

TELEHEALTH WEBINAR 7: CONSENT, CONFIDENTIALITY, & MANDATED REPORTING



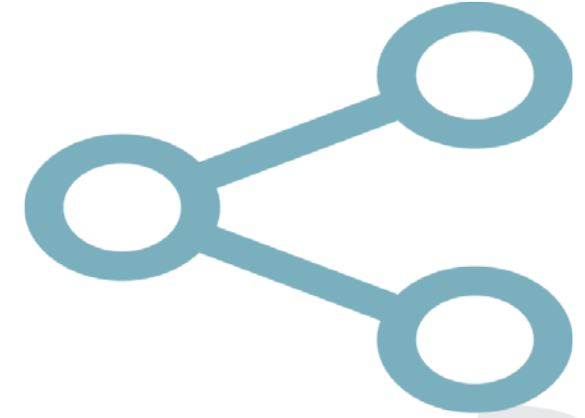


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Telehealth: Consent, Confidentiality, and Child Abuse Reporting

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National Center for Youth Law



New Focus on
Telehealth
during COVID-
19

What is Telehealth?

"A mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care while the patient is at the originating site and health care provider is at the distant site." –B and P 2290.5.





AGENDA

- Consent
- Confidentiality
 - Are you HIPAA or FERPA?
 - HIPAA
 - FERPA
 - Children's Online Privacy Act
- Frequently Asked Questions

