

Consent and Confidentiality in School Based Health Care

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National Center for Youth Law**

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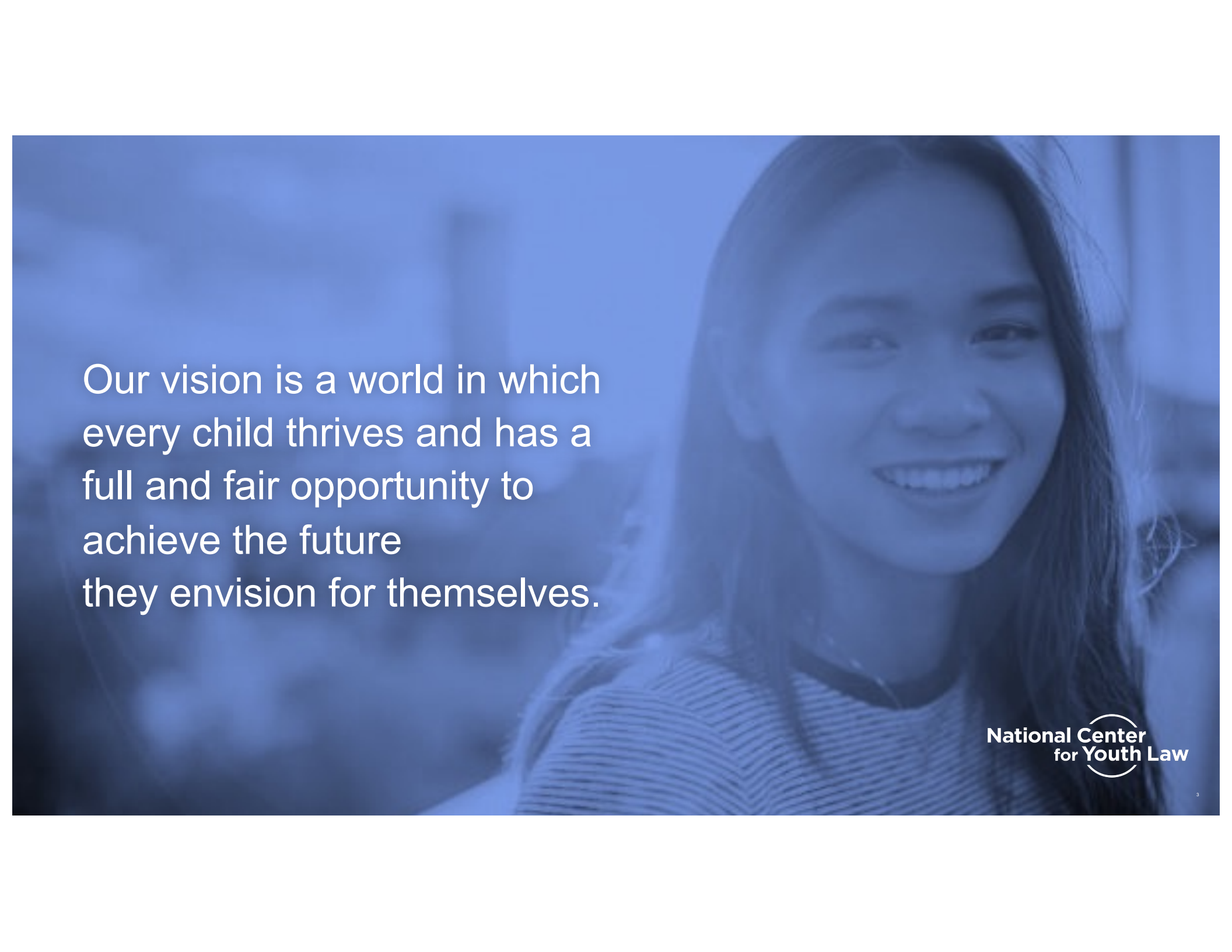




Who We Are

We believe in the incredible power, agency, and wisdom of youth.

For more than 50 years, the National Center for Youth Law has worked to center the voices and experiences of youth blocked from educational, health, and social well-being opportunities, particularly youth of color, youth who identify as LGBTQ, who are disabled, are immigrants, and youth in child welfare and juvenile justice systems.



Our vision is a world in which every child thrives and has a full and fair opportunity to achieve the future they envision for themselves.



What We Do

We are transforming systems – classrooms, courts, the justice system, and health care spaces – to extend equity, dignity, and care for children and youth.

Our **policy, legal, and community-based** work covers **child welfare, commercial sexual exploitation, education, health, immigration, and juvenile justice.**

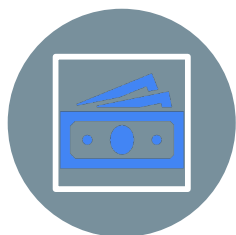
A Scenario About Information Sharing and Privacy

John is in 3rd grade at Franklin Elementary School. He's been distracted and fidgeting in class. His teacher refers him and his family to the mental health counselor from a local nonprofit who comes to campus once a week.

The counselor learns that John's aunt recently passed away and that he's 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's anything she can do to help him.



Other possible information and data sharing goals?



Insurance and
payment



Evaluation of
programs



Population level
impacts on education
and health outcomes



Targeted interventions



Confidentiality goals

7

**“ I’M NEVER GOING TO TELL MY
THERAPIST ANYTHING AGAIN.
EVER. ”**

*14-year-old following release of information
about her relationship with her mother to a third
party*

All patients expect that
their personal health
information will be
kept private...

