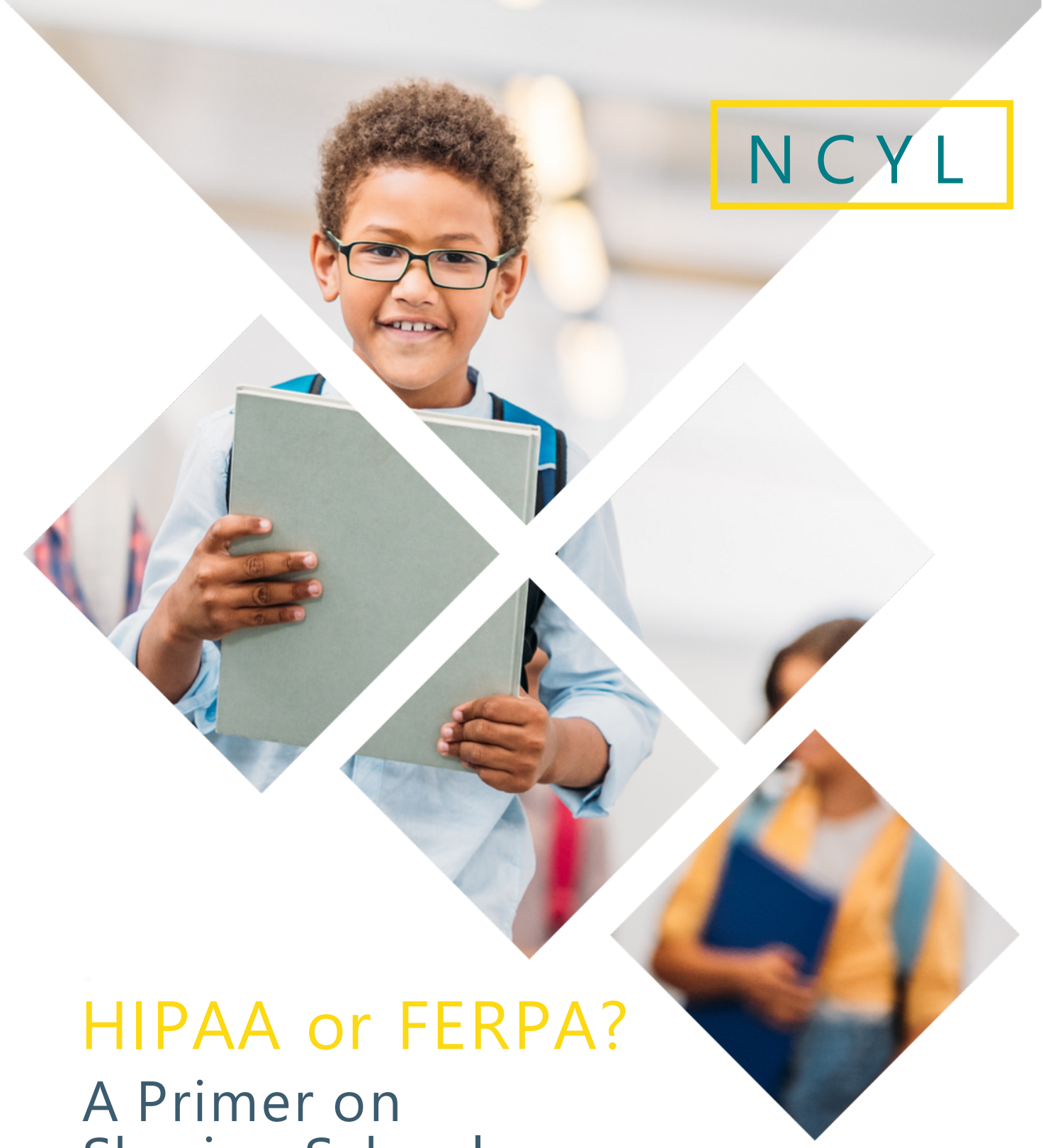

NCYL

HIPAA or FERPA?

A Primer on Sharing School Health Information In Arkansas

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 document provides information and does not provide legal advice or guidance. The document should be used as a reference only and not as a substitute for advice from legal counsel.