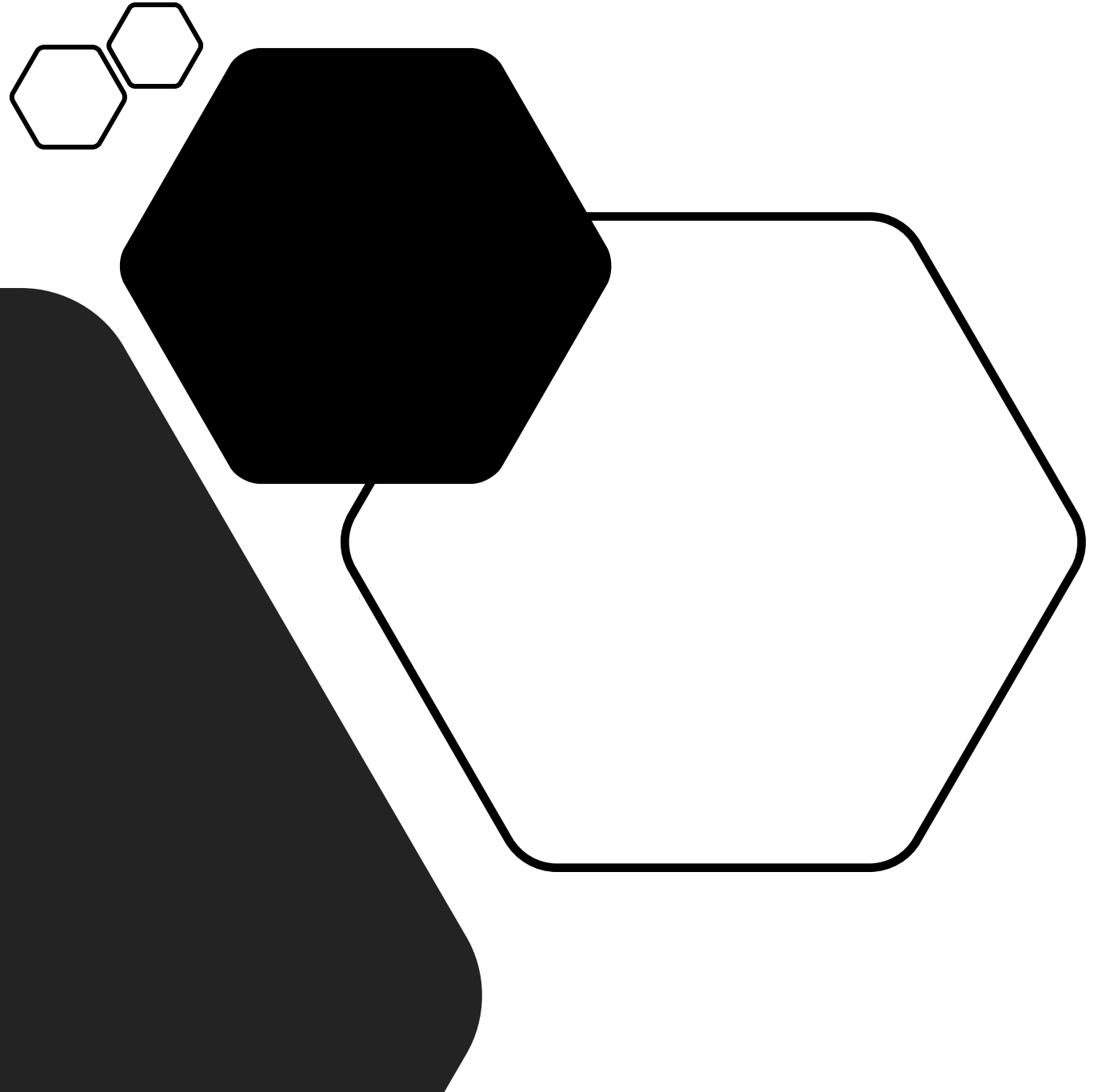


Health Care and Consent

Consent for Telehealth Services

Consent	Treatment
Consent	Use Telehealth Technology
Consent	Bill Insurance

Consent for Treatment





CONSENT for MINOR'S CARE

General Rule

- Minors need parent or guardian to consent for care

Exceptions:

- Caregiver
- Special rules for court-involved youth
- Special rules for Emergencies
- Minor Consent



CALIFORNIA MINOR CONSENT AND CONFIDENTIALITY LAWS*

MINORS OF ANY AGE MAY CONSENT	LAW/DETAILS	MAY/MUST THE HEALTH CARE PROVIDER INFO A PARENT ABOUT THIS CARE OR DISCLOSE RELATED MEDICAL INFORMATION TO THEM
PREGNANCY	"A minor may consent to medical care related to the prevention or treatment of pregnancy," except sterilization. (Fam. Code § 6925).	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. (Health & Saf. Code §§ 123110(a), 123115(a)(1); Civ. Code §§ 56.10, 56.11).
CONTRACEPTION	A minor may receive birth control without parental consent. (Fam. Code § 6925).	
ABORTION	A minor may consent to an abortion without parental consent. (Fam. Code § 6925; <i>American Academy of Pediatrics v. Lungren</i> , 16 Cal.4 th 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 th 307 (1997); Health & Safety Code §§ 123110(a), 123115(a)(1); Civ. Code §§ 56.10, 56.11).
SEXUAL ASSAULT ¹ SERVICES	"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." (Fam. 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. (Fam. Code § 6928).
RAPE ² SERVICES FOR MINORS UNDER 12 YRS ³	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. (Fam. Code § 6928).	Both rape and sexual assault of a minor are considered child abuse under California law and mandated reporters, including health 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. (See Pen. Code §§ 11165.1, 11165.6, 11166, 11167.)

*©19 National Center for Youth Law, revised: Nov. 2018. Available at www.teenhealthlaw.org.

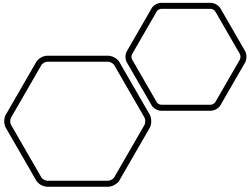
When may minors consent for their own care?

www.TeenHealthLaw.org

Do consent for
treatment
rules change
when
providing
telehealth
services?

NO!

- “All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider’s license shall apply to that health care provider while providing telehealth services.” B&P Code 2290.5.



Consent for Telehealth

State law
usually requires
consent for
telehealth,

“Before the delivery of health care via telehealth, the health care provider initiating the use of telehealth shall inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. The consent shall be documented.” B and P Code 2290.5

**HOWEVER, during COVID-19
Emergency....**

Governor's Executive Order # N-43-20



- In April 2020, Governor issued an executive order that relaxed requirements to facilitate delivery of telehealth services through duration of state of emergency
- Included suspension of requirement that health provider obtain verbal or written consent for use of telehealth services and to document that consent.