Young people and their families are no different

Handling information about youth in a multi-system environment can feel like a tug of war



Sharing



Confidentiality

Balancing Confidentiality and Access



What is the scale?

Federal and State statutes establish:

When, what and to whom information **must not** be disclosed

When, what and to whom **must** be disclosed

When, what and to whom **may** be disclosed

**MUST NOT
Disclose**

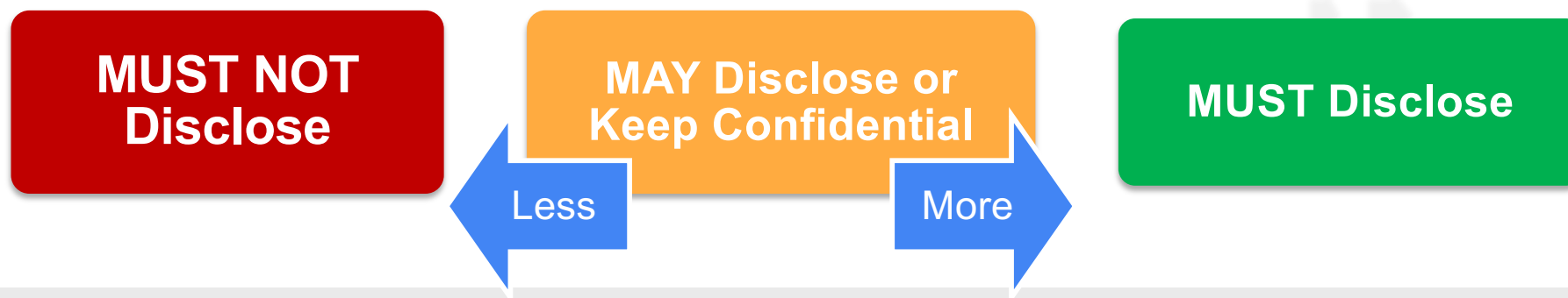
**MAY Disclose or
Keep Confidential**

MUST Disclose

Where does the balance lie?

Many factors may shape how much is and is not shared and how it is shared within parameters of the law, including:

- Ethical and professional practice standards
- Relationships and trust
- Community norms
- Sensitivity of underlying information
- Policies, protocols, contracts, and tools




AGENDA

1. Introduction to the laws – HIPAA, FERPA and State Law
2. How do we know what controls release of health information in school based health services?
3. Given the laws, what and how can agencies appropriately share information?



Getting to know each other



Disclaimer

Information, not legal advice

Information current as of March 2023

Seek advice from your own legal counsel
about application!

Federal and state medical confidentiality law

Source of health information

1. Records or testimony from health care provider
2. Information housed in another agency or individual's file
3. Records or testimony from the patient



Federal and State Confidentiality Laws

- Health Insurance Portability and Accountability Act (HIPAA)
- California Confidentiality of Medical Information Act (CMIA)
- California Lanterman-Petris-Short Act (LPS)
- Other laws and regulations may apply in addition to or in lieu of the above. (e.g. 42 C.F.R. Part 2 (substance use), Family Educational Rights and Privacy Act)



Who must comply with HIPAA?

HIPAA Rules apply to covered entities and business associates

Covered entities include:

- Health plans
- Health care clearinghouses
- Health care providers who conduct certain financial and administrative transactions electronically.

Business associates include:

- Subcontractors that receive or transmit protected health information on behalf of the business associate

Is a school employed provider a “covered entity” subject to HIPAA?

Health care providers are not subject to HIPAA when they do not transmit health information in electronic form related to covered transactions.

For example, even though a school employs a nurse or physician, the school will not be a covered entity subject to HIPAA if the provider does not engage in any of the covered “transactions.”

“[E]ven though a school employs school nurses, physicians, psychologists, or other health care providers, the school is not generally a HIPAA covered entity because the providers do not engage in any of the covered transactions, such as billing a health plan electronically for their services. It is expected that most elementary and secondary schools fall into this category.”

-DOE and HHS, Joint Guidance, 2019

Who must comply with CMIA?

