

# **HIPAA or FERPA?**

## **A Primer on Sharing School Health Information in California**

**Second Edition**

**What This Primer Does:**

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

**What This Primer Does Not Do:**

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

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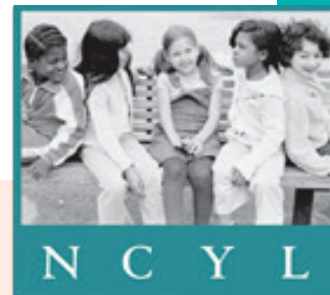
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# Introduction



John is in 3rd grade at Franklin Elementary. He has been distracted and fidgeting in class recently. His teacher refers John and his family to the mental health counselor from a local nonprofit who comes to campus once a week. The counselor discovers that John's aunt recently passed away and that John is scared about losing other family members. He hasn't been sleeping well and is feeling anxious. John's teacher reaches out to the counselor to ask if there is anything she can do to help John. What may the counselor tell John's teacher? Would the answer change if John had been referred to a school nurse instead?

School-based health programs and providers bring a range of needed health care services to a school campus. These programs also provide an exciting opportunity to increase health care access for youth and improve care coordination and collaboration among providers and schools.

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

Whether HIPAA or FERPA applies and how those laws interact with state confidentiality law will impact school-based health service operations in large and small ways:

- from framing how school staff and health providers collaborate and share information;
- to shaping policies about how to deal with suicide threats and other emergencies;
- to determining the content of required notices and consent forms and other administrative issues.

This Primer provides an overview of HIPAA, FERPA, and California state law. The goal is to provide sufficient information for health care providers and schools to be able to start important conversations with legal counsel about which law applies to their services.

### **HIPAA or FERPA?**

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

# An Overview of HIPAA and FERPA in California

## HIPAA and California Health Confidentiality Law – The Basics

### 1. What is HIPAA?

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule is a federal law that protects the privacy of patient health information held by “covered entities.”<sup>1</sup>

### 2. What is a “covered entity”?

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

### 3. Which health care providers are “covered entities” and must comply with HIPAA?

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

The transactions that will make HIPAA applicable include any of the following when done electronically: submitting claims to health insurers, making benefit and coverage inquiries to insurers, making inquiries about submitted claims, and sending health care authorization requests, among others.<sup>4</sup> The fact that a school based program or provider may not use electronic records onsite does not automatically mean it is exempt from HIPAA. Providers may be transmitting electronic health information in another way, for example, by using a billing service that does. That said, there will be providers who are not subject to HIPAA because they do not transmit health information in electronic form related to covered transactions. The U.S. Department of Health and Human Services offers a “Covered Entity Chart” that a provider can use to determine whether the provider is subject to HIPAA.<sup>5</sup> (See Appendix D for chart.) Even if a health

provider meets the definition of “covered entity,” some of its records may be subject to FERPA instead of HIPAA when working at or with a school. This is discussed on page 21 of this Primer.

#### 4. What is a HIPAA “Business Associate”?

Most covered entities work with other organizations and individuals in order to provide health care. Examples include attorneys, data processors, and accountants. A “business associate” is an individual or organization that receives, creates, maintains, or transmits “protected health information” as part of certain types of work it does on behalf of a covered entity. The type of work must be directly related to activities the covered entity does that are regulated by HIPAA, such as claims processing or billing, or services that support that work such as legal, actuarial, transcription, accounting, consulting, management, accreditation, or financial services.<sup>6</sup> (See endnote 6 for more examples.) In most cases, the covered entity must enter into a business associate contract with this individual or organization in order to share protected health information.

#### 5. Must a “Business Associate” comply with HIPAA?

Indirectly, yes. A covered entity cannot share information with a business associate unless the covered entity has received written assurances from the business associate that the business associate will protect “protected health information” in compliance with HIPAA. HIPAA outlines what this written agreement must include before a covered entity may share health information with the business associate. These contracts cannot obligate a business associate to do something that otherwise conflicts with other laws, however, such as FERPA. Providers always should consult legal counsel regarding such contracts and whether an organization qualifies as a “business associate” in the first place.<sup>7</sup>

#### 6. What information is protected under HIPAA?

The HIPAA Privacy Rule limits covered health providers from disclosing what HIPAA calls “protected health information” (PHI).<sup>8</sup> “Protected health information” is individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information.<sup>9</sup>

Protected health information does not include information subject to FERPA. HIPAA explicitly states that health information held in an education record subject to FERPA is not “protected health information.”<sup>10</sup> In other words, if FERPA applies, HIPAA does not, and FERPA and HIPAA can never apply to the same information at the same time.

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

## 7. How do HIPAA and California law intersect?

California has its own laws that protect the confidentiality of medical and mental health information.<sup>11</sup> One of the most comprehensive set of statutes is called the California Confidentiality of Medical Information Act (CMIA). It applies to medical information held by the health care providers, health care services plans and contractors, as each is defined in state law.<sup>12</sup> The CMIA parallels HIPAA in many ways; however, in some situations, it actually provides greater confidentiality protection than HIPAA.

Federal privacy regulations under HIPAA usually supersede – or “preempt” – state laws, but HIPAA states that if a state’s law is more protective of individual privacy, then providers should follow the state law.<sup>13</sup> Thus, California health providers typically are following both HIPAA and state law.

There are two other ways that California law becomes particularly important to understanding HIPAA. HIPAA grants rights to sign authorizations and to access a minor’s protected health information based in part on who is authorized to make health decisions for the minor. State law determines who has those consent rights in many cases.<sup>14</sup> Similarly, HIPAA says a parent’s right to access records when the parent did not consent for the child’s care will depend in part on state law.

Finally, it is important to note that in addition to state and federal statute, licensed health professionals may practice under state ethical and licensing regulations that also include obligations related to confidentiality. These principles may impose greater confidentiality obligations than HIPAA.

## 8. What is the HIPAA/CMIA confidentiality rule?

Generally, health care providers cannot disclose information protected by HIPAA and California’s Confidentiality of Medical Information Act (CMIA) without a signed authorization.<sup>15</sup> An authorization form must include specific elements to be valid under HIPAA and CMIA. (See Appendix B).<sup>16</sup> HIPAA and California law also define who must sign the authorization.<sup>17</sup>

## 9. Who signs an authorization to release health information under HIPAA and CMIA?

A parent, guardian or other person with authority under the law to make health decisions for an unemancipated minor usually must sign authorizations to release the minor’s information.<sup>18</sup> However, if the minor consented or

**J**ake, 16, needs a general physical. He is authorized to consent to his own health care under California law because he is 15 years old or older, not living with his parents, and managing his own financial affairs.

Because he can consent to his own care, he can sign authorizations to release the related health information. (See Appendix D for California Minor Consent laws).

could have consented for the health care under California's minor consent laws for the health care, the minor must sign the authorization. Some of California's minor consent laws are highlighted in Appendix D.

## 10. Do exceptions in HIPAA and CMIA allow release of information without written authorization?

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

- for treatment purposes<sup>19</sup>
- to avert a serious and imminent threat<sup>20</sup>
- for research<sup>21</sup>
- for payment purposes<sup>22</sup>
- for health care operations<sup>23</sup>
- to public health authorities as required by law<sup>24</sup>
- to report child abuse as required by law<sup>25</sup>
- when requested by the individual<sup>26</sup>
- additional exceptions also exist.<sup>27</sup>

Different conditions must be met before information may be shared under each exception. For example, the “treatment” exception under HIPAA and CMIA only allows a health provider to disclose information to other providers of health care, health care service plans, contractors, or other health care professionals or facilities and only for purposes of diagnosis or treatment of the patient.

So, it is important to understand the law before relying on an exception to disclose protected health information.

## 11. What administrative requirements must a provider satisfy under HIPAA?

If a provider operates under HIPAA, it must meet all the administrative requirements in HIPAA and CMIA. This includes but is not limited to making sure the provider has a HIPAA-compliant “Notice of Privacy Practices” that it shares with clients<sup>28</sup>, a HIPAA and CMIA-compliant release form (See Appendix B for requirements), and that it maintains records for the appropriate number of years, among many other things. Providers subject to HIPAA should consult their legal counsel regarding the many administrative requirements in HIPAA.



## FERPA and California Education law – The Basics

### 1. What is FERPA?

The Family Educational Rights and Privacy Act (FERPA) protects the privacy of students' personal records held by "educational agencies or institutions" that receive federal funds under programs administered by the U.S. Secretary of Education.<sup>29</sup>

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

"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.<sup>30</sup> Almost all public schools and public school districts receive some form of federal education funding and must comply with FERPA.

Organizations and individuals that contract with or consult for an educational agency also may be subject to FERPA if certain conditions are met.<sup>31</sup> These conditions are discussed in greater detail later on.

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

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

### 3. What information does FERPA protect?

FERPA controls disclosure of *recorded* information maintained in the "education record." "Education records" are defined as records, files, documents, or other materials that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution.<sup>32</sup> "Information directly related to a student" means any information "that,

alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community ... to identify the student with reasonable certainty."<sup>33</sup>

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

There also are several types of records that are exempted from FERPA. For purposes of school based health care, the most relevant exemptions include:

- Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record<sup>34</sup>
- Treatment records of a student 18 and older when used only in connection with treatment and not made available to anyone other than those providing treatment<sup>35</sup>
- "Law enforcement unit" records.<sup>36</sup>



**“A** teacher personally witnesses an incident, such as one student bullying another. Can the teacher call the victim’s parents and tell them what she observed and who she saw bullying their child?

Yes. This is because FERPA prohibits the improper disclosure of information derived from education records. Therefore, information that is based on observation or hearsay and not specifically contained in education records would not be protected from disclosures under FERPA.”

(Example from U.S. Dept. of Education’s Family Policy Compliance Office, available at <http://familypolicy.ed.gov/content/what-records-are-exempted-ferpa>)

#### **4. Are treatment or health records in an education file 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 in almost all cases.<sup>37</sup> FERPA does not treat health and mental health records in a minor’s education file differently than it does any other information, such as grades or demographic information in the file.<sup>38</sup> That said, FERPA generally limits access to all student records, and for example, only school staff with a “legitimate educational interest” in the information should be able to access it. FERPA requires schools to include in their annual notices to parents a statement indicating whether the school has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.”<sup>39</sup> There is one small exception. Some treatment records are not part of the “education record.” Records of treatment provided students who are 18 and older, created by a medical provider, only used for treatment purposes and not shared with others are not subject to FERPA. This is a very limited exception, however. These records become a part of the education file and are subject to FERPA as soon as the records are used for anything beyond treatment or shared with anyone other than providers -- for example, disclosed to the parent or shared to obtain reimbursement for the care.

#### **5. What are “law enforcement unit” records?**

Records of a law enforcement unit mean those records, files, documents, and other materials that are (i) Created by a law enforcement unit; (ii) Created for a law enforcement purpose; and (iii) Maintained by the law enforcement unit.<sup>40</sup> Law enforcement unit records are not considered part of the “education record” and are not subject to FERPA.

The law enforcement unit of a school is any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to (i) Enforce any local, State, or Federal law, or refer to appropriate authorities a

## **When can a school official's notes be considered a "sole possession" record?**

The U.S. Department of Education provides this guidance: "Generally sole possession records are of the nature to serve as a 'memory jogger' for the creator of the record. For example, if a school official has taken notes regarding telephone or face to face conversations, such notes could be sole possession records depending on the nature and content of the notes."

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

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

matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (ii) Maintain the physical security and safety of the agency or institution.<sup>41</sup>

For information on how and when schools can disclose information to law enforcement and the law enforcement unit at a school, please consult school district counsel.