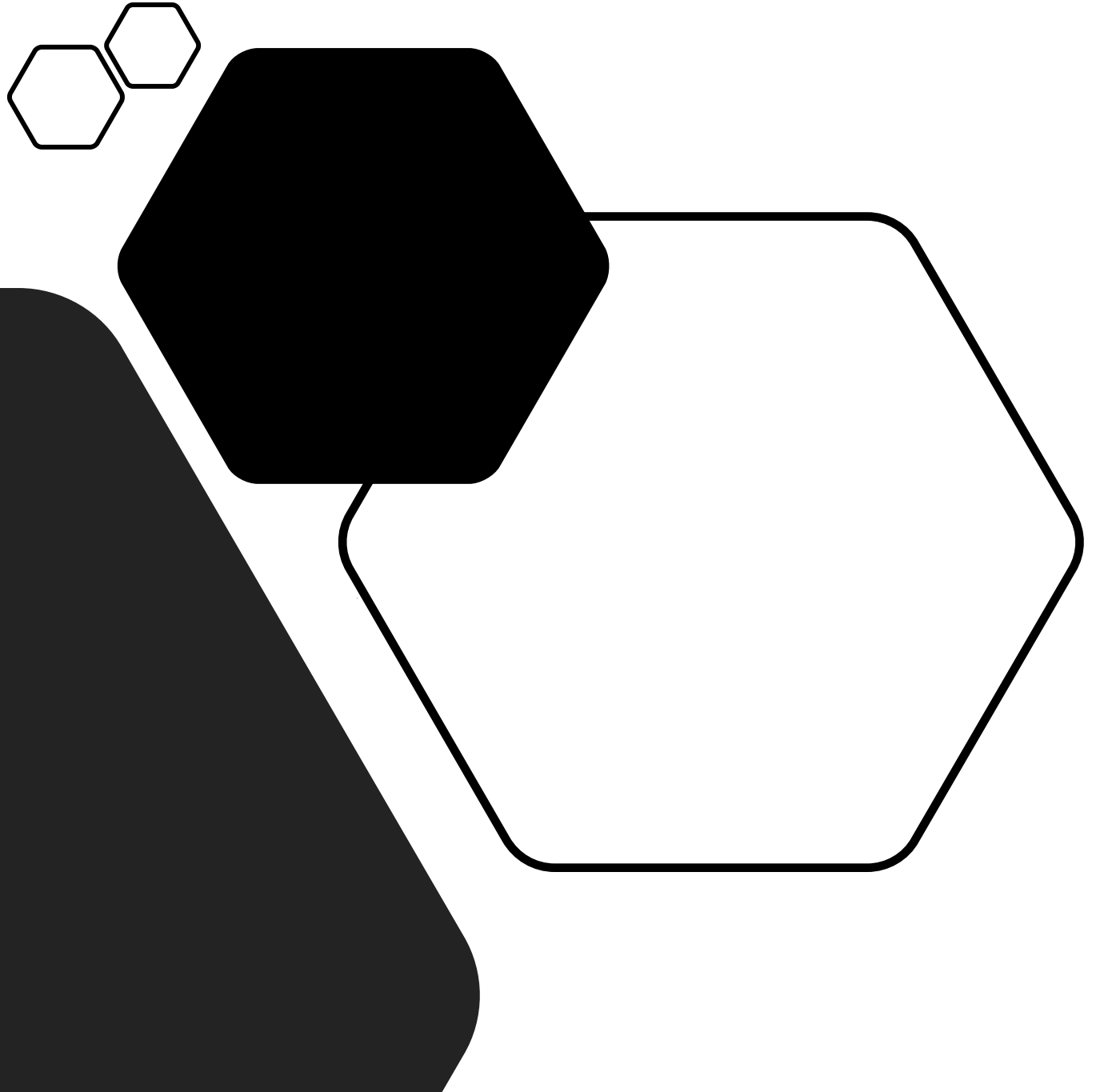
So do we
need
consent for
telehealth?
Verbal?
Written?

- What does state law say?
- What does guidance say?
- What is your agency practice?