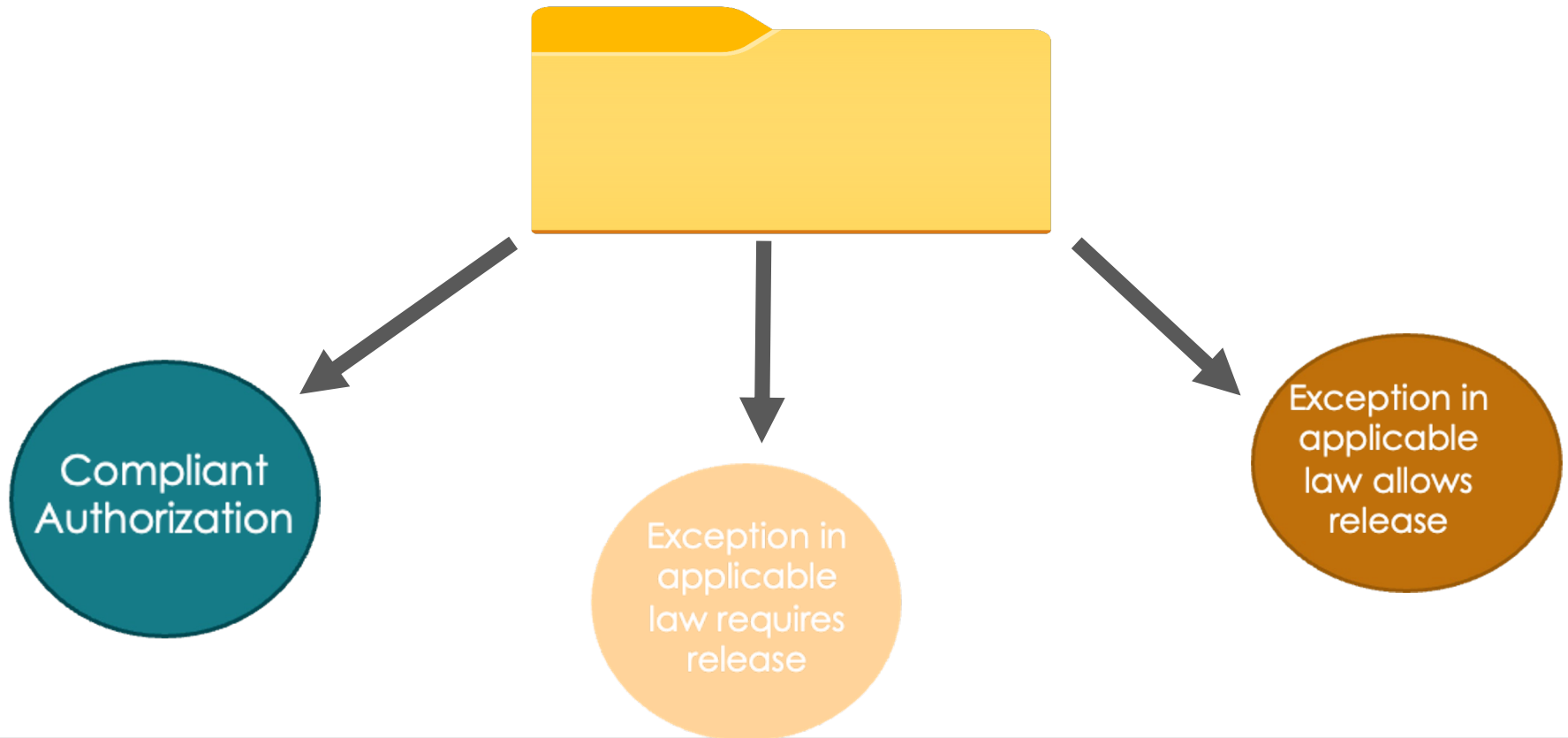
CMIA applies to:

- Health care service plans
- Contractors
- Providers of health care

General rule under HIPAA, CMIA, and LPS

- Health care providers must protect the confidentiality of personal health information.
- Providers must have a signed “**authorization**” in order to share protected health information.
- Some exceptions allow or require disclosure of records absent signed release.

When can protected information be shared?



What must an authorization include?



To comply with HIPAA and CA law, an authorization to release information must include specific elements, including but not limited to:

- Expiration Date or Event
- Generally no compound document
- Describes info to be disclosed in meaningful way
- Description of purpose for release
- Signature
- 14 point font or more
- Required notices, including right to revoke and no conditioning of care



Clewless High School
SCHOOL BASED HEALTH CLINIC
Nowhereyouknow, CA

Student Name: _____ DOB: _____

Notice of Privacy Practice Acknowledgement

By signing below, I acknowledge that I received a copy of SBHC's Notice of Privacy Practices.

Notice of Patients Rights Acknowledgement

By signing below, I acknowledge that I received a copy of SBHC's Notice of Patient Rights

Consent to Treatment

By signing below, I authorize the above named student to receive any services as deemed necessary by staff of Clewless SBHC.

Release of Information

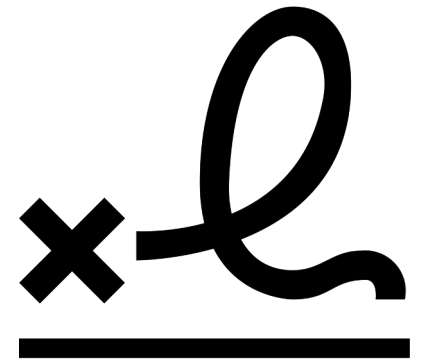
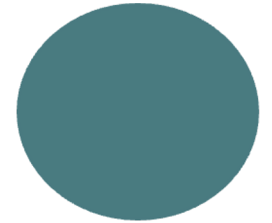
I authorize SBHC to release all necessary information to Clewless school staff, insurance companies, and other medical and mental health providers.

Signature: _____
(If patient is under 18, parent or guardian must sign)

Name of Signee: _____
(If signed by other than patient, print name and relationship to patient)

Who signs an authorization under HIPAA and CMIA?

- **Adults and non-minor dependents** sign for self unless they are conserved.
- **Minor** must sign if records relate to services that minor consented to or could have consented to. Otherwise, parent or legal guardian signs.



When may a minor consent for their own care?