### **6. What are "sole possession" records?**

Sole possession records are records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute. Sole possession records are not considered part of the education record and are not subject to FERPA. These records become a part of the education file and are subject to FERPA, however, as soon as they are shared with anyone other than a temporary substitute for the maker.

### **7. What are the general requirements of FERPA?**

Generally, FERPA prohibits educational agencies from releasing any information in the education record unless they have written permission for the release.<sup>42</sup> In most cases, a parent<sup>43</sup> must sign that release. Requirements for a FERPA-compliant release can be found in Appendix B. When students are eighteen years old or older, they sign their own release forms. FERPA also requires educational agencies to allow parents to access their minor children's education records.

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

FERPA contains exceptions that allow agencies and schools to disclose information absent a written release in some circumstances. For example,

## When can law enforcement unit records be disclosed and what can be withheld?

The U.S. Department of Education provides this guidance: “Law enforcement unit records’ (i.e., records created by the law enforcement unit, created for a law enforcement purpose, and maintained by the law enforcement unit) are not “education records” subject to the privacy protections of FERPA. As such, the law enforcement unit may refuse to provide a parent or eligible student with an opportunity to inspect and review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent or eligible student’s prior written consent. However, education records, or personally identifiable information from education records, which the school shares with the law enforcement unit, do not lose their protected status as education records just because they are shared with the law enforcement unit.”

U.S. Dept. of Educ., “What is a ‘law enforcement unit record’?” available at <https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records>

schools may share “directory information”<sup>44</sup> about students with the public generally if the school and district have given public notice to parents about the types of information the school and district consider directory information, the parents’ right to refuse directory disclosures, and how long parents have to inform the school or district about their intent to opt out.<sup>45</sup>

Another exception allows school staff to share information with “school officials”<sup>46</sup> in the same educational agency who have a “legitimate educational interest” in the information.<sup>47</sup> This exception is further discussed in question 4 on page 15 and question 3 on page 26. Certain policies must be in place at the district level in order to implement both of these exceptions. Additional exceptions also exist, including exceptions that allow sharing information in emergency situations with contractors, and for school transfers, among others.<sup>48</sup> The emergency exception is discussed further in question 4 on page 27, and question 6 on page 32. The contractor exception is discussed in question 3 on page 37.

## 9. How does FERPA intersect with California law?

California has state laws that protect the confidentiality of information held by schools.<sup>49</sup> For the most part, the rules and exceptions in California law parallel those found in FERPA.<sup>50</sup> To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. If an educational agency believes there is an actual conflict between obligations under state law and its ability to comply with FERPA, the educational agency must notify the U.S. Department of Education’s Family Policy Compliance Office.<sup>51</sup> If a school employee believes there may be a conflict between FERPA and California law, they should contact their school district legal counsel.



## 10. What does California Law say about Educational Counseling records?

California law says that “information of a personal nature”<sup>52</sup> disclosed by a student 12 and older, or the student’s parents, to a school counselor<sup>53</sup> as part of receiving “educational counseling”<sup>54</sup> (as defined in state law) does not become part of the pupil record, and access to that information is very limited.<sup>55</sup> (See endnote for limitations.)

The statute goes on to say that “[i]t is the intent of the Legislature that counselors use the privilege of confidentiality under this section to assist the pupil whenever possible to communicate more effectively with parents, school staff, and others.” Before relying on this rule, it is critical to discuss this law with school district legal counsel to understand its scope and any possible conflicts with FERPA.

## 11. What administrative requirements must a health provider with records subject to FERPA satisfy?

If a school based health program has records subject to FERPA, it must meet all the administrative requirements in FERPA. Among other things, this includes:

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

It includes other considerations as well. The National Forum on Education Statistics has a guide to implementing FERPA.<sup>55</sup> Requirements for a compliant release form can be found in Appendix B, and the U.S. Department of Education provides several model notices for educational agencies.<sup>56</sup>

## Comparing HIPAA and FERPA – A Summary of Key Issues

In many ways, the two federal laws are similar; however, there are some important differences. A few of these similarities and differences are highlighted below.		
	FERPA	HIPAA
Does the law usually require a signed release to disclose protected information?	Yes	Yes
Who signs the release?	Parent signs authorization for minor student.	Parent signs authorization in most cases, but minor must sign in some situations.
Does it prescribe what the release must include?	Yes	Yes
What must be included in the release?	See 34 CFR 99.30	See 45 CFR 164.508 In California, releases also must comply with Ca. Civil Code 56.11.
May the agency or provider limit parent access to information regarding minor consent care?	In most all cases, parents have a right to access all information in the education record unless a court order limits their access. Speak to legal counsel.	Parents generally have a right to access information regarding services they consented to for their child; however parents cannot access information about minor consent care unless the minor has authorized access in writing.
Does the law allow disclosures without need of a signed release?	Yes	Yes
Does the law allow disclosures of health information to teachers without a signed release?	Yes, if the teacher is in the same school and has a “legitimate educational interest” in the information as defined in school policy.	No
Does the law allow disclosures of health information to other health providers without a signed release?	Only if the provider is in the same school and has a “legitimate educational interest” in the information as defined by school policy.	Yes, providers may share health information with other providers of health care for treatment purposes.
Does the law allow disclosures in order to prevent danger or harm?	Yes	Yes
Are there administrative requirements?	Yes, including but not limited to: <ul style="list-style-type: none"> <li>• Annual notices of rights</li> <li>• Required local policies</li> <li>• Record retention rules</li> <li>• Documenting access to record</li> <li>• Required forms</li> </ul>	Yes, including but not limited to: <ul style="list-style-type: none"> <li>• Notice of Privacy Practice</li> <li>• Document retention requirements</li> <li>• Documenting access to records</li> <li>• Required forms</li> <li>• Record security requirements</li> </ul>





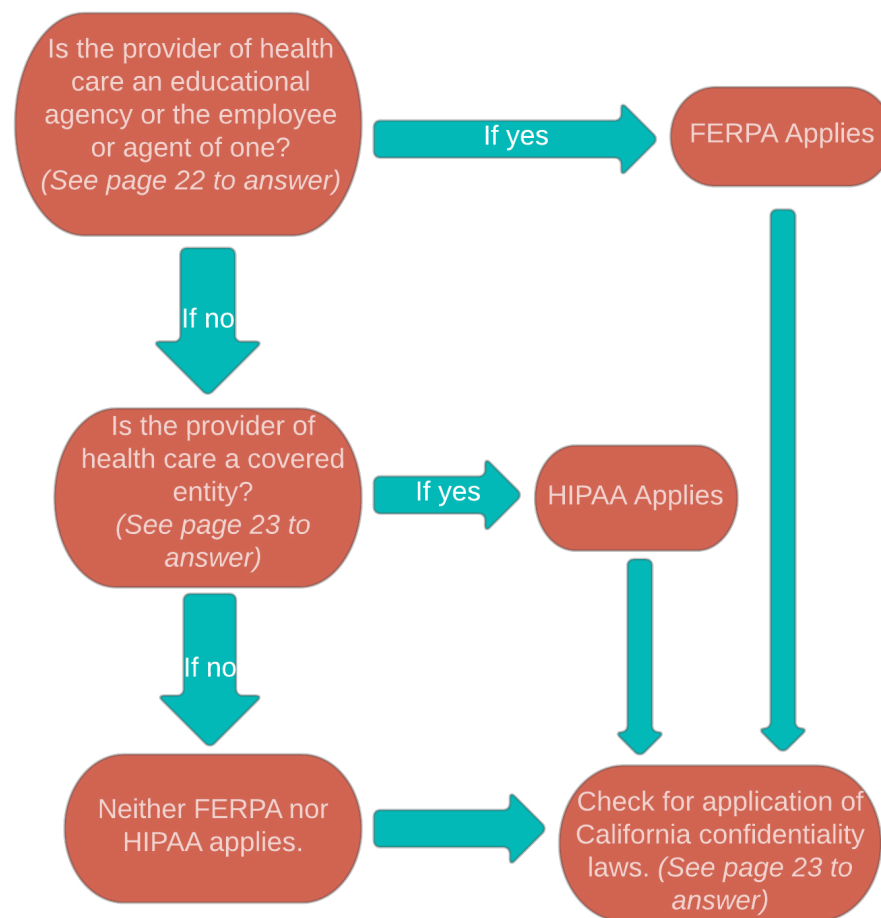
# Am I HIPAA, FERPA, Both or Neither?



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

No. The two laws cannot apply to the same records at the same time. HIPAA explicitly states that its rules do not apply to health information held in an education record subject to FERPA.<sup>57</sup> Therefore, if FERPA applies, HIPAA does not. So the question really is whether the records are subject to FERPA, HIPAA or neither. The following chart helps answer that question:

## HIPAA, FERPA, or Neither? An Algorithm for Decision-making



## Is the provider of healthcare an educational agency?

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

FERPA applies:	Joint Guidance from DOE and DHHS suggests that a health provider or program's records will be subject to FERPA if the program is administered by and under the direct control of an educational agency and providing what can be considered "institutional services" – even if those services are funded entirely by an outside agency. <i>"Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired as a school official (or a contractor), the records maintained by the nurse or clinic are 'education records' subject to FERPA."</i> <sup>58</sup>
FERPA applies:	Another example reiterates the importance of administrative control. The University of New Mexico asked DOE for guidance regarding records held at its campus health center. In its response, the DOE addressed, as a preliminary matter, whether a university health center's records are "education records" subject to FERPA. The letter says that the records of a campus health center are subject to FERPA when the <i>"health services are provided to students by, on behalf of, and under the control of the University, and not a separate health agency or health care provider."</i> <sup>59</sup>
FERPA applies:	Administrative control is more important to a determination than where services are provided physically. In their Joint Guidance, DOE and DHHS wrote: <i>"If a person or entity acting on behalf of a school subject to FERPA, such as a school nurse that provides services to students under contract with or otherwise under the direct control of the school, maintains student health records, these records are education records under FERPA, just as they would be if they school maintained the records directly. This is the case regardless of whether the health care is provided to students on school grounds or off-site."</i> <sup>61</sup>
FERPA does not apply:	By contrast, in the letter to the University of New Mexico, the DOE said that the health records of a campus based health center <i>"would not be subject to FERPA if the center is funded, administered and operated by or on behalf of a public or private health, social services, or other non-educational agency or individual..."</i> <sup>60</sup>
FERPA does not apply:	The Joint Guidance provides also this example: <i>"Some outside parties provide services directly to students and are not employed by, under contract to, or otherwise acting on behalf of the school. In these circumstances, these records are not 'education records' subject to FERPA, even if the services are provided on school grounds, because the party creating and maintaining the records is not acting on behalf of the school. For example, the records created by a public health nurse who provides immunization or other health services to students on school grounds or otherwise in connection with school activities but who is not acting on behalf of the school would not be 'education records' under FERPA."</i> <sup>62</sup>

### **Is the provider of healthcare a covered entity?**

If FERPA does not apply to student health records, the next question is whether HIPAA applies. HIPAA applies if the health provider who created the record is a “covered entity” as defined by HIPAA. A provider is a “covered entity” if the provider is (i) a health plan, health care clearinghouse, or health care provider who (ii) transmits health information in electronic form.<sup>63</sup>

#### **(i) Is the provider a “health care provider” as defined by HIPAA?**

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

- physicians,
- nurses
- clinical social workers,
- other medical and mental health practitioners
- hospitals,
- clinics and
- any other organization that furnishes bills or is paid for health care in the normal course of business.<sup>64</sup>

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

Individual providers are only subject to HIPAA if they transmit health information in electronic form. The fact that a school based program or provider may not use electronic records onsite does not automatically mean it is exempt from HIPAA. Providers may be transmitting electronic health information in another way, for example, by using a billing service that does. Transmission of health information in electronic form includes electronic billing or using a billing service that transmits information electronically, among other things.<sup>65</sup> Providers should consult with legal counsel in making this assessment.