Examples of Guidance

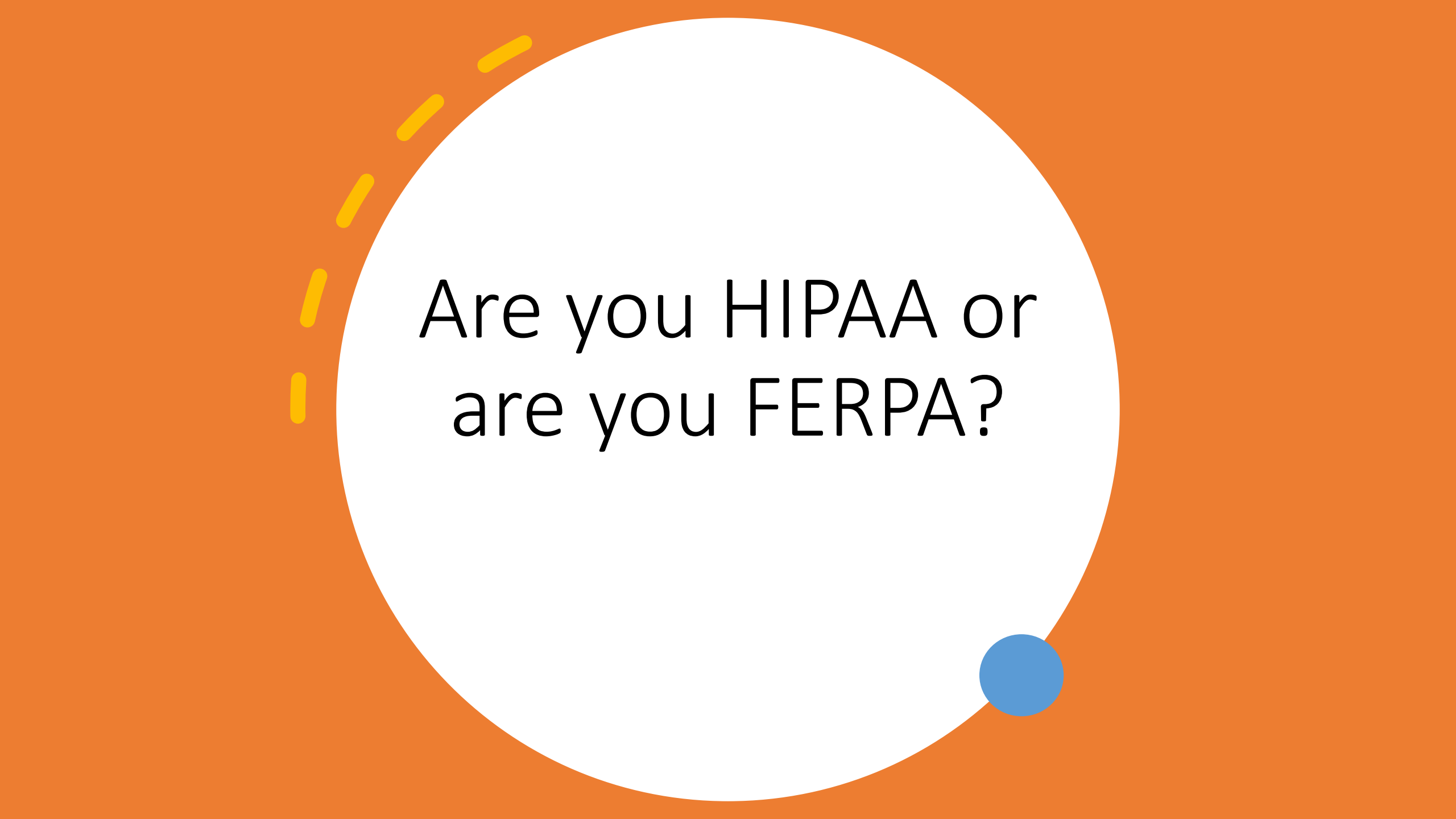
- California Association of School Psychologists
- California Department of Education
- When working with schools and students, guidance is to obtain signed written consent for telehealth services

Consent for Insurance Billing





Confidentiality



Are you HIPAA or
are you FERPA?

What law applies to the records of a school-based health clinic?

- County and Community health clinic employees generally must follow **HIPAA**.
- The records of school employees are generally subject to **FERPA**.
- School-based health and mental health care?

It depends!!