Includes but is not limited to:

- Pregnancy related care, including contraception, abortion, prenatal and postnatal care, any age
- Reportable communicable disease diagnosis and treatment, 12 or older
- STI, prevention, diagnosis, treatment, 12 or older
- Outpatient mental health treatment at 12 or older when minor is deemed mature enough to participate competently in services by their provider
- Medical care related to diagnosis and treatment of substance use disorders, 12 or older
- General health care when 15 or older, living apart from parents and managing own financial affairs

(See www.teenhealthlaw.org for all California minor consent laws)

CASE EXAMPLE: SYLVIA

Sylvia, 16, is pregnant and receiving prenatal care at a community clinic. Her health provider recommends she speak to her school about the pregnancy in order to help the administration understand what support she needs in class.

- May the health provider talk to the school based on Sylvia's verbal permission?
- If a written "authorization" is necessary, who signs it?



CASE EXAMPLE: JOHN

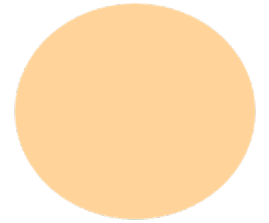
John, 9, is receiving mental health therapy from a private clinician in the community. His parents want his therapist to talk to John's school teacher in order to help the teacher understand what support John needs in class.

May the therapist talk to the teacher based on the parents' verbal permission?

If a written "authorization" is necessary, who signs it?



HIPAA and CMIA: Exceptions that require disclosure even absent signed release

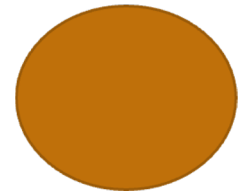


Some exceptions to confidentiality require providers to release information. Examples include but are not limited to:

- Court order*
- When specifically required by another law
- When requested by the patient or patient's representative

*Where information may be used as evidence, evidentiary privilege also must be considered before the information can be disclosed in a court setting.

HIPAA and CMIA: Exceptions that allow disclosure even absent signed release



Some exceptions to confidentiality allow, but do not require, providers to release information. Examples include but are not limited to:

- Treatment exception
- Care Coordination exception
- Emergency exception
- When specifically allowed by another law
- Sharing for Payment Purposes

Case Example: Janice

Pediatrician assesses 14 year old Janice. Believes Janice may have depression and would like to refer Janice to a community based therapist.

May the pediatrician share Janice's contact information and diagnosis with the community based therapist?



CMIA: Treatment Exception

“The information may be disclosed to providers of health care, health care service plans, contractors, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient.”

CMIA



Federal and state education confidentiality law

Federal and State Confidentiality Laws

Family Educational Rights and Privacy Act (FERPA)

Individuals with Disabilities Education Act (IDEA)

CA Education Code



Who must comply with FERPA?

Educational agencies and institutions:

Any public or private agency or institution which is the recipient of funds administered by the federal Sec. of Education under any applicable program if the agency provides educational services or instruction to students, or the agency is authorized to direct and control schools.

Also can include:

Organizations that contract with or consult with an educational agency or a person acting for such agency when they can be called a school official

What is protected?

“Education Record”

Records, files, recordings, other documents, which:

- Contain information directly related to a student; and
- Are maintained by an educational agency or institution or by a person acting for such agency or institution

What is protected?

Education Record may include some health information.

Examples:

- Immunization records
- Sports physicals
- IEP, including testing and evaluation records

What is not an “education record”?

Education records do not include:

- Oral communications, personal impressions
- Records of instructional, supervisory, and administrative personnel in the sole possession of the maker and which are not accessible to any other person except a substitute aka “**sole possession**” records
- Records on students eighteen years or older made by a physician, psychologist or other recognized professional and used only in connection with the provision of medical treatment