The information in this document is current as of March 2023, but laws do change. Materials should be reviewed by legal counsel to ensure they are up to date when used anytime after March 2023.

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INTRODUCTION

John is in 3rd grade at Franklin Elementary. He has been distracted and fidgety in class recently. His teacher refers John and his family to the mental health clinician from a local nonprofit who comes to campus once a week. The clinician 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 clinician to ask if there is anything she can do to help John. What may the clinician tell John's teacher? Would that answer change if John had been referred to a school nurse or school counselor instead?

School health programs and providers bring a range of needed health care services to a school campus. Providers may be school employees, such as school nurses or counselors; community-based providers, such as employees of a community clinic bringing services to the school site; or school-based health centers established through the school district. These programs provide an important opportunity to increase health care access for youth and improve care coordination and collaboration among health providers and schools.

When developing or implementing school health services, there are several considerations that health providers and education agencies should address early on. One of the most important is determining which confidentiality laws control access to and disclosure of the health care information created. 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) Privacy Rule**.

Whether FERPA or HIPAA applies and how those interact with state law will impact school 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.

Of course, understanding the law is just the first step in developing confidentiality and information sharing policies and practices for a site. Many other considerations can and should play a role in determining what the best practice is for a given location. But understanding the parameters of what the law allows, requires, and prohibits sets a baseline from which to have such discussions.

This Primer provides an overview of HIPAA, FERPA, and state law and is current as of the date of publication. The goal of the Primer is to provide readers sufficient information so that they may start important conversations with their own legal counsel about policies and practices for confidentiality and sharing of information.

The Primer does not review all aspects of the confidentiality laws it references. It also does not provide legal advice. The information may raise a number of questions for readers. These questions can and should be directed to legal counsel. Further, laws can change. After publication, content should be reviewed by legal counsel to ensure it is up to date.

AN OVERVIEW OF HIPAA AND FERPA IN ARKANSAS

HIPAA Privacy Rule – The Basics

1. What is the HIPAA Privacy Rule?

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."[1] In addition to the HIPAA Privacy Rule, HIPAA also has Security, Transactions, and Enforcement Rules as well as identifiers requirements. This Primer focuses on the Privacy Rule. Moving forward any reference to HIPAA should be understood to mean the HIPAA Privacy Rule unless explicitly stated otherwise.

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.[2]

[1] See 45 C.F.R. §160.102. ("CFR" means the Code of Federal Regulations.)
[222] 45 C.F.R. § 160.103.

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.[3]

3. Which "health care providers" must comply with HIPAA?

Health care providers who "transmit health information in electronic form" are "covered entities" and must comply with HIPAA.[3] "Health care providers" include individual providers such as physicians, nurses, clinical social workers, and other medical and mental health practitioners, as well as hospitals, clinics and other organizations.[4] **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 but are not limited to 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. The U.S. Department of Health and Human Services (HHS) provides additional guidance on what is considered a "transaction."[5] The fact that a health care provider does not use electronic records onsite does not automatically mean it is exempt from HIPAA. Health care providers may be transmitting health information electronically in another way, for example, by using a billing service that does. That said, there will be providers who are not

Is a school employed provider a "covered entity" subject to HIPAA?

Not necessarily. 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 electronic "transactions." In its 2019 Joint Guidance, the U.S. Departments of Education (DOE) and of Health and Human Services (HHS) suggest that many (but not all) school-employed health care providers will not be considered covered entities because of the electronic transaction requirement: "*[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.*"

[333] 45 C.F.R. § 160.103.

subject to HIPAA because they do not transmit health information in electronic form related to covered transactions. HHS offers a "Covered Entity Decision Tool" to use to determine whether a provider is a covered entity subject to HIPAA.[6]

There may be situations in which a provider is a "covered entity" subject to HIPAA's other rules, like the HIPAA Security Rule, but it holds certain records that are not subject to the HIPAA Privacy Rule. The Primer discusses this situation in response to question 1 on page 8.