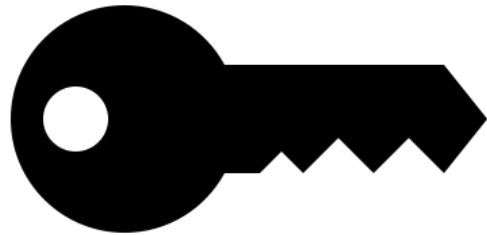


Is it possible to operate under FERPA and HIPAA at the same time?

If FERPA applies, HIPAA does not.

HIPAA explicitly states that its rules do not apply to health information held in an education record subject to FERPA.





HIPAA or FERPA? Key Question

Is the originating health provider an educational agency employee or agent of one?

Case by case assessment. Relevant factors include:

- **operational and administrative control**
- **services and functions provided**
- **financing**

Joint Guidance from federal Department of Health and Human Services and federal Department of Education

This is hard. Can't we just designate a provider as HIPAA or FERPA in an MOU or contract?

Not really. If all the legal factors align to make clear that FERPA (or HIPAA) applies to a set of records, this cannot be changed by contract.

But it can be helpful to address confidentiality in an MOU. **This is why it is so important to work with legal counsel.**



Why does it
matter?

Practical implications include:

Parent access

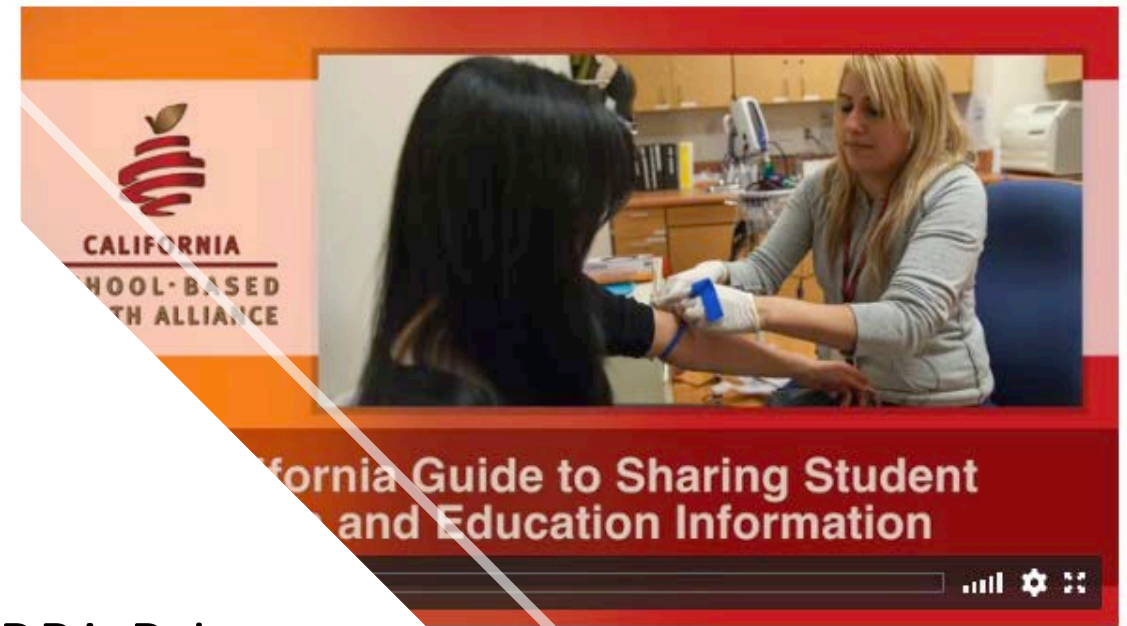
Minor consent and confidentiality laws

Access by other school staff or other medical providers

School nurse/counselor's ability to coordinate care

Public health reporting

Administrative rules



HIPAA or FERPA Primer

HIPAA or FERPA

A Primer on Sharing School Health Information in California

Second Edition

Information in Primer also available on CSHA website

HIPAA BASICS

FERPA BASICS

ADDITIONAL RESOURCES

BACKGROUND



School-Based Health Center Staff

"I want to be a good partner to the teachers and school leaders we work with but still be compliant with health care laws so we can stay open and serve our students."



School Principal

"I need to keep all students on campus safe, and having information empowers me to make the best decisions to keep all students on campus safe."



Behavioral Health Provider

"Keeping confidentiality helps me build close relationships with students and families, but sometimes it would help if I could talk with school staff."

