE:**
  - U.S. Dept. of Educ., “[Letter to Ms. Monica Batanero, School & College Legal Services of California](#),” Apr. 12, 2018<sup>22</sup>
  - U.S. Dept. of Educ., Family Policy Compliance Office, “[Letter to Ms. Martha Holloway, Alabama Dept. of Educ.](#)” Feb. 25, 2004<sup>23</sup>
- **SHARING WITH AN OUTSIDE CONTRACTOR:**
  - See 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<sup>24</sup>
- **HEALTH AND SAFETY EMERGENCIES:**
  - U.S. Dept. of Educ., Family Policy Compliance Office, “[Letter to Ms. Martha Holloway, Alabama Dept. of Educ.](#)” Feb. 25, 2004.
  - [Addressing Emergencies on Campus](#), June 2011<sup>25</sup>
- **MODEL ANNUAL NOTICE** on Directory Information:
  - [English](#) and [Spanish](#)

**5. May a school or district participate in data sharing with outside agencies?**

*Typical scenarios:*

- *Regional Accountable Entity (RAE) asks school district for individual attendance data to match with Medicaid data, for planning and outreach purposes.*
- *School district wants to participate in research study to understand if schools are meeting the educational needs of students in foster care.*
- *School district and RAE want to match individual data to understand if students whose behavioral health care needs are being served through Medicaid have improved educational outcomes.*

Information recorded in an education file is protected by FERPA. The information can always be disclosed pursuant to a valid FERPA-compliant written authorization. A school or school system also always may disclose de-identified data. If there is no authorization in place, personally identifiable information can

<sup>22</sup>[https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/Response%20to%20School%20College%20Legal%20Services%20of%20CA%20Batanero.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Response%20to%20School%20College%20Legal%20Services%20of%20CA%20Batanero.pdf)

<sup>23</sup> <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/alhippaa.html>

<sup>24</sup> <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html>

<sup>25</sup> [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/emergency-guidance.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/emergency-guidance.pdf)

only be disclosed if it meets an exception in FERPA. The relevant exceptions, including legal citations, are summarized in the Colorado information sharing grid in *Appendix C*, but a few examples of such exceptions include:

- **STUDIES EXCEPTION:** A school, district or state or local educational agency (SEA or LEA) may share personally identifiable information from education records with an organization that is conducting a study or studies on behalf of the educational agency, if that study is in relation to: (1) developing, validating or administering predictive tests, (2) administering student aid programs, or (3) improving instruction. The educational agency must enter into a contract with the agency performing the study, and that contract must obligate the outside agency to comply with components of FERPA regarding use and re-disclosure of the information, as well as obligations related to destruction of the records when no longer needed.
  - *Example of studies exception disclosure: A university will conduct a study that compares program outcomes across schools in one district to find out which programs provide the best instruction, with the goal of duplicating successful programs across the district. The school district (LEA) may disclose personally identifiable information from education records to the university for this purpose as long as the district and university have a written agreement in place, report out de-identified results, and meet the other requirements regarding use and disclosure of information under this exception in FERPA.*
  
- **AUDIT and EVALUATION EXCEPTION:** State and local educational authorities (such as the Colorado Department of Education (SEA) or a local school district (LEA)) may share individually identifiable information from education records with an “authorized representative” of the agency if the disclosure is for the purpose of auditing or evaluating an “education program” on behalf of the SEA or LEA. An “education program” is any program that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency.<sup>26</sup> An “authorized representative” is any agency that the SEA or LEA has designated as its authorized representative. The SEA or LEA must enter a contract with their authorized representative that ensures the authorized representative uses and protects the information in compliance with FERPA and only for the specific evaluation purposes described, among other things.
  - *Example of an evaluation disclosure: A district (LEA) wants to evaluate the school district’s transportation program (a state supported education program) to see how effectively it is serving students in assisted housing and improving attendance rates. The district releases individually identifiable information from education records to a third party research organization, which the district has named as its “authorized representative” for this purpose. This organization matches the data with information it received from the housing authority regarding individuals in assisted housing to understand how transportation improves attendance. The results are reported out in a way that ensures individuals cannot be identified.<sup>27</sup>*
  - *Example of evaluation disclosure: A district is interested in evaluating how effectively it is meeting the educational needs of students in foster care. The district enters a contract that establishes the state child welfare agency as the district’s authorized*

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<sup>26</sup> 34 C.F.R. § 99.31.