### **Does California health confidentiality law apply?**

California has its own laws that protect the confidentiality of medical and mental health information. One of the most comprehensive set of statutes is called the California Confidentiality of Medical Information Act (CMIA). The first section of this manual describes how CMIA and HIPAA interact. However, there are additional laws that protect specific types of information (such as drug treatment and HIV related records). Providers and clinics, particularly those with specialty care, should consult legal counsel to understand which California laws may apply to the health services provided. It is also important to note that in addition to state and federal statute, licensed health professionals may practice under state ethical and licensing regulations that also include obligations related to confidentiality. These principles may impose greater confidentiality obligations than HIPAA. Each provider and clinic should be familiar with the rules that apply to them.



# Frequently Asked Questions

# Comparing HIPAA and FERPA

## 1. May parents access their child's protected health information? May a provider ever withhold a minor's health information from a parent?

**HIPAA/CA:** When information is subject to HIPAA and California law, HIPAA and California law say that parents generally have a right to inspect their minor child's health and mental health records when the parents consented to the care.<sup>66</sup> However, there are exceptions. A few such exceptions are listed here:

1. *Minor Consent:* Certain records, such as records related to services minors consented to or could have consented to, are not automatically available to parents.<sup>67</sup> For example, records regarding pregnancy or birth control services provided to a minor cannot be disclosed to parents without the minor's written authorization.<sup>68</sup> Appendix C lists the rules regarding parent ability to access minor consent related health records.
2. *Court Order Limiting Access:* There may be court orders in place that remove legal custody from a parent or limit the parent's right to access their child's health information.
3. *Discretion of Provider to Withhold Information:* Both HIPAA and California law give a health care professional discretion to withhold the child's health record from the parent where the "health care provider determines that access to the patient records requested . . . would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being."<sup>69</sup>

Depending on the types of services provided by a clinic or provider, it is important to consult legal counsel regarding other applicable laws and exceptions.

**FERPA:** When health information is part of an education record subject to FERPA, FERPA says that parents of a student under age 18 may access their child's education record.<sup>70</sup> "Parent" includes a parent, guardian or person acting in the role of parent.<sup>71</sup> The only exception is if a court order explicitly



limits a parent's right to access the record. In California, each school district is required to have procedures in place to grant requests by parents to access student records. Schools must provide access to student records no later than five business days after the date of the request, not including some school breaks.<sup>72</sup> If a school believes release of information may put a student at risk, then the school should contact school district legal counsel for advice before any release.

## **2. May a health care provider at a school share protected health or mental health information about a patient with a health care provider in another clinic in order to coordinate care or make a referral?**

**HIPAA/CA:** Yes, in several cases when the information is subject to HIPAA and CMIA. A provider may share if a HIPAA/CA-compliant authorization is in place. (See Appendix B). In addition, both HIPAA and California law allow a health care provider to share a patient's medical information with another health care provider "for purposes of diagnosis or treatment of the patient."<sup>73</sup> This exception allows, but does not require, disclosure. Other rules, such as ethical guidelines or clinic policy, may also limit a provider's choice to use this exception. And, HIPAA limits providers from sharing psychotherapy notes without written client authorization.<sup>74</sup>

Under California law, "medical information" is defined as "any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment."<sup>75</sup>

**FERPA:** Yes, if a FERPA-compliant authorization to release information is in place. (See Appendix B).

## **3. May a health provider share limited information with a teacher or principal working in the same school about how a student is progressing?**

**HIPAA/CMIA:** Yes if a HIPAA/CA law-compliant authorization is in place.

**FERPA:** Yes in several situations. The provider can release if a FERPA-compliant release form is in place. In addition, an exception in FERPA 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, principals, and school nurses. A school or district may define this term more broadly in its school policies so that it also includes outside consultants, contractors or volunteers to whom a school has outsourced a school function if certain conditions are met.<sup>76</sup> The school official must have a "legitimate educational interest" in the information. This phrase has been defined to mean that the school official needs the information to perform his or her official duties.<sup>77</sup> FERPA requires schools to include in their annual notices to parents a



statement indicating whether the school has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.”<sup>78</sup>

#### 4. May a health provider disclose protected health information in an emergency?

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

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

There is a presumption that a provider acted in good faith in making such a disclosure if the provider’s belief is based on actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.<sup>79</sup> Therapists are permitted to disclose psychotherapy notes without authorization under emergency circumstances.<sup>80</sup>

Under California law, a therapist may disclose medical information as necessary to prevent or lessen a threat to the health or safety of a reasonably foreseeable victim or victims. Exactly when and to whom such information can be disclosed will depend on which California law the therapist is providing services under. For example, if the therapist is subject to CMIA, disclosure of information may be to any person reasonably able to prevent or lessen the threat, including the target of the threat.<sup>81</sup> Therapists should consult their own legal counsel for more information and guidance on which California confidentiality law applies to their records. Providers also should consult their ethical and licensing rules for applicable guidance, such as guidance on when the Tarasoff duty to warn may apply.

**FERPA:** Yes. FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>82</sup> This exception allows disclosure in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a specific situation presents imminent danger or threat to students or other members of the community, or requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>83</sup>





“In making [this] determination”, FERPA goes on to say, “an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>84</sup>

Providers also should consult their ethical and licensing rules for applicable guidance, such as guidance on when the Tarasoff duty to warn may apply.

## **5. May a health provider disclose protected information as part of making a mandated child abuse report?**

**HIPAA/CMIA:** Under California’s Child Abuse and Neglect Reporting Act, mandated reporters<sup>85</sup> of child abuse must make a report to child protective services or law enforcement whenever they have knowledge of or observe a child in their professional capacity whom they know or reasonably suspect has been the victim of child abuse or neglect.<sup>86</sup> If information protected by HIPAA and CMIA is relevant to making that report, the information still

must be disclosed to CPS or law enforcement.<sup>87</sup> This does not mean that the information loses its confidentiality protections. While relevant information must be disclosed to CPS or law enforcement, disclosure to anyone else or for any other reason still must comply with HIPAA and CMIA.

**FERPA:** Under California's Child Abuse and Neglect Reporting Act, mandated reporters<sup>88</sup> of child abuse must make a report to child protective services or law enforcement whenever they have knowledge of or observe a child in their professional capacity whom they know or reasonably suspect has been the victim of child abuse or neglect.<sup>89</sup> If information protected by FERPA is relevant to making that report, the information still must be disclosed to CPS or law enforcement. This does not mean that the information loses its confidentiality protections. While relevant information must be disclosed to CPS or law enforcement, disclosure to anyone else or for any other reason still must comply with FERPA.



# School Nurse Records and Communications

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

Student health records maintained by a school nurse are part of the education record subject to FERPA. California law also may apply to health information held by a school nurse. (See Appendix E for definition of “school nurse.”)

Education records are covered by FERPA. In general, a school nurse's records become part of the school's education record, as they contain information related to a student and are maintained by a school employee or agent.<sup>90</sup> These records are not covered by HIPAA because HIPAA specifically exempts from its coverage health information in an education record.

However, California confidentiality law, including licensing rules, may still apply to some information held by the nurse. In some cases, these laws may conflict with FERPA. For example, if a student receives minor consent care, a parent's right to access related health information is different under FERPA and California law. If FERPA and California law provide conflicting obligations regarding disclosure or protection, school nurses should seek guidance from their legal counsel about which rule to follow.

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

Generally, treatment records created by a school nurse are subject to FERPA, even if the records are kept in a separate file cabinet or file. Thus, while a school nurse may maintain a separate file as a means to limit accidental disclosures, the file still would be subject to FERPA in most cases. There are two types of records that are not considered part of an education record, though, and would not be subject to FERPA.

- 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>91</sup> and
- Treatment records of a student 18 and older when used only in connection with treatment and not made available to anyone other than those providing treatment.<sup>92</sup>

Whether either of these two exceptions applies is something to address with legal counsel.



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

Yes, FERPA still applies. Joint Guidance from the U.S. Departments of Education and Health and Human Services addresses this question: “Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired *as a school official (or a contractor [of the educational agency])*, the records maintained by the nurse or clinic are ‘education records’ subject to FERPA.”<sup>93</sup> (emphasis added).



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

In most cases, yes. The information may be disclosed pursuant to a HIPAA/CMIA-compliant written authorization. Alternatively, HIPAA and California law also permit health care providers to disclose protected health information to other health care providers for “treatment” purposes. HIPAA defines “treatment” broadly in this context to include coordination or management of health care, consultation and referral as well as direct treatment.<sup>94</sup> Health providers also are allowed to disclose information to other providers even without authorization in a few other circumstances, such as in certain medical emergencies.

*It is important to note that once disclosed to the school nurse, if the school nurse places the information in the pupil file, FERPA likely will apply when determining access to the information in the file, not HIPAA.*<sup>95</sup> This means that information that was once protected under HIPAA may lose those protections once it is placed in a student’s education file.

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

In limited circumstances, yes. The information may be disclosed pursuant to a valid FERPA-compliant written authorization. If there is no authorization in place, information can only be disclosed in a few limited circumstances. For example, the school could provide the health provider access to directory



information about a specific student absent parent consent. What that would include will depend on how directory information has been defined by that school district in its annual notice to parents and whether parents have opted out. In addition, the school nurse also may disclose to the pediatrician information that is not contained in the education record, such as information from oral communications or

personal observation that have not been recorded, as long as the disclosure does not violate professional codes of conduct or contractual obligations.<sup>96</sup> In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the emergency exception (described in question 6 below).

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

Yes. FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>97</sup> This exception allows disclosure in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>98</sup>

“In making [this] determination”, FERPA goes on to say, “an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>99</sup>

Providers also should consult their ethical and licensing rules for applicable guidance, such as guidance on when the Tarasoff duty to warn may apply.



# Mental Health Provider Records Subject to FERPA

## 1. Does FERPA or HIPAA apply to a school district employed mental health provider's records?

It depends. Providers should review the chart on page 21 to determine which law applies.

In some cases, a school therapist's records become part of the school's education record, as they contain information related to a student and are created and maintained by "a school employee or agent."<sup>100</sup> Education records are covered by FERPA. These records are not covered by HIPAA because HIPAA specifically exempts from its coverage health information in an education record. Certain education counseling records may not become part of the education record as discussed on page 18.

Even if FERPA applies, California confidentiality law, including licensing rules, may also still apply to some information held by the therapist. For example, if a student receives minor consent care, a parent's right to access related health information is different under FERPA and California law. If FERPA and California law provide conflicting obligations regarding disclosure or protection, school counselors should seek guidance from their legal counsel about which rule to follow.

## 2. May a provider whose records are subject to FERPA maintain a confidential file separate from the education file?

Generally, records created by a school counselor are subject to FERPA, even if the records are kept in a separate file cabinet or file. Thus, while a school counselor may maintain a separate file as a means to limit accidental disclosures, the file still would be subject to FERPA in most cases. There are two types of records that are not considered part of an education record, though, and would not be subject to FERPA.

- 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>101</sup> and
- Treatment records of a student 18 and older when used only in connection with treatment and not made available to anyone other than those providing treatment.<sup>102</sup>

In addition, California law states that certain educational counseling records do not become part of the pupil file. (See page 17 and endnotes 53 and 54). Whether either of these two exceptions applies to exempt school counselor files from FERPA is something to address with legal counsel.