The image features a solid orange background. A large white circle is centered on the page. A dashed yellow line, composed of several short segments, curves along the top-left edge of the white circle. A small, solid blue circle is positioned on the right edge of the white circle.

HIPAA

"HIPAA" and California Medical Confidentiality Laws

- Health Insurance Portability and Accountability Act (HIPAA) – *Federal*
- Confidentiality of Medical Information Act (CMIA) – *California*
- *Other federal and state laws may apply based on funding stream, provider or type of services provided*

HIPAA

HIPAA PRIVACY
RULE

HIPAA SECURITY
RULE

What is PHI?

Individually identifiable health information:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media;
or
- (iii) Transmitted or maintained in
any other form or medium.

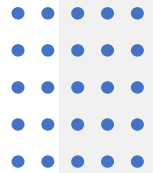


HIPAA Privacy Rule

Protects disclosure of personal health information (PHI)

Generally requires written authorization to release PHI

Exceptions to authorization requirement



HIPAA/CA Law: Who Signs the Authorization?



The minor must sign if records relate to services that minor consented to or could have consented to.



In other cases, parent, guardian or legal representative must sign.

Telehealth FAQ: Can we use electronic signatures for HIPAA Authorizations?

[Hippa guidance from federal DHHS:](#)

- The Privacy Rule allows HIPAA authorizations to be obtained electronically from individuals, provided any electronic signature is valid under applicable law.
- *“No standards exist under HIPAA for electronic signatures. In the absence of specific standards, covered entities must ensure any electronic signature used will result in a legally binding contract under applicable State or other law.”*

Electronic Signatures

Federal Electronic Signatures in Global and National Commerce Act (ESIGN Act) and the Uniform Electronic Transactions Act (UETA)

- **Legal Compliance**
- **User Authentication.**
- **Message Integrity.**
- **Non-Repudiation.**
- **Ownership and Control.**

HIPAA Security Rule

Protects electronic PHI

Requires covered entities to ensure integrity of ePHI

Requires protecting against reasonably anticipated threats to security of information


Requires implementing administrative, physical and technical safeguards



HIPAA Security Rule during COVID?

- Enforcement Discretion for Telehealth from US Department of Health and Human Services.

“Under this Notice, covered health care providers may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype, to provide telehealth without risk that OCR might seek to impose a penalty for noncompliance with the HIPAA Rules related to the good faith provision of telehealth during the COVID-19 nationwide public health emergency. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.”

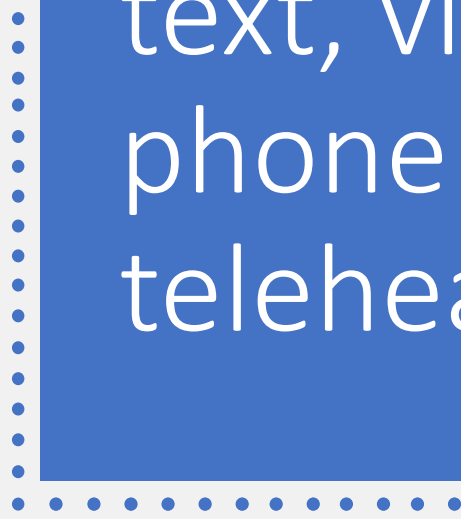



California confidentiality laws when providing telehealth services

Usually, “All laws regarding the confidentiality of health care information and a patient’s rights to the patient’s medical information shall apply to telehealth interactions.”

California Confidentiality Law during COVID?

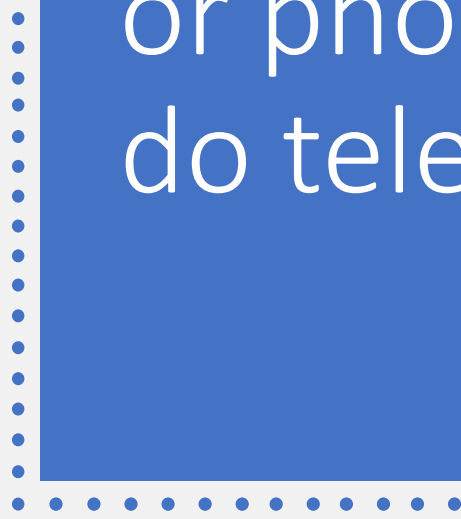

- In April 2020, Governor issued an executive order that relaxed certain requirements to facilitate delivery of telehealth services through duration of state of emergency
- Requires covered entities to ensure they comply with DHHS Notification related to HIPAA



FAQ: Does HIPAA allow me to use text, video or phone to do telehealth?