<sup>27</sup> This example is from the U.S. Department of Education’s Privacy Technical Assistance Center, *Integrated Data Systems and Student Privacy* document, available at: [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/IDS-Final.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final.pdf)

*representative for the purpose of this evaluation. The arrangement complies with the requirements of FERPA. The child welfare agency matches data with its own information on youth in foster care and reports out de-identified information on foster youth graduation rates as well as other measures.*<sup>28</sup>

- *Example of evaluation disclosure: The school district (LEA) is interested in evaluating how effectively it is meeting the educational needs of youth enrolled in Medicaid with behavioral health diagnoses. The district designates the RAE as its authorized representative in order to be able to disclose individually identifiable information from education records to the RAE. They enter a written agreement that says the RAE will only use the information for this specific purpose, describes the scope and duration of the study, and in all other ways, meets the other requirements in FERPA. The RAE matches this data with its own records in order to perform the study on behalf of the LEA. The RAE reports out de-identified results.*

- **CONTRACTOR ACTING AS SCHOOL OFFICIAL:** The information may be disclosed to an outside agency if the agency is a contractor with the school or LEA and (1) qualifies as a “school official,” (2) has a “legitimate educational interest” in the information, and (3) the appropriate administrative steps have been put in place, including the appropriate notices in district policy regarding the definitions of school official and legitimate education interests as well as notice of rights to parents. A contractor may be considered a “school official” if the contractor “(1) Performs an institutional service or function for which the [school or LEA] would otherwise use employees; (2) Is under the direct control of the [school or LEA] 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>29</sup> While FERPA does not explicitly require the school or district to enter a contract with this outside agency, the U.S. Department of Education strongly encourages use of contracts.

#### ***Guidance from the U.S. Department of Education:***

- *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>  
This resource includes helpful case study examples as well as checklists for how to get started creating data sharing agreements in compliance with FERPA.
- For guidance on what to include in a written agreement under the audit and evaluation exception, see U.S. Dept of Education, [\*The Family Educational Rights and Privacy Act Guidance for Reasonable Methods and Written Agreements\*](#)

#### ***Other Resources:***

- [Example of data sharing agreement](#) between Alameda County (California) Health Agency and Oakland Unified School District

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<sup>28</sup> Id.

<sup>29</sup> See 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>.

## 6. May a school or school district participate in an integrated data exchange with other agencies?

Integrated data systems (IDS) allow linkage of administrative data from multiple government agencies. They may be used to “better understand the complex needs in communities, inform the design of new strategies and interventions, and evaluate the effectiveness of programs and policies on the desired outcomes.”<sup>30</sup> Each IDS has a “lead” organization. This is the organization that will receive protected information from the other participating agencies and ‘integrate’ it. The lead organization may be a university, school district, RAE or any other agency, as long as that agency can provide the appropriate data protections required by HIPAA, FERPA or other applicable law and the appropriate written agreements are in place. A school or school system may participate in an integrated data system and release individually identifiable information from education records to the IDS lead agency if the disclosure complies with FERPA. FERPA and the FERPA disclosure exceptions most relevant to data sharing as part of an integrated system are described in Question 5 above.

### ***Guidance from the U.S. Department of Education:***

- U.S. DOE, Privacy Technical Assistance Center, [\*Integrated Data Systems and Student Privacy\*](#)  
This resource explains the exceptions in FERPA that allow participation in an IDS and includes detailed checklists on what an SEA, LEA or school must do to ensure participation in an IDS complies with FERPA.

## **IV. Disclosing Information from a Health Provider or Agency Whose Records are Subject to HIPAA:**

### **1. Who must sign an authorization to release information under HIPAA?**

HIPAA requires a signed authorization to release protected health information, unless an exception otherwise allows the disclosure. Under HIPAA, a parent or the legal guardian of a minor (a person under age 18) usually must sign an authorization to release health information about that minor.<sup>31</sup> However, there are situations in which a minor must sign to release their own health information, including the following situations:

- The minor must sign when the minor consents for their own care.<sup>32</sup> See *Appendix B* for Colorado minor consent statutes.
  - *Example: Jake, 16, is homeless, living separate and apart from his parents, and is managing his own financial affairs. He accesses health services at his school-based health center on his own consent, as authorized by state law. Because he consented to the care on his own behalf under Colorado law, he signs the authorization to release the related health information.*
- The minor must sign if a court consented for the minor’s medical care pursuant to state law.<sup>33</sup>

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<sup>30</sup> U.S. Dept. of Educ., *Integrated Data Systems and Student Privacy*, PTAC-IB-4 January 2017, available at: [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/IDS-Final.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final.pdf)

<sup>31</sup> 45 C.F.R. §§ 164.502(g)(1), (g)(3); see 45 C.F.R. § 164.508(c)(vi).