4. **Which "health care providers" must comply with HIPAA?** Health care providers who "transmit health information in electronic form" are "covered entities" and must comply with HIPAA.[4] "Health care providers" include individual providers such as physicians, nurses, clinical social workers, and other medical and mental health practitioners, as well as hospitals, clinics and other organizations.[5] **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 but are not limited to 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. The U.S. Department of Health and Human Services (HHS) provides additional guidance on what is considered a "transaction."[6] The fact that a health care provider does not use electronic records onsite does not automatically mean it is exempt from HIPAA. Health care providers may be transmitting health information electronically 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. HHS offers a "Covered Entity Decision Tool" to use to determine whether a provider is a covered entity subject to HIPAA.[7]

There may be situations in which a provider is a "covered entity" subject to HIPAA's other rules, like the HIPAA Security Rule, but it holds certain records that are not subject to the HIPAA Privacy Rule. The Primer discusses this situation in response to question 6 on page 10.

[4] 45 C.F.R. § 164.104.

[5] 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.")

[6] U.S. Department of Health and Human Services (HHS), *Transactions Overview*, https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Transactions/TransactionsOverview, accessed March 6, 2023

[7] HHS, *Covered Entity Decision Tool*, https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf, accessed March 6, 2023

5. What is a HIPAA "business associate?"

Many 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.[8] (See footnote 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.

[8] 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.").

6. Must a "business associate" comply with HIPAA?

Indirectly yes.[9] 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 requiring the business associate to violate FERPA.[10] Health care providers always should consult legal counsel regarding such contracts and whether an organization qualifies as a business associate in the first place.

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

Not always. Even if a health care provider is a covered entity for purposes 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.

In its 2008 Joint Guidance, the DOE and HHS provide this example: *"[I]f 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."*

7. What information does HIPAA protect?

The HIPAA Privacy Rule limits covered health providers from disclosing what HIPAA calls "protected health information" (PHI).[11] **"Protected health information"** is individually identifiable health information created or received by a health care provider, health plan, employer, or health care clearinghouse in any form, including oral communications as well as

45 C.F.R. § 164.104 ("Where provided, the standards, requirements, and implementation specifications adopted under this part apply to a business associate.").

[10] 45 C.F.R. §§ 164.502(a)(3)&(4), 164.504(e). See HHS, *Business Associates,* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html, accessed on March 6, 2023.

[11] 45 C.F.R. § 164.502(a).

written or electronically transmitted information.[12] HIPAA does not limit the disclosure of health information that is not individually identifiable, also known as "de-identified information."[13]

Protected health information also 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."[14] In other words, **if FERPA applies, HIPAA does not,** even if the school provider otherwise qualifies as a covered entity under HIPAA. There may be situations in which a school employed health provider is considered a "covered entity" for HIPAA purposes but the HIPAA privacy rule does not apply to the records they create because those records are subject to FERPA. For example, if a school employed therapist bills Medicaid for services provided under the IDEA using an electronic billing system, the school is a HIPAA covered entity subject to other parts of HIPAA. However, if the school's provider maintains health information in "education records" under FERPA, the school is not required to comply with the HIPAA Privacy Rule, but with FERPA in terms of access and protection.

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

HIPAA controls disclosure of individually identifiable health information. Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information, and HIPAA does not limit its release.[15] HIPAA has its own standard for defining whether or not there is a reasonable basis to believe information can be used to identify an individual and establishes methods to meet this standard.[16] A covered entity may assign a re-identification code to de-identified information to allow for matching of data but that coding must meet the requirements of HIPAA.[17]

[12] 45 C.F.R. § 160.103("*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. *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.").

[13] See 45 C.F.R. §§ 164.502(a), 164.514.

[14] 45 C.F.R. § 164.103("*Protected Health Information*…Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. §1232g; ….").

[15] See 45 C.F.R. § 164.502(d).

[16] 45 C.F.R. § 164.514(a),(b).

[17] 45 C.F.R. § 164.514(c).

9. What is the HIPAA confidentiality rule?

As a general rule, health care providers cannot disclose information protected by HIPAA without a signed authorization.[18] An authorization form must include specific elements to be valid under HIPAA.[19] (See Appendix B.) HIPAA also defines who must sign the authorization.[20] There are some exceptions to this general rule, discussed below.