“Under this Notice, covered health care providers may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype, to provide telehealth without risk that OCR might seek to impose a penalty for noncompliance with the HIPAA Rules related to the good faith provision of telehealth during the COVID-19 nationwide public health emergency.”

HIPAA guidance from DHHS



FAQ: Should I use text, video or phone to do telehealth?

- “Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications” HIPAA guidance from DHHS
- All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider’s license shall apply to that health care provider while providing telehealth services. B and P Code 2290.5.



FAQ: Do Abuse Reporting Rules still apply in the same way?

- All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider's license shall apply to that health care provider while providing telehealth services.
- B and P Code 2290.5.
- See [COVID-19, Telehealth and Mandated Child Abuse Reporting](#)



FERPA



Family Educational Rights and Privacy Act

- Intended to:
 - Protect privacy of educational records
 - At the same time, assure parental access to records
- Educational Institutions and Agencies
 - Can include organizations that contract with or consult with educational agency
 - Any person acting for or employed by such agency

Family Educational Rights and Privacy Act

What is Protected?

“Education Record”

- Any information directly related to a student
- Maintained by an educational agency or institution or by a person acting for such agency or institution
- Includes IEP, testing and evaluation records
- Includes health records, including nursing records and any other student health pupil records



Family Educational Rights and Privacy Act

- What is not an “Education Record”?
 - Oral communications, personal impressions
 - Records of instructional, supervisory and administrative personnel in the sole possession of the maker which are not accessible to any other person except a substitute
 - Records of student 18 or older made by a physician, psychologist or other health professional that are used only in connection with the provision of medical treatment
 - See Primer for more information

Family Educational Rights and Privacy Act

- What is the rule?
 - Generally FERPA prohibits educational agencies from releasing any personally identifiable information (PII) in the education record without written consent. A written consent to release must include certain elements to be valid.

Family Educational Rights and Privacy Act



- Remember:
 - Can always share with identified recipients with a valid written authorization to release information
 - Otherwise, can only share if there is a valid exception
 - Best Practice is to have Informed Consent to Release Signed when starting treatment.

Family Educational Rights and Privacy Act

- What are exceptions to share?
 - Legitimate educational interests
 - Can include contractors and consultants if there is notice in local policy that they are “school officials” and if they comply with FERPA regarding use and disclosure of information
 - Health or Safety Emergency
 - Court Order
 - Child Abuse Reporting Exception
 - Directory Information
 - Others

Practical Consequences – Medicaid and FERPA

- “There is no exception to the definition of “education record” for records used to submit reimbursement claims to Medicaid ... nor is there any exception to the written consent requirement in FERPA.” Therefore, the claim form can only be shared with Medicaid with prior parent consent
- For students with IEPs, this consent is on IEP form



Who signs informed consent to release information?

- Parent for students under 18 years old
- Student if student is 18 or older

Who is parent for this purpose?

- Parent includes “a natural parent, a guardian, individual acting as a parent in the absence of a parent or guardian.”



Children's Online Privacy Protection Acts

What is the Child Online Privacy Act?

- Children's Online Privacy Protection Act (COPPA)
- (5 U.S.C. 6501 et seq., 16 C.F.R. 312.1 et seq)
- An operator of a commercial website or online service that is "targeted to children" and/or "has actual knowledge that it is collection personal information from a child" must obtain parental consent before collecting "personal information" from any child under the age of 13

What is the Child Online Privacy Act?

- Student Online Personal Information Protection Act (SOPIPA)
- (California Business & Professions Code 22584 et seq.)
- Education technology providers must comply with baseline privacy and security protections, such as prohibiting targeted advertising using information acquired from students, protecting the privacy of student records, and prohibiting the sale of student information

A stylized sun graphic on the left side of the slide. It features a solid yellow circle at the bottom left, with several short, curved yellow lines of varying lengths extending from its top right edge, suggesting rays. The background is split: orange on the left and white on the right, separated by a curved line that follows the sun's rays.