See Primer for more information

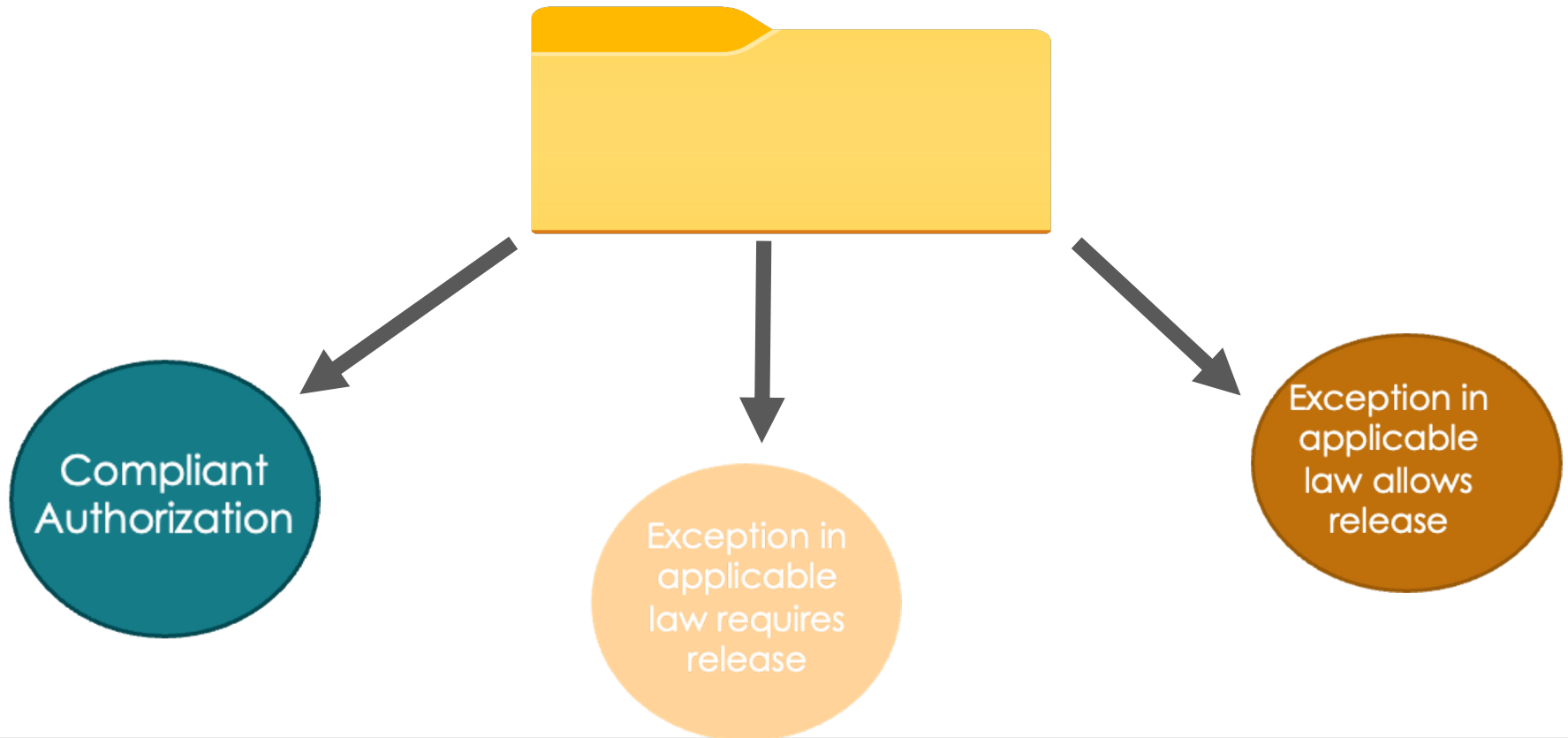
General Rule under FERPA

Generally, FERPA prohibits educational agencies from releasing any personally identifiable information (PII) in the education record without written consent.

A written consent must include certain elements to be valid.

There are some exceptions.

When can protected information be shared?



Who signs the release?

“Parent” for students under 18 years old

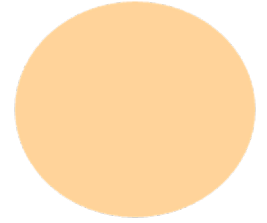
“Student” if student is 18 or older



Who is a parent for this purpose?

Parent “includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.”
(See Ed code 49061, see definition in local education policy).

Exceptions that allow disclosure absent signed authorization



Some exceptions in FERPA allow or require education agencies to release PII without need of signed release.

Examples:

- To school officials with legitimate educational interests
- Juvenile Justice exception
- Research exception
- Child Abuse Reporting exception
- Court Order
- Others

Exception: “Legitimate Educational Interests”

School officials may share PII with other school officials in the same educational agency or institution, who have “legitimate educational interests” in the information

“Legitimate educational interest” can be defined to mean simply that the “official needs to review the education record in order to fulfill his or her professional responsibility.”

(See U.S. DOE Model Notification on School Officials)

Important: How is this defined in local policy?

Who is a “school official?”

- School staff, such as teachers, counselors, and school nurses
- It also can include a “board member, trustee, registrar, ...attorney, accountant, human resources professional...and support or clerical personnel.” (from “*Who is a school official under FERPA?*” by DOE)
- A school or district may define this term more broadly in its school policies such that it also includes outside consultants, contractors, or volunteers to whom a school has outsourced a school function if certain conditions are met as follows.

Who is a “school official?”

“School officials” may include contractors, consultants and other parties if the other party:

- Performs an institutional service that the agency would otherwise provide for itself using employees
- Has legitimate educational interests in the information being shared
- Is under the direct control of the school in terms of use of education records
- Is complying with FERPA requirements related to the use and re-disclosure of PII.
- Meets the criteria for “school official as specified in annual notification

CASE EXAMPLE: ONLINE RECORDS SYSTEM

Clark County School District wants to use “Edline,” a private company that operates an online system that allows parents to access their child’s current grades and class attendance reports, among other things. Edline provides secure hosting, encryption and passwords so that parents and students may access records, but only their own records. Edline has a strict policy against sharing education records with any third parties and it complies with FERPA. The District would control who can access records online, not Edline.

-Is the district allowed to share records with Edline without obtaining written parent approval from each student?

HIPAA, FERPA, Both or Neither?