<sup>32</sup> 45 C.F.R. § 164.502(g)(3)(i).

<sup>33</sup> *Id.*

- *Example: Court orders minor be provided a certain medical service. Minor signs the authorization to release related health information.*
- The minor must sign if the parent or guardian assented to an agreement of confidentiality between the health provider and minor with respect to certain health care.<sup>34</sup>
  - *Example: Parent consents to mental health treatment for their 11 year old child, Sam, and signs an agreement that states the parent understands the therapist will maintain notes from Sam’s therapy as private between the therapist and Sam. Sam signs the authorization to release the related health information.*
- The minor must sign if the information relates to services funded under the federal Title X family planning program.<sup>35</sup>
- The minor must sign if the records relate to substance abuse treatment in a facility subject to the federal regulations protecting certain substance abuse treatment records, 42 C.F.R. Part 2.<sup>36</sup> See *Appendix B* for more information on this federal confidentiality law.

It is important to note that a parent’s ability to access health information about their minor child is not the same as their ability to sign authorization forms. See question 2 below.

***Guidance from the U.S. Department of Health and Human Services:***

- [Can a minor child’s doctor talk to parents about the child’s parent about the patient’s mental health status and needs?](#)

**2. What are a parents’ rights under HIPAA to see their minor child’s health information?**

Under HIPAA, when a parent consents for an unemancipated minor’s health care, that parent generally has a right to inspect their child’s records.<sup>37</sup> However, a provider may refuse to provide a parent access to a minor’s medical records if:

1. The provider has a “reasonable belief” that:
  - a) The minor has been or may be subjected to domestic violence, abuse or neglect by the parent, guardian or other person giving consent; or
  - b) Treating such person as the personal representative could endanger the minor; and:
2. The provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to give the parent, guardian or other person such access.<sup>38</sup>

When a minor has the legal right to sign an authorization to release health information, as described in question 1 above, the HIPAA Privacy rule states that a parent or guardian’s right to inspect the related medical records depends on state and other federal law.<sup>39</sup> If there is nothing in other law, including case law, specifying whether or not a parent may have access to the information, a health care provider may provide or deny access to a parent or guardian as long as that decision is consistent with the law, and the

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<sup>34</sup> Id.

<sup>35</sup> 42 C.F.R. § 59.11.

<sup>36</sup> 42 C.F.R. §§ 2.11, 2.14.

<sup>37</sup> 45 C.F.R. §§ 164.502(g)(1), (g)(3), (a)(1)(i), (a)(2)(i).

<sup>38</sup> 45 C.F.R. § 164.502(g)(5).

<sup>39</sup> 45 C.F.R. § 164.502(g)(3)(ii).

decision is made by a licensed health care professional exercising his or her professional judgment.<sup>40</sup> See *Appendix B for confidentiality law*.

- Example: A minor receives substance abuse treatment on the minor's own consent from a facility subject to federal confidentiality law, 42 C.F.R. Part 2. This federal law specifically addresses a parent or guardian's right to access the related health records. HIPAA says the provider must follow the applicable federal law. See *Appendix B*.

### 3. What must a HIPAA compliant authorization include?

To comply with HIPAA, a written authorization to release protected health information must include: (1) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion; (2) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure; (3) 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; (4) A description of each purpose of the requested use or disclosure; and (5) An expiration date or an expiration event. In addition, the form must include several notices. These are described in more detail in *Appendix A*.

It is possible to create an authorization form that allows release to multiple agencies; however, it is important to ensure that this remains a 'meaningful' release such that the person signing the form understands what information is being released to whom. It also is possible to create a form that complies with both HIPAA and FERPA and thus allows disclosure in both directions between agencies.

#### ***Resources:***

- [Model Authorization to Release](#): Here is an example of a form created for Colorado that complies with both FERPA and HIPAA and allows both schools and health care providers to disclose information in the juvenile justice context.