10. Who signs an authorization to release health information under HIPAA?

HIPAA allows sharing of PHI when there is an authorization, or release, signed by someone legally authorized to do so. Usually, when the patient is age 18 years or older or an emancipated minor, the patient usually signs on their own behalf, and in most cases, when the patient is an unemancipated minor, a parent, guardian, or other person with authority under the law to make health decisions for the unemancipated minor (called the patient's "personal representative") must sign authorizations to release the minor patient's information.[21] (Minor means a person under age 18 in Arkansas.[22]) However, an unemancipated minor must sign the authorization when they are considered the "individual" for purposes of HIPAA which occurs in any of the following situations:

(1) The minor consented to the underlying health care,
(2) The minor lawfully may obtain care without the consent of a parent or person acting in place of the parent, such as a legal guardian, and the minor, a court, or another person authorized by law consented for the care, or
(3) A parent, guardian or person acting in place of a parent assented to an agreement of confidentiality.[23]

Thus, who signs will depend in part on when state and other laws allow minors to obtain care on their own and allow other adults to act on behalf of minors in making health decisions. Some relevant federal and state consent laws are highlighted in Appendix C.

[18] 45 C.F.R. §164.502(a).
[19] 45 C.F.R. § 164.508(c).
[20] 45 C.F.R. § 164.508(c).
[21] 45 C.F.R. § 164.502(g)(i).
[22] Ark. Code § 9-25-101
[23] 45 C.F.R. § 164.502(g)(i).

Who signs the authorization to release information? An Arkansas minor consent example

Jonas, who is 17, seeks a sports physical from a community-based pediatrician whose records are subject to HIPAA. The provider determines that Jonas is "of sufficient intelligence to understand and appreciate the consequences of the …medical treatment or procedures for himself" and thus is authorized to consent to his own sports physical under Arkansas law. (See Appendix C for state minor consent laws.) Because he consented to his own care, Jake is an "individual" for purposes of HIPAA and signs the authorization to release the health information related to the sports physical.

11. Do exceptions in HIPAA allow release of information without an authorization?

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

- For treatment purposes[24]
- To avert a serious and imminent threat[25]
- For research[26]
- For payment purposes[27]
- For health care operations[28]
- To public health authorities as required by law[29]

[24] 45 C.F.R. §§ 164.502(a)(1)(ii),164.506.
[25] 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".).
[26] 45 C.F.R. § 164.512(i).
[27] 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506.
[28] 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506.
[29] 45 C.F.R. § 164.512(b)(1)(i).

- To report child abuse as required by law[30]
- When requested by the individual[31]
- Additional exceptions also exist.[32]

Different conditions must be met before information may be shared under each HIPAA exception. State law also may limit their application as described below.

12. How do HIPAA and Arkansas law intersect?

There are several ways that Arkansas law intersects with HIPAA. First, 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 situations. Similarly, parental access to records when the parent did not consent for the child's care will depend in part on state law. Appendix C includes some of Arkansas's consent to treatment laws.

Second, Arkansas has its own laws and regulations that protect and control disclosure of certain health information. In some situations, they provide greater confidentiality protection than HIPAA. While HIPAA usually preempts state law, when state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law.[33]

For example, persons licensed to provide alcoholism and drug abuse counseling must comply with a state confidentiality law that, just like HIPAA, requires written consent for disclosures as a general rule and has some exceptions to this general rule, but the Arkansas law has fewer exceptions to the general rule than does HIPAA.[34] Providers who are subject to both HIPAA and this state law must follow the more protective state law. There are also special protections for certain other types of health information in Arkansas law, including but not limited to confidential communications between psychologists and counselors and their patients.[35] Similarly, the Arkansas Department of Human Services (DHS) has issued confidentiality regulations that apply to all DHS agencies that service clients, including covered health care components, internal business associates, and non-covered health care components,

[30] 45 C.F.R. § 164.512(b)(1)(ii).
[31] 45 C.F.R. §§ 164.502(a)(1)(i)&(2)(i), 164.524.
[32] *See* 45 C.F.R. §§ 164.502(a)(1), 164.512.
[33] 45 C.F.R. §§ 160.203, 164.202.
[34] Ark. Code § 17-27-416.
[35] Ark. Code §§ 17-27-311, 17-97-105.