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

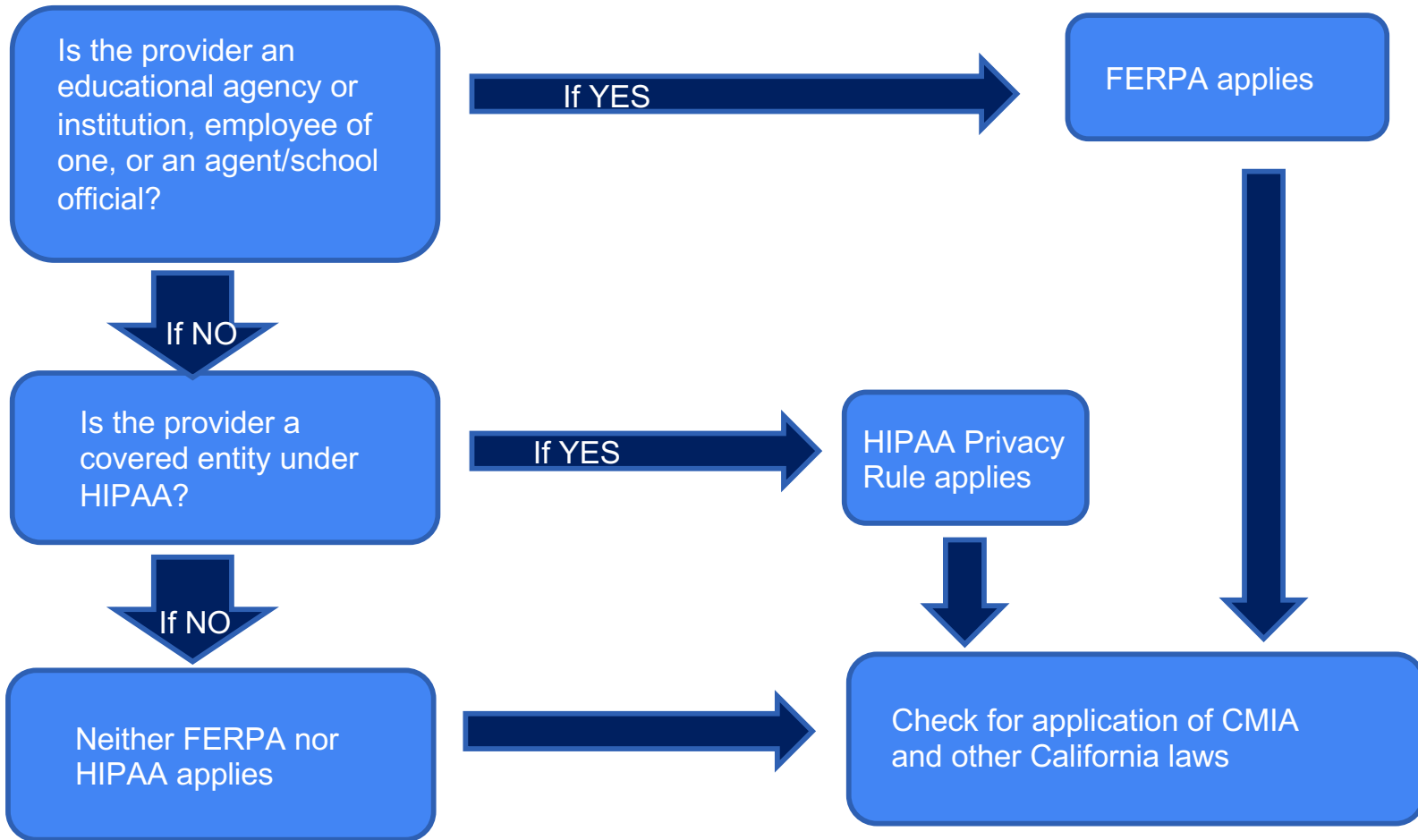
NO! HIPAA explicitly states that its rules do not apply to health information held in an education record subject to FERPA.

If FERPA applies, HIPAA does not.

Must a school employed provider who is a “covered entity” comply with the HIPAA Privacy Rule?

Even if a health care provider is a covered entity for purposes of HIPAA and is subject to other parts of HIPAA, the health information they create will not be subject to the HIPAA Privacy Rule if that information is part of an education record subject to FERPA.

“If a public high school employs a health care provider that bills Medicaid electronically for services provided to a student under the IDEA, the school is a HIPAA covered entity and would be subject to the HIPAA requirements concerning transactions. However, if the school’s provider maintains health information only in what are education records under FERPA, the school is not required to comply with the HIPAA Privacy Rule. Rather, the school would have to comply with FERPA’s privacy requirements with respect to its education records.” Joint Guidance 2008



Question 1: Who is a “school official?”

“School officials” may include contractors, consultants and other parties if the other party:

- Performs an institutional service that the agency would otherwise provide for itself using employees
- Has legitimate educational interests in the information being shared
- Is under the direct control of the school in terms of use of education records
- Is complying with FERPA requirements related to the use and re-disclosure of PII.
- Meets the criteria for “school official” as specified in annual notification

Where can I find examples related to school based health care?

Joint Guidance issued by the federal Departments of Health and Human Services and of Education in 2008 and updated in 2019

When reviewing whether an entity is a “school official,” relevant factors you see in Department guidance include:

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

Question 3: Does state law apply?

Always check for state law application.

- Is state law more protective?
- Is it possible to comply with both federal and state law?

Question 3: Guidance from DOE

DOE has clarified that many of the exceptions in FERPA, such as the legitimate educational interests/school official exception, are permissive rather than mandatory, meaning the educational institution can choose to disclose pursuant to the exception or not. In such cases, DOE states that educational institutions must take state law into account and attempt to honor both FERPA and state law:

“[M]any states have privacy laws that protect the confidentiality of medical and counseling records. FERPA's permissive exceptions to the requirement of consent do not preempt any state laws that may provide more stringent privacy protections for this information.”