Education Code Privacy Protections for Technology Contracts

Student Privacy – Additional Legal Framework

- California Education Code Section 49073.1
- Permits LEAs to enter into contracts with third parties to provide services for digital storage, management, and retrieval of pupil records and to provide digital educational software that authorizes the provider to access, store and use pupil records

Student Privacy – Additional Legal Framework



- Nine minimum contract requirements, including, but not limited, to (1) provisions addressing the ownership and control of pupil records, (2) a prohibition against unauthorized use of pupil records, and (3) a description of actions the third party provider will take to ensure the security and confidentiality of pupil records



Student Privacy: Best Practice in Informed Consent and Treatment for Telehealth under FERPA and Related California Law

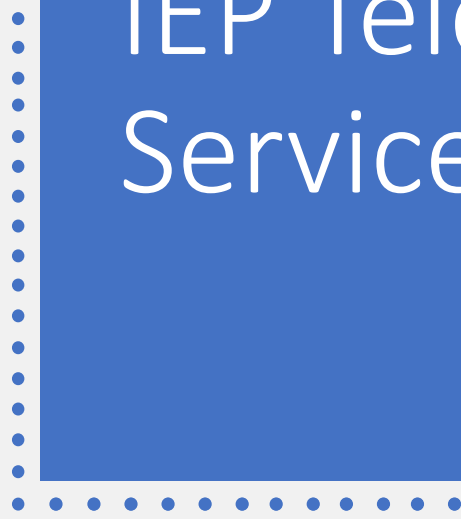

Notice to Parents of Privacy Rules and Limitations

- Provide written notice to students and parents advising them of privacy limitations of telehealth services
 - Limited expectation of privacy vis-à-vis the LEAs ability to monitor online activity
- Refer to annual parent notification to see if distance education activities have been addressed
 - Include provisions regarding privacy and expected participant behavior
 - Include legal prohibition against recording and consequences for failure to abide



FAQ: Consent for IEP Telehealth Services

- When providing psychological services through telehealth for students with IEP consent for service, is a new separate consent necessary for telehealth delivery method?
 - Written consent for service is required and should include notice service will be delivered remotely and limitations of privacy in telehealth
 - Refer to CASP Technology Checklist for School Telehealth, April 2020, casponline.org





FAQ: Remote Consent for IEP Telehealth Services

- How do we obtain remote consent in writing to IEP telehealth services?
 - Pursuant to the IDEA and implementing law, Parents must provide written consent to a proposed action/service 34 C.F.R. 300.9; Ed Code 56021.1
 - Consent can be obtained in writing through electronic means, such as school district email when IEP is transmitted, or snail mail
 - Consent for all services should be clear in writing as to what is being consented to
 - CASP has recommended docuhub and docuSign



FAQ: Best Practice for Maintaining Confidentiality During Telehealth Services

- Informed consent to treatment is important to maintaining confidentiality during sessions
- Participants should be in confidential space without distraction and/or access to others
- Participants should be notified session may be discontinued if there is a breach of confidentiality during session
- Participants should be notified no recording unless consent



FAQ: Can I use text, video or phone when I provide school services??

- As covered above, telehealth services can be offered within a FERPA governed system
- However, FERPA controls the privacy of any and all records which are generated
- As such, consumers and parents must be notified of information sharing practices through informed consent to telehealth treatment and to release of information
- Electronic medium which generates records which will be maintained in the regular course of business and is identifiable to the pupil is subject to FERPA



Best Practice Resources from CSBHA:



Telehealth Webinar 4 on clinical considerations and technology for telemedicine



Telehealth webinar 3: Telehealth Platforms



Telehealth webinar 2: Billing and Reimbursement



Telehealth webinar 1: Behavioral Health

Best Practice Resources:

California Telehealth Resource Center:

- Telehealth Implementation Workshops
- COVID 19 Telehealth Toolkit
- Telehealth 101
- CTRC Sample Forms, including consent to participate in telemedicine
- Telehealth Best Practices

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Gracias

謝謝

Thank you

Cảm ơn

Salamat

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