that maintain individually identifiable health information.[36] The regulations in many ways parallel HIPAA; however, the Arkansas regulations may be more restrictive in some cases. For example, while HIPAA and Arkansas regulations do not explicitly prohibit redisclosure of protected health information once shared, the Arkansas regulation does place restrictions on redisclosure of certain types of information, such as information regarding clients of publicly funded mental health or developmental disability providers and HIV information, among others.[37] Arkansas regulations also require use of a specific release form – "DHS Form Authorization To Disclose Health Information" when a DHS agency is being asked to release protected health information.[38] Providers who are subject to both HIPAA and this Arkansas regulation must attempt to comply with both and must follow the more protective law where they conflict.

Finally, in addition to laws, licensed health professionals may practice under ethical and licensing principles that also include obligations related to confidentiality and privilege. Indeed, in some cases, Arkansas law specifically incorporates professional codes of medical ethics into the laws regulating certain practice areas.[39] These principles may impose greater confidentiality obligations than HIPAA or state laws. For example, HIPAA may permit certain disclosures without an authorization, but a provider may work under ethical, contractual, or licensing obligations that require them to seek authorizations for every disclosure. Providers should do their best to comply with all obligations and consult legal counsel if they have questions or concerns about the intersection of ethical obligations and the law.

13. May parents access their minor child's protected health information?

When they consented for the minor's care, a parent, guardian, or other person with legal authority to make health decisions for an unemancipated minor generally has a right to access the minor child's protected health information under HIPAA.[40] However, there are some exceptions. A parent may not have this right if a court has removed or restricted their legal custody. It is also important to review the next question related to withholding access to records.

[36] Ark. Admin. Code §§ 016.14.7-4009.0.0.
[37] Ark. Admin. Code §§ 016.14.7-4009.3.6.
[38] Ark. Admin. Code §§ 016.14.7-4009.3.1.
[39] See e.g. Ark. Code § 17-27-203 ("(a) The Arkansas Board of Examiners in Counseling shall…shall adopt rules and procedures as it deems necessary for the performance of its duties…The board shall adopt the Code of Ethics of the American Counseling Association and any revisions or additions deemed appropriate by this board to govern appropriate practice or behavior referred to in this chapter…The board shall adopt the Code of Ethics of the American Association for Marriage and Family Therapy to govern licensed marriage and family therapists and licensed associate marriage and family therapists.").
[40] 45 C.F.R. § 164.502(g)(3)(i).

In addition, where a minor has authority to consent to their own care under state or other law and is considered to be "the individual" under HIPAA, parent access will depend in part on what federal, state, and other laws say about parent access.[41] Certain information, such as records related to substance use disorder treatment or Title X family planning care, may be subject to federal or state confidentiality laws that prohibit disclosure to parents without the minor patient's consent.[42] In such cases, providers must follow the law that restricts parent access.[43] In some cases, state law may authorize clinicians to make a determination about whether or not to disclose to parents. For example, Arkansas state law allows minors to consent to provision of medical care related to sexually transmitted infections; the law also explicitly authorizes a physician or member of medical staff to decide whether to inform a parent or guardian as to the treatment given or needed, or to keep that information confidential from the parent or guardian.[44]

If state and other law, including case law, is silent as to parent access, HIPAA says "a covered entity may provide or deny access…to a parent, guardian, or other person acting in loco parentis, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment."[45]

In 2001, the Arkansas Attorney General was asked whether a mental health provider in the state ever has a right or obligation to withhold "information (safety-related)" from the legal guardian of a minor. The Attorney General opined that "[s]everal sources of state law [including rules adopted by licensing boards]…indicate that it is not only permissible, but usually required, for a mental health provider to withhold information from the legal guardian of a minor."[46]

Providers, particularly those whose practice, by law and license, may be subject to ethical principles and codes of conduct that address confidentiality, should consult legal counsel for advice on this question.

[41] 45 C.F.R. § 164.502(g)(3)(ii).
[42] See e.g. 42 C.F.R. § 59.10(b); 42 C.F.R. Part 2; 45 C.F.R. § 164.502(g)(5).
[43] 45 C.F.R. § 164.502(g)(3)(ii)(B).
[44] Ark. Code § 20-16-508.
[45] 45 C.F.R. § 164.502(g)(3)(ii)(C).
[46] Ark. Op. Atty. Gen. No. 2001-354.