### **3. Does FERPA apply if a school employed provider is hired by the district with funds from an agency not subject to FERPA, such as a government or community-based mental health agency?**

Yes, FERPA most likely still applies, if the mental health provider is acting as a “school employee.” The Joint Guidance from the U.S. Departments of Education and Health and Human Services addressed this question in relation to school nurses: “Some schools may receive a grant from a foundation or government agency to hire a nurse. Notwithstanding the source of the funding, if the nurse is hired *as a school official (or a contractor [of the educational agency])*, the records maintained by the nurse or clinic are ‘education records’ subject to FERPA.”<sup>103</sup> (Emphasis added). The same rule the Department of Education laid out above for hiring school nurses applies to other health providers employed by a school district. If the providers are employed by the district and hired to fill a traditional, institutional position, then their records would be subject to FERPA. Whether FERPA applies should be discussed with legal counsel.

### **4. May a private therapist share confidential health information subject to HIPAA with a school employed counselor?**

In some cases, yes. The information may be disclosed pursuant to a valid HIPAA/CA-compliant written authorization. In addition, HIPAA and state medical confidentiality law permit mental health providers to share information related to outpatient care (except therapy notes) with other health and mental health care professionals for purposes of treatment. The therapist has discretion to determine what disclosures are appropriate in these cases.<sup>104</sup> Providers also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain medical emergencies pursuant to an emergency exception (described below). It is important to note that once disclosed to a school employee, if the school employee places the information in the pupil file, FERPA likely will apply when determining access to the information in the file, not HIPAA.<sup>105</sup>

### **5. May a provider whose records are subject to FERPA share confidential information with a private psychologist?**

In limited circumstances, yes. The information may be disclosed pursuant to a valid FERPA-compliant written authorization. If there is no authorization in place, information can only be disclosed in a few limited circumstances. For example, the school could provide the health provider access to directory information about a specific student absent parent consent. What that would include will depend on how directory information has been defined by that school district in its annual notice to parents and whether parents have opted out. In addition, the school

also may disclose information to the provider that is not contained in the education record, such as information from oral communications or personal observation that have not been recorded as long as the disclosure does not violate professional codes of conduct or contractual obligations.<sup>106</sup> In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the emergency exception (described in question 6 below).

## 6. May a provider whose records are subject to FERPA disclose information from the education record in an emergency?

Yes, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>107</sup> This exception allows disclosure in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>108</sup>

“In making [this] determination”, FERPA goes on to say, “an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”<sup>109</sup>

Providers also should consult their ethical and licensing rules for applicable guidance, such as guidance on when the Tarasoff duty to warn may apply.

## 7. May a provider whose records are subject to FERPA disclose information from the education record to make a mandated child abuse report?

Under California’s Child Abuse and Neglect Reporting Act, mandated reporters of child abuse must make a report to child protective services or law enforcement whenever they have knowledge of or observe a child in their professional capacity whom they know or reasonably suspect has been the victim of child abuse or neglect. If information protected by FERPA is relevant to making that report, the information still must be disclosed to CPS or law enforcement. This does not mean that the information loses its confidentiality protections. While relevant information must be disclosed to CPS or law enforcement, disclosure to anyone else or for any other reason still must comply with FERPA.

# Obtaining Information from the School Record

## 1. May a school or district share information from the education record, such as the student's schedule, attendance, or grades, with a school based provider operating under FERPA, such as a school nurse, for purposes of service provision?

It depends. The information can always be disclosed with parent consent. Absent parent consent, FERPA permits a school to disclose information in the education record to other school officials as long as they have a legitimate educational interest in the information.<sup>110</sup> FERPA requires schools to include in their annual notices to parents a statement indicating whether the school has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.”<sup>111</sup> Thus, the school may share the information with the school nurse or counselor if the nurse or counselor has a legitimate educational reason in needing the information, as legitimate educational interest is defined by the district.<sup>112</sup>

In addition, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals”<sup>113</sup> in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>114</sup> The school based provider will be required to protect the information subject to FERPA.<sup>115</sup>

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

It depends. The information can always be disclosed with parent consent. Absent parent consent, FERPA permits a school to disclose information in the education record to other school officials as long as they have a legitimate educational interest in the information.<sup>116</sup> FERPA requires schools to include in their annual notices to parents a statement indicating whether the school

has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.”<sup>117</sup> Thus, the school nurse may share the information with the teacher if the teacher has a legitimate educational reason in needing the information, as legitimate educational interest is defined by the district.<sup>118</sup>



In addition, FERPA authorizes disclosures to “appropriate parties” if “knowledge of the information is necessary to protect the health or safety of the student or other individuals”<sup>119</sup> in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”<sup>120</sup>

### 3. May a school disclose information from the education record to an outside contractor, contracting with the district?

It depends. The information can always be disclosed with FERPA-compliant parent consent. If there is no consent in place, the information can be shared in some cases depending on the contractor’s role and the services being provided. According to guidance from the U.S. Department of Education, “agencies and institutions subject to FERPA are not precluded from disclosing education records to parties to whom they have outsourced services so long as they do so under the same conditions applicable to school officials who are actually employed.” The guidance reminds schools and educational agencies that “an educational agency or institution may not disclose education records without prior written consent merely because it has entered into a contract or agreement with an outside party. Rather, the agency or institution must be able to show that 1) the outside party provides a service for the agency or institution that it would otherwise provide for itself using employees; 2) the outside party would have “legitimate educational interests” in the information disclosed if the service were performed by employees; and 3) the outside party is under the direct control of the educational agency or institution with respect to the use and maintenance of information from educational records.” Examples of services that a district would otherwise use an employee to perform but may be contracted to a vendor include legal services, student





transportation, school nursing, and online data systems.

The guidance reminds districts that they remain completely responsible for their contractor's compliance with FERPA requirements in these situations and states "[f]or that reason, we recommend that these specific protections be incorporated into any contract or agreement between an educational agency or institution and any non-employees it retains to provide institutional services." The U.S. Department of Education adds that if the school has not "listed contractors and other outside service providers as 'school officials' in its annual § 99.7 FERPA notification, then it is required to record each disclosure to a qualifying contractor in accordance with § 99.32(a)."<sup>121</sup>

#### **4. May a school or district share information from the education record about chronic disease with a health provider operating under HIPAA?**

Yes, but only with a signed FERPA-compliant release or in an emergency. Disclosure of

information in the education file about a student's chronic conditions to a provider operating under HIPAA is permitted under a FERPA-compliant release. In addition, information from the education record may be disclosed to protect the health or safety of a student or other individual.<sup>122</sup> However, this exception has been strictly interpreted by the U.S. Department of Education. The emergency must be a specific situation that requires immediate need for disclosure of the information. Thus, for example, the emergency exception *could not be used* to send a list of all students with asthma or diabetes to the school-based health center; however, the exception could be used by the school to provide information to a health provider about a specific student with asthma who is having acute symptoms and needs immediate intervention.



## Providing Minor Consent, Including Mental Health (MH) and Sexual and Reproductive Health (SRH), Services

### 1. Do California's minor consent laws still apply if minor consent MH or SRH services are delivered at school?

Yes. The same consent rules apply whether the services are provided on or off-campus and whether the provider is required to comply with HIPAA or FERPA confidentiality laws. Under California law, minors of any age may consent to both sexual assault services and pregnancy-related health care (including contraception, pregnancy testing, prenatal care, abortion and postnatal care), and minors 12 and older may consent to care related to prevention, diagnosis, and treatment of sexually transmitted diseases. Minors 12 and older may also consent to MH counseling in many cases. A clinic or school cannot adopt a policy that requires obtaining parent consent for these services, as such a policy would conflict with state constitutional and statutory law. (See Appendix D for a summary of California's minor consent laws).

### 2. If a student receives MH or SRH services, may parents access their student's protected health information?

**HIPAA/CA:** If the records are subject to HIPAA and CMIA, the health provider cannot disclose information or share records related to minor consent services provided to the student without obtaining written authorization from the student on a HIPAA/CMIA-compliant authorization form.<sup>123</sup>

**FERPA:** If the records are within an education file subject to FERPA, the parent may access the information for students under age 18. Generally, a parent has the right to review their minor child's education record. FERPA does not obligate the school or school employed health provider to affirmatively notify parents of any services delivered, however. If a provider believes that disclosing records may put a student in danger, the provider should contact legal counsel.

### **3. May the principal access minor consent information documented in the education file?**

It depends. If a school nurse, or another health provider subject to FERPA, documents minor consent information, this becomes part of the education file and is subject to FERPA.

Information in the education file of a student 18 and younger can always be disclosed to the principal with parent consent. Absent parent consent, FERPA permits a school to disclose information in the education record to other school officials as long as the school official has a legitimate educational interest in the information.<sup>124</sup> A principal is a school official, but the principal can only access the information if the principal has a legitimate educational interest in the information. FERPA requires schools to include in their annual notices to parents a statement indicating whether the school has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.”<sup>125</sup>

### **4. May health providers whose records are subject to FERPA promise students that parents will not have access to their minor consent health records?**

For the most part, no. The records of health providers operating under FERPA are part of the education record, and parents have a right to inspect the education record of their minor child if they choose to do so.<sup>126</sup> There is no exception under FERPA that limits parent inspection rights simply because the information in the record pertains to health care services, with one caveat. Parents usually do not have the right to inspect health information in the education record of students eighteen and older, though there are exceptions to this rule as well.<sup>127</sup>

It is important to note, however, that to the extent the school health provider holds information that is not in the education record, (such as information from a conversation that was not recorded), the information would not be subject to FERPA.

### **5. What is confidential medical release?**

State law requires school officials to excuse students from school to attend confidential medical appointments. Confidential appointments are appointments to receive services that minors can obtain on their own consent under state or federal law. This includes the mental health and sexual and reproductive health services described in Appendix D. The school cannot require that the student have parent or guardian consent in order to attend the appointment and cannot notify parents or guardians when students choose

to leave for an appointment during the school day.<sup>128</sup> For more information on confidential medical release, including implementation and documentation of absences, please see National Center for Youth Law's *"Confidential Medical Release: Frequently Asked Questions from Schools and Districts"*, available at [www.teenhealthlaw.org](http://www.teenhealthlaw.org).

## 6. Why is confidential medical release important for school based providers to understand?

If a school-based provider is subject to FERPA, the provider cannot promise that a parent will not be able to access SRH information documented in the education file. Providers subject to HIPAA and CMIA, however, can promise patients additional confidentiality protections. For some students, this guarantee of confidentiality is critical. These students may choose not to access needed care if confidentiality cannot be guaranteed. In these cases, the provider whose records are subject to FERPA may wish to consider referring the student to a provider operating under HIPAA, and confidential medical release is one mechanism the student can use to make such an appointment possible.



# Community Based Provider Records and Communication

## 1. May a school or district share information from the education record with a community health provider that is operating under HIPAA, for purposes of service provision?

In limited circumstances, yes. The information may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed in a few limited circumstances. For example, the school could provide the health provider access to directory information about a specific student absent parent consent. What that would include will depend on how directory information has been defined by that school district in its annual notice to parents and whether parents have opted out. In addition, the school also may disclose information to the provider that is not contained in the education record, such as information from oral communications or personal observation that have not been recorded.<sup>129</sup> In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the FERPA emergency exception (described in question 6 on page 32).

## 2. May a community health provider share information subject to HIPAA with school employees in an emergency?

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

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

There is a presumption that a provider acted in good faith in making such a disclosure if the provider's belief is based on actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.<sup>130</sup> Therapists are permitted to disclose psychotherapy notes without authorization under emergency circumstances.<sup>131</sup>

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

Under California law, a therapist may disclose medical information as necessary to prevent or lessen a threat to the health or safety of a reasonably foreseeable victim or victims. Exactly when and to whom such information can be disclosed will depend on which California law the therapist is providing services under. For example, if the therapist is subject to the Civil Code, disclosure of information may be to any person reasonably able to prevent or lessen the threat, including the target of the threat.<sup>132</sup> Therapists should consult their own legal counsel for more information and guidance on which California confidentiality law applies to their records. Providers also should consult their ethical and licensing rules for applicable guidance.