### 4. What does "de-identified information" mean in HIPAA?

HIPAA controls disclosure of individually identifiable health information. If that information is not individually identifiable, then HIPAA no longer limits its release. Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information. HIPAA has its own standard for defining whether or not there is a reasonable basis to believe information can be used to identify an individual and establishes methods to meet this standard.<sup>41</sup> A covered entity may assign a re-identification code to allow for matching of data but that coding must meet the requirements of HIPAA.<sup>42</sup>

#### ***Guidance from the U.S. Department of Health and Human Services:***

- [Guidance Regarding Methods for De-identification of Protected Health Information](#)

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<sup>40</sup> 45 C.F.R. §§ 164.502(a)(1)(i)&(iv), (a)(2)(i), (g)(1), (g)(3)(i), (g)(5).

<sup>41</sup> 45 C.F.R. § 164.514(a).

<sup>42</sup> 45 C.F.R. § 164.514(c).

## 5. Does HIPAA treat mental health information differently?

For the most part, health and mental health information are treated similarly under HIPAA; however, HIPAA does treat “psychotherapy notes” differently. Psychotherapy notes require a release in most circumstances. “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>43</sup>

### ***Guidance from the U.S. Department of Health and Human Services:***

- [HIPAA Privacy Rule and Sharing Information related to Mental Health](#)

## 6. May a health provider or agency operating under HIPAA disclose protected health information to an outside agency?

*Typical scenarios:*

- *Primary care physician wants to share medication dosage information with school nurse.*
- *School asks community health agency for immunization records for enrolling student.*
- *Health provider wants to share information with regional accountable entity (RAE) care coordination team.*

The information can always be disclosed pursuant to a valid HIPAA-compliant written authorization. If there is no authorization in place, personally identifiable information can only be disclosed if it meets an exception in HIPAA. The relevant exceptions, including legal citations, are summarized in the Colorado information sharing grid at *Appendix C*, but a few examples of such exceptions include:

- **TREATMENT:** HIPAA permits health care providers to disclose protected health information to certain others for “treatment” purposes. HIPAA defines “treatment” broadly in this context to include coordination or management of health care by a provider with a third party, consultation and referral between providers, as well as direct treatment. It is important to understand that while HIPAA allows providers to make such disclosures, it does not require them to do so, and some providers may adopt policies or practices that are more protective of confidentiality. Health providers also must ensure that the individual seeking the information is in fact someone who needs the information for ‘treatment’ purposes for a patient they have in common.
  - *Example of treatment disclosure: School nurse contacts primary care physician to confirm dosages on a medication order for a student who is required to take medication in school. Primary care physician confirms that school nurse is in fact the nurse in charge of this student’s medication plan. Primary care physician may share information with school nurse.*
  - *Example of treatment disclosure: A covered entity wants to coordinate care for a patient who is or has received services from multiple providers. The covered entity requests information from the patient’s other providers for care planning purposes.*

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<sup>43</sup> 45 C.F.R. § 164.501.

*The other providers may share that information with the covered entity.*

- **IMMUNIZATION:** A health provider or agency may share immunization information with a school regarding a student or prospective student if: “(A) The protected health information that is disclosed is limited to proof of immunization; (B) The school is required by State or other law to have such proof of immunization prior to admitting the individual; and (C) The covered entity obtains and documents the agreement to the disclosure from either: (1) A parent, guardian, or other person acting in loco parentis of the individual, if the individual is an unemancipated minor’ or (2) The individual, if the individual is an adult or emancipated minor.”
- **EMERGENCY:** HIPAA permits health care providers to disclose protected health information if the provider, consistent with standards of ethical conduct, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and makes the disclosure to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.
  - *Example of emergency exception: Patient discloses to health provider that they plan to commit suicide tonight and describes the plan. The provider determines, in consult with ethical standards, that communication with the patient’s family is necessary to prevent the imminent risk to the patient’s life.*

It is important to note that once disclosed to a school or school employee, if the information is placed in the education record, FERPA likely will apply when determining access to the information in the file, not HIPAA.