14. May a health care provider ever withhold a child's health information from the child's parent?

Yes. Although a parent or guardian generally has a right to access the records when the parent or guardian consented for the minor child's health services, there are two situations in which a parent may be limited from accessing the protected health information of their unemancipated minor child. First, where a minor has authority to consent to their own care under federal, state, or other law and is considered to be "the individual" under HIPAA, parent access will depend in part on what state and other laws say. As noted above, certain information may be subject to confidentiality laws that prohibit disclosure to parents without the minor patient's consent.

Second, even where a parent otherwise may have a right to access information, HIPAA says that a provider may choose not to disclose where:

- the provider has a reasonable belief that the minor has been or may be subject to domestic violence, abuse or neglect by the parent, or
- giving the parent the right to access to the minor's medical information could endanger the minor, and the provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to provide the parent with access to the minor's medical information.[47]

In 2001, the Arkansas Attorney General was asked whether a mental health provider in the state ever has a right or obligation to withhold "information (safety-related)" from the legal guardian of a minor. The Attorney General opined that "[s]everal sources of state law [including rules adopted by licensing boards]…indicate that it is not only permissible, but usually required, for a mental health provider to withhold information from the legal guardian of a minor."[48]

[47] 45 C.F.R. § 164.502 (g)(5).
[48] Ark. Op. Atty. Gen. No. 2001-354.

Providers, particularly those whose practice, by law and license, may be subject to ethical principles and codes of conduct that address confidentiality, should consult legal counsel for advice on this question.

15. What is the "treatment" exception in HIPAA?

As described above, HIPAA authorizes health care providers to disclose protected health information for treatment purposes without an authorization.[49] HIPAA defines "treatment" for this purpose to mean "the 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."

It is important to review which Arkansas law, if any, may apply to the information in question, and under what circumstances and to whom disclosure is allowed for treatment purposes under that law, as in some cases, state law may be more restrictive than HIPAA. For example, persons licensed to provide alcoholism and drug abuse counseling must comply with a state confidentiality law that does not include a "treatment" exception.[50]

16. What is the "emergency" exception in HIPAA?

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 or 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

[49] 45 C.F.R. §§ 164.502(a)(1)(ii),164.506.

[50] Ark. Code § 17-27-416.

person with apparent knowledge or authority.[51] Mental health providers are permitted to disclose psychotherapy notes without authorization under emergency circumstances under HIPAA.[52]

It is important to review which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed in an emergency, as well as how emergency is defined under the applicable law, as in some cases, such as disclosures of mental health or alcohol and drug abuse counseling records in an emergency, state law may vary slightly from HIPAA.[53]

17. Does HIPAA and/or Arkansas law treat mental health information differently?

For the most part, health and mental health information are treated similarly under HIPAA; however, HIPAA does treat a subset of mental health records called "psychotherapy notes" differently. Many of the exceptions that allow disclosure of other health information without a release do not apply to psychotherapy notes. Instead, psychotherapy notes require a written release in most circumstances.[54] "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."[55] It is important to note that Arkansas law includes confidentiality rules that apply to counselor and therapist communications. This is discussed further below.

Arkansas has laws that create a confidential relationship between, and protect "confidential relations and communications" between, patients and certain therapists, including licensed counselors, associate counselors, licensed marriage and family therapists, licensed associate marriage and family therapists, licensed psychologists and psychological examiners. This

[51] 45 C.F.R. § 164.512(j).
[52] 45 C.F.R §§ 164.508(a)(2)(ii).
[53] See e.g. Ark. Code §§ 17-27-416, 17-27-311, 17-97-105.
[54] 45 C.F.R. § 164.508(a)(2).
[55] 45 C.F.R. § 164.501.

privilege may provide different and sometimes greater protections than HIPAA at times.[56] As well, persons licensed to provide alcoholism and drug abuse treatment must comply with a special state law that protects and limits disclosure of information acquired during provision of services, and sometimes provides greater protections than does HIPAA. This same information also may be subject to federal regulations protecting substance use treatment information, which also are more protective than HIPAA.[57] Providers whose services may be subject to any of these laws should consult legal counsel about their application and their intersection with HIPAA, as there may be many restrictions on disclosure of counseling information.