### **3. May a health provider whose records are subject to HIPAA, such as a student's pediatrician, disclose protected health information to the school nurse?**

In most cases, yes. The information may be disclosed pursuant to a HIPAA and state law compliant written authorization. Alternatively, HIPAA and California law also permit health care providers to disclose protected health information to other health care providers for “treatment” purposes. HIPAA defines “treatment” broadly in this context to include coordination or management of health care, consultation and referral as well as direct treatment.<sup>133</sup> Providers also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain medical emergencies. It is important to note that once disclosed to the school nurse, if the school nurse places the information in the pupil file, FERPA likely will apply when determining access to the information in the file, not HIPAA.<sup>134</sup>

### **4. May a health provider whose records are subject to HIPAA disclose health information to let a teacher know how a student is progressing in treatment?**

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





# APPENDICES



## Appendix A: KEY POINTS about FERPA and HIPAA in California

### Basics

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

### FERPA or HIPAA?

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

### Why does the distinction between FERPA and HIPAA matter?

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

## Appendix B: Requirements for Release of Information Forms

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

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

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

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

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

3. The authorization must be written in plain language.

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

### **III. Requirements under CMIA: Civil Code 56.11**

An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor shall be valid if it:

1. Is handwritten by the person who signs it or is in a typeface no smaller than 14-point type.
2. Is clearly separate from any other language present on the same page

and is executed by a signature which serves no other purpose than to execute the authorization.

3. Is signed and dated by one of the following:

(1) The patient if the patient is either an adult or a minor who consented or lawfully could have consented for the services under minor consent law described in Appendix C.

(2) The legal representative of the patient, if the patient is a minor or an incompetent. However, a legal representative cannot give authorization to release information related to services a minor consented to or could have consented to under minor consent law described in Appendix C.

4. States the specific uses and limitations on the types of medical information to be disclosed.

5. States the name or functions of the provider of health care, health care service plan, pharmaceutical company, or contractor that may disclose the medical information.


6. States the name or functions of the persons or entities authorized to receive the medical information.

7. States the specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information.

8. States a specific date after which the provider of health care, health care service plan, pharmaceutical company, or contractor is no longer authorized to disclose the medical information.

9. Advises the person signing the authorization of the right to receive a copy of the authorization.

# Appendix C: Minor Consent Laws

 <b>CALIFORNIA MINOR CONSENT AND CONFIDENTIALITY LAWS*</b>		
MINORS OF ANY AGE MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<b>PREGNANCY</b>	<p>“A minor may consent to medical care related to the prevention or treatment of pregnancy,” except sterilization. (Cal. Family Code § 6925).</p> <p>A minor may receive birth control without parental consent. (Cal. Family Code § 6925).</p>	The health care provider is not permitted to inform a parent or legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).
<b>CONTRACEPTION</b>	A minor may consent to an abortion without parental consent. (Cal. Family Code § 6925; <i>American Academy of Pediatrics v. Lungren</i> , 16 Cal.4 <sup>th</sup> 307 (1997)).	The health care provider is not permitted to inform a parent or legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. ( <i>American Academy of Pediatrics v. Lungren</i> , 16 Cal.4 <sup>th</sup> 307 (1997); Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).
<b>ABORTION</b>	“A minor who [may] have been sexually assaulted may consent to medical care related to the diagnosis, . . . treatment and the collection of medical evidence with regard to the . . . assault.” (Cal. Family Code § 6928).	The health care provider must attempt to contact the minor’s parent/guardian and note in the minor’s record the day and time of the attempted contact and whether it was successful. This provision does not apply if the treating professional reasonably believes that the parent/guardian committed the assault. (Cal. Family Code § 6928).
<b>SEXUAL ASSAULT<sup>1</sup> SERVICES</b>	A minor under 12 years of age who may have been raped “may consent to medical care related to the diagnosis, . . . treatment and the collection of medical evidence with regard” to the rape. (Cal. Family Code § 6928).	Both rape and sexual assault of a minor are considered child abuse under California law and must be reported as such to the appropriate authorities by mandated reporters. The child abuse authorities investigating a child abuse report legally may disclose to parents that a report was made. (See Cal. Penal § 11167 and 11167.5.)
<b>RAPE<sup>2</sup> SERVICES FOR MINORS UNDER 12 YRS<sup>3</sup></b>		

<sup>1</sup>For the purposes of minor consent alone, sexual assault includes acts of oral copulation, sodomy, and other crimes of a sexual nature.

<sup>2</sup>Rape is defined in Cal. Penal Code § 261.

<sup>3</sup>See also “Rape Services for Minors 12 and Over” on page 3 of this chart

MINORS OF ANY AGE MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<b>EMERGENCY MEDICAL SERVICES*</b> <i>*An emergency is "a situation . . . requiring immediate services for alleviation of severe pain or immediate diagnosis of unforeseeable medical conditions, which, if not immediately diagnosed and treated, would lead to serious disability or death" (Cal. Code Bus. &amp; Prof. § 2397(c)(2)).</i>	<p>A provider shall not be liable for performing a procedure on a minor if the provider "reasonably believed that [the] procedure should be undertaken immediately and that there was insufficient time to obtain [parental] informed consent." (Cal. Bus. &amp; Prof. Code § 2397).</p>	<p>The parent or guardian usually has a right to inspect the minor's records. (Cal. Health &amp; Safety Code §§ 123110(a); Cal. Civ. Code § 56.10. <i>But see exception at endnote (FVC).</i>)</p>
<b>SKELETAL X-RAY TO DIAGNOSE CHILD ABUSE OR NEGLECT*</b> <i>*The provider does not need the minor's or her parent's consent to perform a procedure under this section.</i>	<p>"A physician and surgeon or dentist or their agents . . . may take skeletal X-rays of the child without the consent of the child's parent or guardian, but only for purposes of diagnosing the case as one of possible child abuse or neglect and determining the extent of." (Cal. Penal Code § 11171.2).</p>	<p>Neither the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this law in any court proceeding.</p>
MINORS 12 YEARS OF AGE OR OLDER MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<b>INFECTIOUS, CONTAGIOUS COMMUNICABLE DISEASES (DIAGNOSIS, TREATMENT)</b>	<p>"A minor who is 12 years of age or older and who may have come into contact with an infectious, contagious, or communicable disease may consent to medical care related to the diagnosis or treatment of the disease, if the disease . . . is one that is required by law . . . to be reported . . ." (Cal. Family Code § 6926).</p>	<p>The health care provider is not permitted to inform a parent or legal guardian without the minor's consent. The provider can only share the minor's medical information with them with a signed authorization from the minor. (Cal. Health &amp; Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).</p>
<b>SEXUALLY TRANSMITTED DISEASES (PREVENTIVE CARE, DIAGNOSIS, TREATMENT)</b>	<p>A minor 12 years of age or older who may have come into contact with a sexually transmitted disease may consent to medical care related to the diagnosis or treatment of the disease. (Cal. Family Code § 6926).</p> <p>Beginning in January 2012, "A minor who is 12 years of age or older may consent to medical care related to the prevention of a sexually transmitted disease." (AB 499 (2011); Cal. Family Code § 6926).</p>	



MINORS 12 YEARS OF AGE OR OLDER MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<p><b>AIDS/HIV TESTING AND TREATMENT</b></p>	<p>A minor 12 and older is competent to give written consent for an HIV test. (Cal. Health and Safety Code § 121020). A minor 12 and older may consent to diagnosis and treatment of HIV/AIDS. (Cal. Family Code § 6926).</p>	<p>The health care provider is not permitted to inform a parent or legal guardian without the minor's consent. The provider can only share the minor's medical information with them with a signed authorization from the minor. (Cal. Health &amp; Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).</p>
<p><b>RAPE SERVICES FOR MINORS 12 and OVER</b></p>	<p>“A minor who is 12 years of age or older and who is alleged to have been raped may consent to medical care related to the diagnosis or treatment of the condition and the collection of medical evidence with regard to the alleged rape.” (Cal. Family Code § 6927).</p>	<p>The health care provider is not permitted to inform a parent or legal guardian without the minor's consent. The provider can only share the minor's medical information with them with a signed authorization from the minor. (Cal. Health &amp; Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).</p> <p><u>RAPE</u></p> <p>Rape of a minor is considered child abuse under California law and mandated reporters, including health care providers, must report it as such. Providers cannot disclose to parents that they have made this report without the adolescent's authorization. However, adolescent patients should be advised that the child abuse authorities investigating the report may disclose to parents that a report was made.</p>

MINORS 12 YEARS OF AGE OR OLDER MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<p><b>OUTPATIENT MENTAL HEALTH SERVICES<sup>4</sup>/ SHELTER SERVICES</b></p> <p><sup>4</sup>This section does not authorize a minor to receive convulsive therapy, psychosurgery or psychotropic drugs without the consent of a parent or guardian.</p>	<p>Two statutes give minors the right to consent to mental health treatment. If a minor meets the criteria under either statute, the minor may consent to his or her own treatment. If the minor meets the criteria under both, the provider may decide which statute to apply. There are differences between them. See endnote ** for more on these differences:</p> <p><u>Family Code § 6924</u></p> <p>“A minor who is 12 years of age or older may consent to mental health treatment or counseling on an outpatient basis or to residential shelter services, if both of the following requirements are satisfied:</p> <p>(1) The minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services or residential shelter services. AND</p> <p>(2) The minor (A) would present a danger of serious physical or mental harm to self or to others without the mental health treatment or counseling or residential shelter services, or (B) is the alleged victim of incest or child abuse.”</p> <p>(Cal. Family Code § 6924.)</p> <p>Health &amp; Safety Code § 124260</p> <p>“[A] minor who is 12 years of age or older may consent to [outpatient] mental health treatment or counseling services if, in the opinion of the attending professional person, the minor is mature enough to participate intelligently in the mental health treatment or counseling services.”</p> <p>(Cal. Health &amp; Saf. Code § 124260.)</p>	<p><b>MENTAL HEALTH TREATMENT:</b></p> <p>The health care provider is required to involve a parent or guardian in the minor’s treatment unless the health care provider decides that such involvement is inappropriate. This decision and any attempts to contact parents must be documented in the minor’s record. (Cal. Fam. Code § 6924; 45 C.F.R. 164.502(g)(3)(ii).) For services provided under Health and Safety Code § 124260, providers must consult with the minor before deciding whether to involve parents. (Cal. Health &amp; Saf. Code § 124260(a).)</p> <p>While this exception allows providers to inform and involve parents in treatment when appropriate, it does not give providers a right to disclose medical records to parents without the minor’s authorization. The provider can only share the minor’s medical records with parents with a signed authorization from the minor. (Cal. Health &amp; Saf. Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11, 56.30; Cal. Welf. &amp; Inst. Code § 5328. <i>See also endnote<sup>(EXC)</sup></i>.)</p> <p><b>SHELTER:</b></p> <p>Although minor may consent to service, the shelter must use its best efforts based on information provided by the minor to notify parent/guardian of shelter services.</p>