This is hard. Can't we just designate a provider's records as subject to 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. For example, a school can't just contract its pupil records out of FERPA.

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



What are the implications for access and confidentiality?

Whether information is subject to HIPAA or FERPA implicates, among other things:

- Parent access
- Minor consent and confidentiality laws
- Access by other school staff or other medical providers
- School nurse/counselor/staff's ability to coordinate care
- Public health reporting
- Administrative obligations (notices, record storage etc)

Case Scenarios

Example: Public Health Nurse

- LCSW employed by the local department of mental health comes to the high school campus to provide health screenings to interested youth and families.
- **Are the records created by the LCSW subject to FERPA or HIPAA?**
- **May the school share student schedules with the LCSW to help them coordinate appointments?**



Example: Medication management

- Shawn has been diagnosed with diabetes by his pediatrician.
- It is important that he have a diabetes management plan and access to insulin at school.
- **May Shawn's pediatrician discuss Shawn's medication and treatment needs with the school nurse?**
- **May the school nurse share information with others at the school?**
- Shawn's blood sugar is very low one day, and he passes out at school.
- **May the school call 911? May the school nurse share Shawn's diabetes diagnosis with paramedics?**



Circling back to John's Story

John is in 3rd grade at Franklin Elementary School. He's been distracted and fidgeting in class. His teacher refers him and his family to the mental health counselor at the school based health center.

The counselor learns that John's aunt recently passed away and that he's 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's anything she can do to help him. The school also wants to bring a team together to support John.



John's Story: HIPAA, FERPA, or...?

- The provider is affiliated with the school-based health center. **Is John's protected health information subject to FERPA, HIPAA, or neither?**
- **If the records are subject to FERPA, may the provider share anything with the teacher? With the care team?**
- **If the records are subject to HIPAA and state law, may the provider share anything with the teacher? With the care team?**

Coming up with Confidentiality and Information Sharing Policies: Tips and Best Practices

Trauma Informed Practices

Key components of a Trauma informed approach:

1. Safety
2. Trustworthiness and transparency
3. Understanding cultural, historic and gender issues
4. Collaboration and mutuality
5. Peer support
6. Empowerment, voice and choice

Step one: Figuring out the variables

- What laws apply and what parameters do they put in place?
- What are the ethical, licensing or agency rules that should be considered?
- What is the community context?

Step two: Building policy and practice with a trauma informed approach

- In building your policies and practices, how can you take into account: safety, empowerment, and collaboration?
- Once policies and practices are in place, how can you make sure that families, youth and partners understand and have appropriate expectations?

Federal DOE Guidance to Post Secondary Educational Agencies re School Health:

“Many institutions offer their students on-campus access to medical services, including mental health services. These services can help comprehensively promote campus safety and health; improve academic achievement; and assist those who experience sexual violence, other violence, or harassment. These benefits cannot be fully realized in an environment where trust between students and the institution is undermined. Students should not be hesitant to use the institution's medical services out of fear that information they share with a medical professional will be inappropriately disclosed to others. **The Department urges that institutions inform students at the time they receive treatment of the privacy protections afforded to their medical records pursuant to Federal and State law as well as institutional policy...**

DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016*

Federal DOE Guidance continued:

Most disclosures under FERPA are permissive, rather than mandatory, meaning that institutions choose when to share education records, including medical records without consent under the exceptions set forth in [FERPA]. When institutions choose to disclose PII from education records, including medical records, without consent, they should always take care to consider the impact of such sharing, and only should disclose the minimum amount of PII necessary for the intended purpose. When making these decisions involving student medical records, **the Department recommends that institutions give great weight to the reasonable expectations of students that the records generally will not be shared, or will be shared only in the rarest of circumstances, and only to further important purposes, such as assuring campus safety.** Failure to meet those expectations could deter students from taking advantage of critical campus resources, and could undermine the integrity of the patient-doctor/provider relationship as well as trust between students and the institution.”

DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016*

Remember

- Whether HIPAA, FERPA or state law, you can always share information if there is a valid written authorization to release.
- Otherwise, you only may share if there is an exception that allows or requires disclosure.

Isn't there a "best" model policy?

Not really.

Just like one size does not always fit all...

One information or data sharing strategy does not fit all information or data sharing needs.