18. What administrative requirements must a health care provider satisfy under HIPAA?

If a health care provider or program is a "covered entity" under HIPAA, it must meet all the administrative requirements in the HIPAA Privacy Rule. This includes making sure that the provider has and distributes a "notice of privacy practices," uses HIPAA-compliant release of information form, and maintains records with the appropriate security in place for the appropriate number of years, among many other things.[58] Health care providers subject to HIPAA should always consult their legal counsel regarding the many administrative requirements in HIPAA. Certain providers also may be subject to administrative requirements in Arkansas law. For example, DHS offices, facilities, programs and workforce members must follow all policies and procedures in the Arkansas Health Insurance Portability and Accountability Act (HIPAA) Policies and Procedures Manual.[59]

If a health care provider or program is a "covered entity" under HIPAA, the covered entity also should assess whether other HIPAA rules may apply and ensure that it is complying with all applicable regulations.

19. Are there special rules for electronic health records?

HIPAA includes a Security Rule that requires use of appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity, and security of "electronic protected

[56] Ark. Code §§ 17-27-311, 17-97-105. See Ark. Op. Atty. Gen. No. 2008-110, Ark. Op. Atty. Gen. No. 2001-354.
[57] Ark. Code § 17-27-416.
[58] See e.g. 45 C.F.R. §§ 164.508(c)(release requirements), 164.520 (notice of privacy practices), 164.530 (administrative requirements); Ind Code §§ 16-39-1-4, 16-39-7-1.
[59] Ark. Admin. Code § 016.14.7-4001.0.2.

health information" [60](EPHI).[61] If a health care provider or program is a "covered entity" under HIPAA, it may need to comply with the HIPAA Security Rule. In addition, the provider may need to comply with regulations HHS issued under the 21st Century Cures Act in 2021.[62] These regulations contain provisions that create standards and implementation provisions for health information technology and IT systems related to electronic health information (EHI).[63] Health care providers should consult with legal counsel regarding applicability and implementation of both the HIPAA Security Rule and the regulations under the 21st Century Cures Act.

[60] 45 C.F.R. § 160.103 ("electronic protected health information" means "individually identifiable health information:… that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media").

[61] HHS, *The Security Rule*, https://www.hhs.gov/hipaa/for-professionals/security/index.html#:~:text=The%20HIPAA%20Security%20Rule%20establishes,maintained%20by%20a%20covered%20entity, accessed March 8, 2023.

[62] 45 C.F.R. Parts 170 and 171.

[63] 45 C.F.R. Parts 170 and 171.

Helpful Links and Resources

- The Code of Federal Regulations (CFR) is available online at www.ecfr.gov
- The Arkansas Code is available at https://www.arkleg.state.ar.us/ArkansasLaw/
- The Arkansas Administrative Code is available at https://www.law.cornell.edu/regulations/arkansas

Resources on HIPAA From the U.S. Department of Health and Human Services

- Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records, December 2019, [hereinafter Joint Guidance 2019]
- 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 2008]

- Covered Entity Decision Tool
- Business Associates
- HIPAA Privacy Rule and Sharing Information Related to Mental Health
- Permitted Uses and Disclosures: Exchange for Treatment
- Research Exception in HIPAA
- HIPAA and health operations
- HIPAA and health oversight
- HIPAA and research
- Guidance Regarding Methods for De-identification of Protected Health Information
- HIPAA Security Rule Toolkit (for electronic records)

FERPA – 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.[64]

2. What is an "educational agency or institution?"

"Educational agencies or institutions" are defined as institutions that receive federal funds under programs administered by the U.S. Department of Education (DOE) and that either provide direct instruction or educational services to students, such as schools; or are educational agencies that direct or control schools, including school districts and state education departments.[65] 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 volunteer or consult for an educational agency also may need to follow FERPA if certain conditions are met and they can be considered a school official.[66] These conditions are discussed below.