MINORS 12 YEARS OF AGE OR OLDER MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<p style="text-align: center;"><b>DRUG AND ALCOHOL ABUSE TREATMENT</b></p> <ul style="list-style-type: none"> <li>This section does not authorize a minor to receive replacement narcotic abuse treatment without the consent of the minor's parent or guardian.</li> <li>This section does not grant a minor the right to refuse medical care and counseling for a drug or alcohol related problem when the minor's parent or guardian consents for that treatment. (Cal. Family Code § 6929(f)).</li> </ul>	<p>“A minor who is 12 years of age or older may consent to medical care and counseling relating to the diagnosis and treatment of a drug or alcohol related problem.” (Cal. Family Code §6929(b)).</p>	<p>There are different confidentiality rules under federal and state law. Providers meeting the criteria listed under ‘federal’ below must follow the federal rule. Providers that don’t meet these criteria follow state law.</p> <p><b>FEDERAL:</b> Federal confidentiality law applies to any individual, program, or facility that meets the following two criteria:</p> <ol style="list-style-type: none"> <li>The individual, program, or facility is federally assisted. (Federally assisted means authorized, certified, licensed or funded in whole or in part by any department of the federal government. Examples include programs that are: tax exempt; receiving tax-deductible donations; receiving any federal operating funds; or registered with Medicare.) (42 C.F.R. §2.12); <b>AND</b></li> <li>The individual or program:             <ol style="list-style-type: none"> <li>Is an individual or program that holds itself out as providing alcohol or drug abuse diagnosis, treatment, or referral; <b>OR</b></li> <li>Is a staff member at a general medical facility whose primary function is, and who is identified as, a provider of alcohol or drug abuse diagnosis, treatment or referral; <b>OR</b></li> <li>Is a unit at a general medical facility that holds itself out as providing alcohol or drug abuse diagnosis, treatment or referral. (42 C.F.R. §2.11; 42 C.F.R. §2.12).</li> </ol> </li> </ol> <p>For individuals or programs meeting these criteria, federal law prohibits disclosing any information to parents without a minor’s written consent. One exception, however, is that an individual or program may share with parents if the individual or program director determines the following three conditions are met: (1) that the minor’s situation poses a substantial threat to the life or physical well-being of the minor or another; (2) that this threat may be reduced by communicating relevant facts to the minor’s parents; and (3) that the minor lacks the capacity because of extreme youth or a mental or physical condition to make a rational decision on whether to disclose to her parents. (42 C.F.R. §2.14).</p> <p><b>STATE RULE:</b> Cal. Family Code §6929(c). Parallels confidentiality rule described under “Mental Health Treatment” at page 4 above. <i>See also exception at endnote <sup>(EXC)</sup>.</i></p>

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MINOR 15 YEARS OF AGE OR OLDER	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?
<b>GENERAL MEDICAL CARE</b>	“A minor may consent to the minor’s medical care or dental care if all of the following conditions are satisfied: (1) The minor is 15 years of age or older. (2) The minor is living separate and apart from the minor’s parents or guardian, whether with or without the consent of a parent or guardian and regardless of the duration of the separate residence. (3) The minor is managing the minor’s own financial affairs, regardless of the source of the minor’s income.” (Cal. Family Code § 6922(a).)	“A physician and surgeon or dentist may, with or without the consent of the minor patient, advise the minor’s parent or guardian of the treatment given or needed if the physician and surgeon or dentist has reason to know, on the basis of the information given by the minor, the whereabouts of the parent or guardian.” (Cal. Family Code § 6922(c). <i>See also exception at endnote (EXC)</i> ).
<b>MINOR MUST BE EMANCIPATED (GENERALLY 14 YEARS OF AGE OR OLDER)</b>	<b>LAW/DETAILS</b>	<b>MAY/MUST THE HEALTH CARE PROVIDER INFORM A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM?</b>
<b>GENERAL MEDICAL CARE for EMANCIPATED YOUTH</b>	An emancipated minor may consent to medical, dental and psychiatric care. (Cal. Family Code § 7050(e)). <i>See</i> Cal. Family Code § 7002 for emancipation criteria.	The health care provider is not permitted to inform a parent or legal guardian without minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11).

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Endnotes:

\* There are many confidentiality and consent rules. Different rules apply in different contexts. This chart addresses the rules that apply when minors live with their parents or guardians. It does not address the rules that apply when minors are under court jurisdiction or in other special living situations. Further, the confidentiality section focuses on parent and provider access. It does not address when other people or agencies may have a right to access otherwise confidential information.

\*\* In addition to having slightly different eligibility criteria, there are other small differences between Health and Safety Code §124260 and Family Code § 6924. For example, the two laws both allow “professional persons” to deliver minor consent services but the two laws define “professional person” differently. Also, there is a funding restriction that applies to Health and Safety Code §124260 but not to Family Code § 6924. (See Cal. Family Code 6924, Cal. Health & Saf. Code § 124260 and Cal. Welf. & Inst. Code § 14029.8 and look for more information on [www.teenhealthlaw.org](http://www.teenhealthlaw.org) ).

**EXC:** Providers may refuse to provide parents access to a minor’s medical records, where a parent normally has a right to them, if “the health care provider determines that access to the patient records requested by the [parent or guardian] would have a detrimental effect on the provider’s professional relationship with the minor patient or the minor’s physical safety or psychological well-being.” Cal. Health & Safety Code § 123115(a)(2). A provider shall not be liable for any good faith decisions concerning access to a minor’s records. *Id.*

## Appendix D: Covered Entities\*

**A Covered Entity is one of the following:**

A Health Care Provider	A Health Plan	A Health Care Clearinghouse
<p>This includes providers such as:</p> <ul style="list-style-type: none"> <li>• Doctors</li> <li>• Clinics</li> <li>• Psychologists</li> <li>• Dentists</li> <li>• Chiropractors</li> <li>• Nursing Homes</li> <li>• Pharmacies</li> </ul> <p>...but only if they transmit any information in an electronic form in connection with a transaction for which HHS has adopted a standard.</p>	<p>This includes:</p> <ul style="list-style-type: none"> <li>• Health insurance companies</li> <li>• HMOs</li> <li>• Company health plans</li> <li>• Government program that pay for health care, such as Medicare, Medicaid, and the military and veterans health care programs</li> </ul>	<p>This includes entities that process nonstandard health information they receive from another entity (i.e., standard electronic format or data content), or vice versa.</p>

\*This chart is excerpted from U.S. Department of Health and Human Services, "Covered Entities and Business Associates," available at <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>



## Appendix E: Glossary of Key Terms

HIPAA	
<i>Authorization:</i>	Written document that grants permission to a covered entity to disclose protected health information. An authorization must contain certain elements outlined in HIPAA to be valid. 45 C.F.R. 164.508.
<i>Business Associate:</i>	Individual or organization that receives, creates, maintains or transmits protected health information as part of certain types of work it does on behalf of a covered entity. 45 C.F.R. 160.103.
<i>Covered Entity:</i>	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.
<i>Disclosure:</i>	Release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information. 45 C.F.R. 160.103.
<i>Protected Health Information:</i>	Individually identifiable health information in any form, including oral communications. It does not include information subject to FERPA. 45 C.F.R. 164.103.
<i>Psychotherapy Notes:</i>	Notes records in any medium by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. This excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis and progress. 45 C.F.R. 164.501.
<i>Treatment:</i>	Provision, coordination, or management of health care and related services by one or more health care providers, including the coordination or management of health care by a health care provider with a third party; consultation between health care providers relating to a patient; or the referral of a patient for health care from one health care provider to another. 45 C.F.R. 164.501.

**FERPA**

<i>Directory Information:</i>	Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended. 34 C.F.R. 99.3.
<i>Disclosure:</i>	To permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record. 34 C.F.R. 99.3.
<i>Educational Agency or Institution:</i>	Institutions that receive federal funds under programs administered by the U.S. Department of Education and that either provide direct instruction to students, such as schools; or are educational agencies that direct or control schools, such as school districts and state education departments. 34 C.F.R. 99.1.
<i>Education Record:</i>	Records, files, documents, or other materials recorded in any way that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution. 34 C.F.R. 99.3.
<i>Parent:</i>	A natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 C.F.R. 99.3.
<i>Personally Identifiable Information:</i>	The term includes, but is not limited to: the student's name; the name of the student's parent or other family members; the address of the student or student's family; a personal identifier, such as the student's social security number, student number, or biometric record; other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. 34 C.F.R. 99.3.
<i>School nurse</i>	A school nurse is a registered nurse currently licensed under the Business and Professions Code and who has completed the additional educational requirements for, and possesses a current credential in, school nursing pursuant to Education Code Section 44877. School nurses strengthen and facilitate the educational process by improving and protecting the health status of children and by identification and assistance in the removal or modification of health-related barriers to learning in individual children. The major focus of school health services is the prevention of illness and disability, and the early detection and correction of health problems. The school nurse is especially prepared and uniquely qualified in preventive health, health assessment, and referral procedures. State statute provides a list of common duties of a school nurse. Cal. Educ. Code 49426.
<i>School psychologist</i>	A school psychologist is a credentialed professional whose primary objective is the application of scientific principles of learning and behavior to ameliorate school-related problems and to facilitate the learning and development of children in the public schools of California. To accomplish this objective the school psychologist provides services to children, teachers, parents, community agencies, and the school system itself. State statute provides for a list of typical services. Cal. Educ. Code 49424.
<i>Sole Possession Record:</i>	Records kept in the sole possession of the maker, used only as a personal memory aid, and that are not accessible or revealed to any other person except a temporary substitute for the maker of the record. 34 C.F.R. 99.3.
<i>Treatment Record:</i>	Records of a student 18 and older, or who is attending a postsecondary institution, that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity, made or maintained only in connection with treatment of the student and disclosed only to individuals providing the treatment. 34 C.F.R. 99.3.

## Appendix F: References and Resources

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

1. *Data-Sharing Tool Kit for Communities: How to Leverage Community Relationships While Protecting Student Privacy* (March 2016), available at: <http://www2.ed.gov/programs/promiseneighborhoods/datasharingtool.pdf>
2. *Checklist for Developing School District Privacy Programs* (August 2015), available at: <http://ptac.ed.gov/document/checklist-developing-school-district-privacy-programs-august-2015>
3. *FERPA for School Officials - Model Notices and Guidance*, available at <http://familypolicy.ed.gov/content/ferpa-school-officials-guidance-and-notices?src=fpco>

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

1. *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records*, November 2008, available at <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>
2. *HIPAA for Professionals*, available at <http://www.hhs.gov/hipaa/for-professionals/index.html>
3. *HIPAA – General Information*, available at <https://www.cms.gov/Regulations-and-Guidance/HIPAA-Administrative-Simplification/HIPAAGenInfo/index.html>

### Other Resources:

1. U.S. Code of Federal Regulations, available at <http://www.ecfr.gov/cgi-bin/ECFR?page=browse>
2. California State Code, available at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>