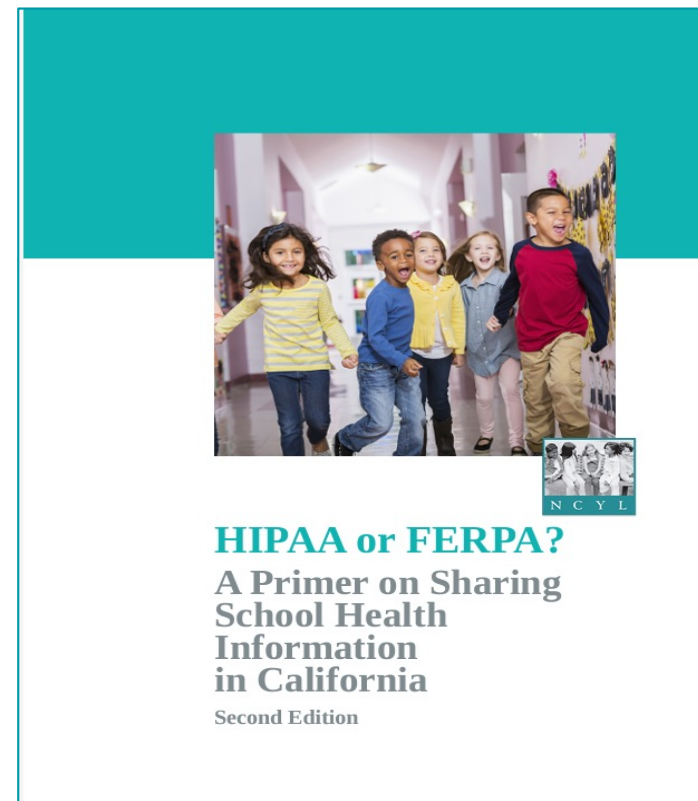


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Where to find more information on the topics covered today?

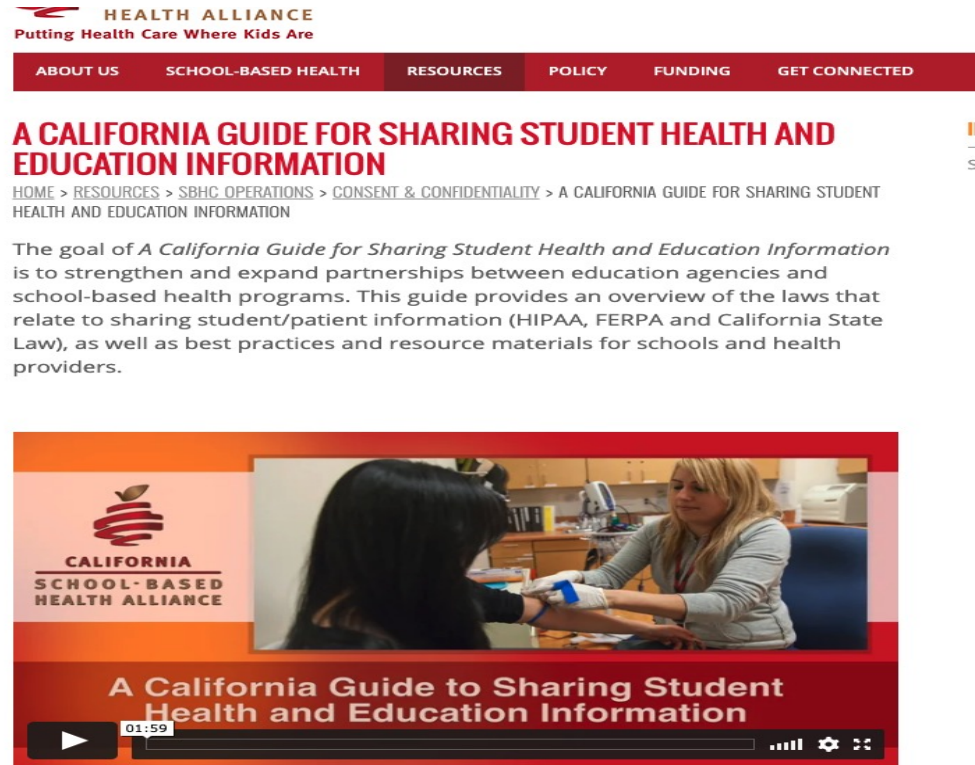
HIPAA or FERPA?
A Primer on School Health
Information in California
From
The National Center for Youth Law

Available at teenhealthlaw.org



Where to find more information on the topics covered today?

California Guide
for Sharing Student
Health and
Education
Information:
Interactive Webtool



HEALTH ALLIANCE
Putting Health Care Where Kids Are

ABOUT US SCHOOL-BASED HEALTH RESOURCES POLICY FUNDING GET CONNECTED

A CALIFORNIA GUIDE FOR SHARING STUDENT HEALTH AND EDUCATION INFORMATION

HOME > RESOURCES > SBHC OPERATIONS > CONSENT & CONFIDENTIALITY > A CALIFORNIA GUIDE FOR SHARING STUDENT HEALTH AND EDUCATION INFORMATION

The goal of *A California Guide for Sharing Student Health and Education Information* is to strengthen and expand partnerships between education agencies and school-based health programs. This guide provides an overview of the laws that relate to sharing student/patient information (HIPAA, FERPA and California State Law), as well as best practices and resource materials for schools and health providers.

CALIFORNIA SCHOOL-BASED HEALTH ALLIANCE

A California Guide to Sharing Student Health and Education Information

01:59

Information on this webpage is based on the HIPAA FERPA Primer

AVATARS: Frequently Asked Questions



Caregiver



School Nurse



Medical Provider



Student



**Behavioral Health
Provider**



School Administrator

? School Nurse: Example



Can I operate under
HIPAA and FERPA at
the same time?

? School Administrator



We've recently brought in a community-based mental health clinic to provide services on campus. What do we need to do to make referrals? What information can we share?

Videos on Website: Example



Other Videos on Website:

- A California Guide to Sharing Student Health and Education Information
- HIPAA: An Overview for California Health Professionals
- FERPA: An Overview for California School Health Professionals
- HIPAA / FERPA 101



The logo features a white circle with a gap at the top and bottom, framing the text. The text is in a bold, sans-serif font.

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