**Guidance from the U.S. Department of Health and Human Services:**

- [Permitted Uses and Disclosures: Exchange for Treatment](#)
- [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

**Other Resources:**

- [Example of data sharing agreement](#) between Alameda County Health Agency and Oakland Unified School District

**7. May a health provider or agency share data with other agencies?**

*Typical scenarios:*

- *The Department of Health Care Policy and Financing wants data from Regional Accountable Entity (RAE).*
- *RAE wants data from primary care physicians for case management.*
- *RAE wants information from community providers to understand population level trends regarding obesity in children.*

Information can always be disclosed pursuant to a valid HIPAA-compliant written authorization. A covered entity also always may disclose de-identified data. If there is no authorization in place, personally identifiable information can only be disclosed if it meets an exception in HIPAA. The relevant

exceptions, including legal citations, are summarized in the Colorado information sharing grid in *Appendix C*, but a few examples of such exceptions include:

- **BUSINESS ASSOCIATE**: A covered entity may share protected information with a “business associate.” The covered entity must have a business associate agreement with the business associate, and the agreement must include certain commitments regarding use and re-disclosure of the information. A business associate is an individual or organization that creates, receives, maintains or transmits protected health information on behalf of the covered entity for a function or activity regulated by HIPAA, such as claims processing or administration, quality assurance, benefit and practice management and repricing; or an individual or organization that provides management, administrative, accreditation or financial services to or for a covered entity or to or for an organized health care arrangement in which the covered entity participates. A business associate does not include a health care provider, with respect to disclosures by a covered entity to the health care provider concerning the treatment of the individual or 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.
  - *Example of business associate arrangement: The county departments of social and human services are business associates of the Department of Health Care Policy and Financing (DHCPF) for purposes of administration of the Medicaid program. This arrangement allows the county agencies to create ‘protected health information’ on behalf of DHCPF and allows DHCPF to disclose information to these county agencies.<sup>44</sup>*
- **HEALTH OPERATIONS**: A covered entity may share with another covered entity or its business associate for purpose of health care operations. HIPAA defines health care operations for this purpose. The definition includes: Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines; population-based activities relating to improving health or reducing health care costs; protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment. It also includes reviewing the competence or qualifications of health care professionals and evaluating practitioner and provider performance, among other things. In general, both covered entities must have or have had a relationship with the patient and the information requested must relate to that relationship.
  - *Example of health operations disclosure: A health plan hires a case management company to provide nutritional coaching to certain patients. The health plan makes the case management company its business associate for this purpose. The case management company needs certain information from the patient’s primary care physicians to ensure the appropriate nutritional advice is being provided and is consistent with any treatment being provided. The primary physicians may disclose information to the case management company as this is considered a health care operation (case management and population based activity) on behalf of the health plan.*
- **HEALTH OVERSIGHT**: A covered entity may disclose protected health information to a health oversight agency for certain oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil,

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<sup>44</sup> HCPF 03-008.

administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of: the health care system; government benefit programs for which health information is relevant to beneficiary eligibility; entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or entities subject to civil rights laws for which health information is necessary for determining compliance. A health oversight agency is an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.

- *Example of health oversight disclosure: The RAEs may share protected health information with the Department of Health Care Policy and Financing as part of the Department's oversight of the Medicaid program.*
- **RESEARCH:** A covered entity may disclose protected health information for research purposes provided the entity receives documentation that a waiver of the requirement for an authorization to release information has been approved by an Institutional Review Board (IRB) or Privacy Board that meets the requirements of HIPAA, and the covered entity obtains certain representations from the researcher regarding use and protection of the information. HIPAA provides greater details on what this documentation must contain to be in compliance with HIPAA.

***Guidance from the U.S. Department of Health and Human Services:***

- HIPAA and business associate contracts: <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html>
- HIPAA and health operations: [https://www.hhs.gov/sites/default/files/exchange\\_health\\_care\\_ops.pdf](https://www.hhs.gov/sites/default/files/exchange_health_care_ops.pdf)
- HIPAA and health oversight: [https://www.healthit.gov/sites/default/files/phi\\_permitted\\_uses\\_and\\_disclosures\\_fact\\_sheet\\_012017.pdf](https://www.healthit.gov/sites/default/files/phi_permitted_uses_and_disclosures_fact_sheet_012017.pdf)
- HIPAA and research: <https://www.hhs.gov/hipaa/for-professionals/special-topics/research/index.html>

## Appendix A: Requirements for Release of Information Forms

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

### I. Requirements under FERPA: 34 CFR 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.

## **Appendix B: Colorado Minor Consent and Confidentiality Laws**

(see attached)

## **Appendix C: Information and Data Sharing Quick Reference Legal Chart –Colorado**

(see attached)