## Endnotes

- <sup>1</sup> 45 C.F.R. § 160.103. (The U.S. Government Publishing Office makes the Code of Federal Regulations available online at [http://www.ecfr.gov/cgi-bin/text-idx?SID=ffea9a9ccdd79672b39852004d69ffe1&mc=true&tpl=/ecfrbrowse/Title45/45cfrv1\\_02.tpl#0](http://www.ecfr.gov/cgi-bin/text-idx?SID=ffea9a9ccdd79672b39852004d69ffe1&mc=true&tpl=/ecfrbrowse/Title45/45cfrv1_02.tpl#0))
- <sup>2</sup> 45 C.F.R. § 160.103
- <sup>3</sup> 45 C.F.R. § 160.103 (“Health care provider means a provider of services ... a provider of medical or health services ... and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.”).
- <sup>4</sup> See 45 C.F.R. Part 162; see Privacy Rights Clearinghouse, HIPAA Basics, available at <http://www.privacyrights.org/fs/fs8a-hipaa.htm#3>
- <sup>5</sup> U.S. Dept. of Health & Human Services, “Covered Entities and Business Associates,” available at <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>
- <sup>6</sup> 45 C.F.R. § 160.103 (“Except as provided in paragraph (4) of this definition, business associate means, with respect to a covered entity, a person who: (i) On behalf of such covered entity or of an organized health care arrangement (as defined in this section) in which the covered entity participates, but other than in the capacity of a member of the workforce of such covered entity or arrangement, creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing; or (ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation (as defined in § 164.501 of this subchapter), management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person. (2) A covered entity may be a business associate of another covered entity. (3) Business associate includes: (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information. (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity. (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate. (4) *Business associate* does not include: (i) A health care provider, with respect to disclosures by a covered entity to the health care provider concerning the treatment of the individual. (ii) A plan sponsor, with respect to disclosures by a group health plan (or by a health insurance issuer or HMO with respect to a group health plan) to the plan sponsor, to the extent that the requirements of § 164.504(f) of this subchapter apply and are met. (iii) A government agency, with respect to determining eligibility for, or enrollment in, a government health plan that provides public benefits and is administered by another government agency, or collecting protected health information for such purposes, to the extent such activities are authorized by law. (iv) A covered entity participating in an organized health care arrangement that performs a function or activity as described by paragraph (1)(i) of this definition for or on behalf of such organized health care arrangement, or that provides a service as described in paragraph (1)(ii) of this definition to or for such organized health care arrangement by virtue of such activities or services.”)
- <sup>7</sup> 45 C.F.R. 164.502; see also U.S. Dept. of Health & Human Services, “Business Associates,” available at <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html>
- <sup>8</sup> 45 C.F.R. § 160.103 (“Definitions: *Health information* means any information, whether oral or recorded in any form or medium, that: (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. *Individually identifiable health information* is information that is a subset of health information, including demographic information collected from an individual, and: (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual. *Protected health information* means individually identifiable health information: (1) Except as provided in paragraph (2) of this definition, that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium.....”)
- <sup>9</sup> *Id.*
- <sup>10</sup> 45 C.F.R. § 164.103 (“*Protected Health Information*...Protected health information excludes individually identifiable health information in: (i) Educational records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. § 1232g; ...”)
- <sup>11</sup> See e.g., Cal. Civ. Code §§ 56-56.37; Cal. Welf. & Inst. Code §§ 5628-5329.
- <sup>12</sup> Cal. Civ. Code § 56.05 (“Contractor” means any person or entity that is a medical group, independent practice association, pharmaceutical benefits manager, or a medical service organization and is not a health care service plan or provider of health care. “Contractor” does not include insurance institutions as defined in subdivision (k) of Section 791.02 of the Insurance Code or pharmaceutical benefits managers licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code). ... “Health care service plan” means any entity regulated pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code). ... “Licensed health care professional” means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, the Osteopathic Initiative Act or the Chiropractic Initiative Act, or Division 2.5 (commencing with Section 1797) of the Health and Safety Code.... “Medical information” means any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient’s medical history, mental or physical condition, or treatment. “Individually identifiable” means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient’s name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual’s identity.... “Provider of health care” means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code; any person licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act; any person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code; any clinic, health dispensary, or health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. “Provider of health care” does not include insurance institutions as defined in subdivision (k) of Section 791.02 of the Insurance Code.”)(emphasis added).
- <sup>13</sup> 45 C.F.R. §§ 160.203; 164.202
- <sup>14</sup> See, e.g., Cal. Health & Safety Code §§ 123110(a), 123115(a)(1).
- <sup>15</sup> 45 C.F.R. § 164.502(a)
- <sup>16</sup> 45 C.F.R. § 164.508(c).
- <sup>17</sup> *Id.*
- <sup>18</sup> 45 C.F.R. § 164.502(g)(i).
- <sup>19</sup> 45 C.F.R. §§ 164.502(a)(1)(ii); 164.506; Ca. Civ. Code § 56.10(c)(1).
- <sup>20</sup> 45 C.F.R. § 164.512(j)(1)(“ (1) Permitted disclosures. A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure: (i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.”); Ca. Civ. Code § 56.10(c)(19).
- <sup>21</sup> 45 C.F.R. § 164.512(i); Ca. Civ. Code § 56.10(c)(7).
- <sup>22</sup> 45 C.F.R. §§ 164.502(a)(1)(ii); 164.506; Ca. Civ. Code § 56.10(c)(2)&(3).
- <sup>23</sup> 45 C.F.R. §§ 164.502(a)(1)(ii); 164.506; Ca. Civ. Code § 56.10(c)(4), (10)&(16).
- <sup>24</sup> 45 C.F.R. § 164.512(b)(1)(i); Ca. Civ. Code § 56.10(b)(9).
- <sup>25</sup> 45 C.F.R. § 164.512(b)(1)(ii); Ca. Civ. Code § 56.10(b)(9).
- <sup>26</sup> 45 C.F.R. §§ 164.502(a)(1)(i)&(2)(i); 164.524; Ca. Health & Saf. Code § 123110(a)
- <sup>27</sup> See 45 C.F.R. §§ 164.502(a)(1); 164.512; see Ca. Civ. Code § 56.01 et al.
- <sup>28</sup> 45 C.F.R. § 164.520; U.S. Dept. of Health & Human Services, “Notice of Privacy Practices,” available at <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/privacy-practices-for-protected-health-information/index.html>
- <sup>29</sup> 20 U.S.C. § 1232g.
- <sup>30</sup> 34 C.F.R. § 99.1(a) (“Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made

- available under any program administered by the Secretary, if—(1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.”).
- 31 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.”).
- 32 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.”).
- 33 34 C.F.R. § 99.3.
- 34 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.”).
- 35 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”).
- 36 34 C.F.R. § 99.3(b)(2).
- 37 U.S. Dept. of Health and Human Services & U.S. Dept. of Educ. *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, November 2008, [hereinafter *Joint Guidance*], at page 2; see also U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Martha Holloway, Alabama Dept. of Educ.,” Feb. 25, 2004.
- 38 See U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>
- 39 U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>
- 40 34 C.F.R. § 99.8(b)(1).
- 41 34 C.F.R. § 99.8(a)(1).
- 42 34 C.F.R. § 99.30.
- 43 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.”)
- 44 The scope of the term ‘directory information’ will depend on district policy, but can include the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A).
- 45 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>
- 46 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).
- 47 20 U.S.C. § 1232g (b)(1); 34 C.F.R. § 99.31(a)(1)(i)(A).
- 48 See 34 C.F.R. §§ 99.31.
- 49 Cal. Civ. Code §§ 56-56.37; Cal. Welf. & Inst. Code §§ 5328-5329.
- 50 Cal. Ed. Code §§ 49060-49079.
- 51 34 C.F.R. § 99.61.
- 52 Cal. Educ. Code 49062 (“As used in this section, ‘information of a personal nature’ does not include routine objective information related to academic and career counseling.”).
- 53 Cal. Educ. Code 49600(b) (“For purposes of this section, ‘educational counseling’ means specialized services provided by a school counselor possessing a valid credential with a specialization in pupil personnel services who is assigned specific times to directly counsel pupils.”).
- 54 Cal. Educ. Code 49062(b)-(f) (“It is the intent of the Legislature that school counselors do all of the following:
- (1) Engage with, advocate for, and provide support for, all pupils with respect to learning and achievement.
  - (2) Plan, implement, and evaluate programs to promote the academic, career, personal, and social development of all pupils, including pupils from low-income families, foster youth, homeless youth, undocumented youth, and pupils at all levels of academic, social, and emotional abilities.
  - (3) Use multiple sources of information to monitor and improve pupil behavior and achievement.
  - (4) Collaborate and coordinate with school and community resources.
  - (5) Promote and maintain a safe learning environment for all pupils by providing restorative justice practices, positive behavior interventions, and support services.
  - (6) Intervene to ameliorate school-related problems, including issues related to chronic absences.
  - (7) Use research-based strategies to reduce stigma, conflict, and pupil-to-pupil mistreatment and bullying.
  - (8) Improve school climate and pupil well-being.
  - (9) Enhance pupils’ social and emotional competence, character, health, civic engagement, cultural literacy, and commitment to lifelong learning and the pursuit of high-quality educational programs.
  - (10) Provide counseling interventions and support services for pupils classified as English learners, eligible for free or reduced-price meals, or foster youth, including enhancing equity and access to the education system and community services.
  - (11) Engage in continued development as a professional school counselor.
- (d) Educational counseling shall include academic counseling, in which pupils receive counseling in the following areas:
- (1) Development and implementation, with parental involvement, of the pupil’s immediate and long-range educational plans.
  - (2) Optimizing progress towards achievement of proficiency standards.
  - (3) Completion of the required curriculum in accordance with the pupil’s needs, abilities, interests, and aptitudes.
  - (4) Academic planning for access and success in higher education programs, including advisement on courses needed for admission to public colleges and universities, standardized admissions tests, and financial aid.
  - (5) Career and vocational counseling, in which pupils are assisted in doing all of the following:
    - (A) Planning for the future, including, but not limited to, identifying personal interests, skills, and abilities, career planning, course selection, and career transition.
    - (B) Becoming aware of personal preferences and interests that influence educational and occupational exploration, career choice, and career success.
    - (C) Developing realistic perceptions of work, the changing work environment, and the effect of work on lifestyle.
    - (D) Understanding the relationship between academic achievement and career success, and the importance of maximizing career options.
    - (E) Understanding the value of participating in career technical education and work-based learning activities and programs, including, but not limited to, service learning, regional occupational centers and programs, partnership programs, job shadowing, and mentoring experiences.
    - (F) Understanding the need to develop essential employable skills and work habits.



- (G) Understanding the variety of four-year colleges and universities and community college vocational and technical preparation programs, as well as admission criteria and enrollment procedures.
- (e) Educational counseling may also include counseling in any of the following:
- (1) Individualized review of the academic and deportment records of a pupil.
  - (2) Individualized review of the pupil's career goals, and the available academic and career technical education opportunities and community and workplace experiences available to the pupil that may support the pursuit of those goals.
  - (3) Opportunity for a counselor to meet with each pupil and, if practicable, the parents or legal guardian of the pupil to discuss the academic and deportment records of the pupil, his or her educational options, the coursework and academic progress needed for satisfactory completion of middle or high school, education opportunities at community colleges, eligibility for admission to a four-year institution of postsecondary education, including the University of California and the California State University, and the availability of career technical education. The educational options discussed at the meeting shall include, to the extent these services are available, the college preparatory program and career technical education programs, including regional occupational centers and programs and similar alternatives available to pupils within the school district.
  - (4) Identifying pupils who are at risk of not graduating with the rest of their class or do not have sufficient training to allow them to fully engage in their chosen career.
  - (5) In schools that enroll pupils in grades 10 and 12, developing a list of coursework and experience necessary to assist each pupil in his or her grade who has not satisfied, or is not on track to satisfy, the curricular requirements for admission to the University of California and the California State University, and to successfully transition to postsecondary education or employment.
  - (6) Developing a list of coursework and experience necessary to assist each pupil in middle school to successfully transition to high school and meet all graduation requirements.
  - (7) In schools that enroll pupils in grades 6 to 12, inclusive, developing a list of coursework and experience necessary to assist each pupil to begin to satisfy the curricular requirements for admission to the University of California and the California State University.
  - (8) Providing a copy of the lists developed pursuant to paragraphs (6) and (7) to a pupil and his or her parent or legal guardian, ensuring that the list of coursework and experience is part of the pupil's cumulative record.
  - (9) Developing a list of coursework and experience for a pupil enrolled in grade 12, including options for continuing his or her education if he or she fails to meet graduation requirements. These options shall include, but are not limited to, all of the following:
    - (A) Enrolling in an adult education program.
    - (B) Enrolling in a community college.
    - (C) Continuing enrollment in the pupil's current school district.
    - (D) Continuing to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12.
  - (10) Providing a copy of the list of coursework and experiences developed pursuant to paragraph (9) to the pupil and his or her parent or legal guardian, ensuring that the list of coursework and experience is part of the cumulative records of a pupil.
  - (11) Offering and scheduling an individual conference with each pupil in grades 10 and 12 who has not satisfied, or is not on track to satisfy, the curricular requirements for admission to the University of California and the California State University and to successfully transition to postsecondary education or employment, and providing the following information to the pupil and his or her parent or legal guardian:
    - (A) Programs, courses, and career technical education options available to the pupil as needed for satisfactory completion of middle or high school.
    - (B) Cumulative records and transcripts of the pupil.
    - (C) Results of standardized and diagnostic assessments of the pupil.
    - (D) Remediation strategies, high school courses, and alternative education options available to the pupil, including, but not limited to, informing the pupil of the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12.
    - (E) Information on postsecondary education and training.
    - (F) The score of the pupil on the English language arts or mathematics portion of the California Assessment of Student Performance and Progress, established pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33, administered in grade 6, as applicable.
    - (G) Eligibility requirements, including coursework and test requirements, and the progress of the pupil toward satisfaction of those requirements for admission to four-year institutions of postsecondary education, including the University of California and the California State University.
    - (H) The availability of financial aid for postsecondary education.
  - (12) Personal and social counseling, in which pupils receive counseling pertaining to interpersonal relationships for the purpose of promoting the development of their academic abilities, careers and vocations, and personal and social skills.
    - (f) Professional development related to career and vocational counseling shall include strategies for counseling pupils pursuing postsecondary education, career technical education, multiple pathways, college, and global career opportunities.<sup>55</sup>
- 54 Cal. Educ. Code 49062("The information shall not be revealed, released, discussed, or referred to, except as follows:
- (a) Discussion with psychotherapists as defined by Section 1010 of the Evidence Code, other health care providers, or the school nurse, for the sole purpose of referring the pupil for treatment.
  - (b) Reporting of child abuse or neglect as required by Article 2.5 (commencing with Section 11165) of Chapter 2 of Title 1 of Part 4 of the Penal Code.
  - (c) Reporting information to the principal or parents of the pupil when the school counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety, or welfare of the pupil or the following other persons living in the school community: administrators, teachers, school staff, parents, pupils, and other school community members.
  - (d) Reporting information to the principal, other persons inside the school, as necessary, the parents of the pupil, and other persons outside the school when the pupil indicates that a crime, involving the likelihood of personal injury or significant or substantial property losses, will be or has been committed.
  - (e) Reporting information to one or more persons specified in a written waiver after this written waiver of confidence is read and signed by the pupil and preserved in the pupil's file.
- Notwithstanding the provisions of this section, a school counselor shall not disclose information deemed to be confidential pursuant to this section to the parents of the pupil when the school counselor has reasonable cause to believe that the disclosure would result in a clear and present danger to the health, safety, or welfare of the pupil.
- Notwithstanding the provisions of this section, a school counselor shall disclose information deemed to be confidential pursuant to this section to law enforcement agencies when ordered to do so by order of a court of law, to aid in the investigation of a crime, or when ordered to testify in any administrative or judicial proceeding.
- Nothing in this section shall be deemed to limit access to pupil records as provided in Section 49076.
- Nothing in this section shall be deemed to limit the counselor from conferring with other school staff, as appropriate, regarding modification of the pupil's academic program.
- It is the intent of the Legislature that counselors use the privilege of confidentiality under this section to assist the pupil whenever possible to communicate more effectively with parents, school staff, and others.
- No person required by this section to keep information discussed during counseling confidential shall incur any civil or criminal liability as a result of keeping that information confidential.
- As used in this section, "information of a personal nature" does not include routine objective information related to academic and career counsel

<sup>55</sup> Nat. Forum on Education Statistics, "Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies," NCES 2004-330, Washington, DC: 2004, available at <http://nces.ed.gov/pubs2004/2004330.pdf>.

<sup>56</sup> U.S. Dept. of Educ., "Resources," available at <https://studentprivacy.ed.gov/resources>.

<sup>57</sup> 45 C.F.R. § 160.103("Protected Health Information...Protected health information excludes individually identifiable health information in: (i) Educational records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. §1232g; ....").

<sup>58</sup> Joint Guidance at page 4.

- <sup>59</sup> U.S. Dept. of Educ., Family Policy Compliance Office, Letter to Ms. Melanie P. Baise, University of New Mexico, November 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>
- <sup>60</sup> U.S. Dept. of Educ., Family Policy Compliance Office, Letter to Ms. Melanie P. Baise, University of New Mexico, November 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.*
- <sup>63</sup> 45 C.F.R. § 160.103.
- <sup>64</sup> 45 C.F.R. § 160.103 (“Health care provider means a provider of services ... a provider of medical or health services ... and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.”).
- <sup>65</sup> See 45 C.F.R. Part 162; see Privacy Rights Clearinghouse, HIPAA Basics, available at <http://www.privacyrights.org/fs/fs8a-hipaa.htm#3>; see also Dept. of Health & Human Services, Covered Entity Chart, available at <https://www.cms.gov/regulations-and-guidance/hipaa-administrative-simplification/hipaageninfo/areyoucoveredentity.html>.
- <sup>66</sup> See, e.g., Cal. Family Code § 6922(c); Cal. Health & Safety Code §§ 123110(a); Cal. Civ. Code § 56.10.
- <sup>67</sup> See, e.g., Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11; Cal. Fam. Code § 6929(c); 42 C.F.R. § 2.14.
- <sup>68</sup> Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11. For information on the confidentiality laws that apply to Title X and drug treatment services, see Gudeman, Madge, “The Federal Title X Family Planning Program: Privacy and Access Rules for Adolescents,” *Youth Law News* Jan.-Mar. 2011 and see Gudeman, “Federal Privacy Protection for Substance Abuse Treatment Records: Protecting Adolescents,” *Youth Law News*, July-Sep. 2003.
- <sup>69</sup> Cal. Health & Saf. Code § 123115(a)(2); see 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506. (online NCYL chart cites 45 C.F.R. § 164.502(g)(5)).
- <sup>70</sup> 34 C.F.R. § 99.31(a)(8).
- <sup>71</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>72</sup> Cal. Educ. Code § 49069.
- <sup>73</sup> Cal. Civ. Code § 56.10(c)(1); 45 C.F.R. § 164.506(c)(2); 45 C.F.R. § 164.501 (defining “treatment”).
- <sup>74</sup> For a definition of psychotherapy notes, see 45 C.F.R. 164.501 and speak to your own counsel. 45 C.F.R. 164.502(a)(1)(ii); 45 C.F.R. 164.506; 45 C.F.R. 164.508(a)(2); Cal. Welf. & Inst. Code § 5328(a). Compare Cal. Civ. Code §§ 56.10(c)(1); 56.104.
- <sup>75</sup> Cal. Civ. Code § 56.05.
- <sup>76</sup> See 34 C.F.R. § 99.31(a)(1)(i).
- <sup>77</sup> 20 U.S.C. § 1232g (b)(1); 34 C.F.R. § 99.31(a)(1)(i)(A).
- <sup>78</sup> See U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>
- <sup>79</sup> 45 CFR § 164.512(j)(1), (4).
- <sup>80</sup> 45 C.F.R. §§ 164.508(a)(2)(ii); 45 CFR 164.501 (“Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.”).
- <sup>81</sup> Cal. Civ. Code § 56.10 (c)(19) (“The information may be disclosed, consistent with applicable law and standards of ethical conduct, by a psychotherapist, as defined in Section 1010 of the Evidence Code, if the psychotherapist, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.”).
- <sup>82</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.
- <sup>83</sup> U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Martha Holloway, Alabama Dept. of Educ.”, Feb. 25, 2004.
- <sup>84</sup> 34 C.F.R. § 99.36(c).
- <sup>85</sup> Cal. Penal Code § 11165.7
- <sup>86</sup> Cal. Penal Code § 11166(a).
- <sup>87</sup> 45 C.F.R. 164.512(b)(1)(ii); Ca. Civ. Code § 56.10(b)(9); *People ex rel. Eicheberger v. Stockton Pregnancy Control Medical Clinic, Inc.*, 249 Cal. Rptr. 762, 768 (3rd Dist. Ct. App. 1988).
- <sup>88</sup> Cal. Penal Code § 11165.7
- <sup>89</sup> U.S. Dept. of Educ., Family Policy Compliance Office, Letter to Ms. Melanie P. Baise, University of New Mexico, November 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>
- <sup>90</sup> 20 USC § 1232g(a)(4)(A).
- <sup>91</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>92</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>93</sup> *Joint Guidance* at page 4.
- <sup>94</sup> 45 C.F.R. 164.501
- <sup>95</sup> *Joint Guidance* at page 2.
- <sup>96</sup> 34 C.F.R. 99.8(b).
- <sup>97</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.
- <sup>98</sup> U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Martha Holloway, Alabama Dept. of Educ.”, Feb. 25, 2004.
- <sup>99</sup> 34 C.F.R. § 99.36(c).
- <sup>100</sup> 20 USC § 1232g(a)(4)(A).
- <sup>101</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>102</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>103</sup> *Joint Guidance* at page 4.
- <sup>104</sup> See 45 C.F.R. § 164.506.
- <sup>105</sup> *Joint Guidance* at page 2.
- <sup>106</sup> 34 C.F.R. 99.8(b).
- <sup>107</sup> 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and

- Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.
- 108 U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.," Feb. 25, 2004.
- 109 34 C.F.R. § 99.36(c).
- 110 20 USC § 1232g(b)(1).
- 111 U.S. Dept. of Educ., Office of Management, Letter to the Honorable Suzanne Bonamici U.S. House of Representatives, June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>.
- 112 20 USC § 1232g(b)(1).
- 113 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>.
- 114 U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.," Feb. 25, 2004.
- 115 34 C.F.R. § 99.33(a)(1).
- 116 20 USC § 1232g(b)(1).
- 117 U.S. Dept. of Educ., Office of Management, "Letter to the Honorable Suzanne Bonamici U.S. House of Representatives," June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>.
- 118 20 USC § 1232g(b)(1).
- 119 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>.
- 120 U.S. Dept. of Educ., Family Policy Compliance Office, "Letter to Ms. Martha Holloway, Alabama Dept. of Educ.," Feb. 25, 2004.
- 121 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>.
- 122 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>.
- 123 See, e.g., Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11; Cal. Fam. Code § 6929(c); 42 C.F.R. §2.14.
- 124 20 USC § 1232g(b)(1).
- 125 U.S. Dept. of Educ., Office of Management, "Letter to the Honorable Suzanne Bonamici U.S. House of Representatives," June 8, 2015, available at <https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-representative-suzanne-bonamici.pdf>.
- 126 34 C.F.R. § 99.10.
- 127 34 C.F.R. § 99.5.
- 128 Educ. Code § 48205; 87 Ops. Cal. Atty. Gen. 168, 172 (2004)
- 129 34 C.F.R. § 99.8(b).
- 130 45 CFR § 164.512(j)(1), (4).
- 131 45 C.F.R. §§ 164.508(a)(2)(ii); 45 CFR 164.501("Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.").
- 132 Cal. Civ. Code § 56.10 (c)(19)("The information may be disclosed, consistent with applicable law and standards of ethical conduct, by a psychotherapist, as defined in Section 1010 of the Evidence Code, if the psychotherapist, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.").
- 133 45 C.F.R. § 164.501
- 134 *Joint Guidance* at page 2.

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