[64] 34 C.F.R. § 99.1(a).

[65] 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.").

[66] *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.").

3. What is a "school official?"

The term "school official" includes 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."[67] 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 as follows.[68]

According to the regulations, "[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 [when] 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; (3) Is subject to the requirements of [FERPA] governing the use and redisclosure of personally identifiable information from education records" and meets the criteria for being a school official with a legitimate educational interest in the records as specified in the school or Local Educational Authority (LEA)'s annual notification.[69] FERPA requires schools to include in their annual notices to parents a statement indicating which parties are considered school officials.[70]

4. What information does FERPA protect?

FERPA controls disclosure of information maintained in the "education record." "Education records" are defined as records, files, documents, or other recorded 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.[71] "Information directly related to a student" means any information "that, alone or in combination, is linked or linkable to a specific

[67] DOE, *Who is a "school official" under FERPA?*, https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa, accessed on March 9, 2023.

[68] See 34 C.F.R. § 99.31(a)(1)(i).

[69] 34 C.F.R. § 99.31(a)(1)(i)(B); see also DOE, *Who is a "school official" under FERPA?*, https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa, accessed on March 9, 2023.

[70] 34 C.F.R. § 99.7(a)(1)(iii).

[71] 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."); 34 C.F.R. § 99.3 ("'Record' means any information recorded in any way, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.").

student that would allow a reasonable person in the school community … to identify the student with reasonable certainty."[72]

FERPA does not apply to all information at a school. For example, communications that are not recorded in any form, such as personal knowledge or the contents of a conversation between a teacher and student in a hallway that is not recorded, 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 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,
- 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, and
- Law enforcement unit records.[73]

[72] 34 C.F.R. § 99.3.

[73] 34 C.F.R. § 99.3("'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. (2) Records of the law enforcement unit.…(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").

Education Records and Personal Knowledge: Case examples

A teacher overhears a student making threatening remarks to another student. May this teacher disclose that information to third parties?

Yes. Personal knowledge that is not part of an education record is not subject to FERPA. "FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official's personal knowledge or observation, rather than from the student's education records. For example, if a teacher overhears a student making threatening remarks to other students, FERPA does not protect that information from disclosure. Therefore, a school official may disclose what he or she overheard to appropriate authorities, including disclosing the information to local law enforcement officials, school officials, and parents." DOE, "*Does FERPA permit school officials to release information that they personally observed or of which they have personal knowledge?*"

After hearing about these threats, the principal decides to suspend the student. May the Principal disclose this information to third parties?

No, because the personal knowledge became a basis for an official school action and becomes documented and part of the education record in that way. "FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official's personal knowledge or observation unless that knowledge is obtained through his or her official role in making a determination maintained in an education record about the student. For example, under FERPA a principal or other school official who took official action to suspend a student may not disclose that information, absent consent or an exception in [FERPA] that permits the disclosure." DOE, "*Are there any limitations to sharing information based on personal knowledge or observations?*"

5. What are "sole possession records?"

Sole possession records are exempt from FERPA.[74] 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

[74] 34 C.F.R § 99.3(b)(1).

not accessible or revealed to any other person except a temporary substitute."[75] Sole possession records are not considered part of the education record and are not subject to FERPA.

6. What are "law enforcement unit records?"

Law enforcement unit records are exempt from FERPA.[76] Records of a law enforcement unit means 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.[77]

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:

- Enforce any local, state, or federal law, or refer to appropriate authorities a matter for enforcement of any local, state or federal law against any individual or organization other than the agency or institution itself; or
- Maintain the physical security and safety of the agency or institution.[78]

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.

7. Are health records treated differently than other types of information in the education file?

Student health records maintained by a school or school employee, such as treatment records, special education assessments, or immunization documents, are part of the education file.[79] FERPA does not treat health or mental health records in a minor's education file differently

[75] 34 C.F.R. § 99.3.
[76] 34 C.F.R. § 99.3(b)(2).
[77] 34 C.F.R. § 99.8.
[78] 34 C.F.R. § 99.8.
[79] Joint Guidance 2019, at 4.

than it does any other information, such as grades of attendance information, in the file.[80] That said, FERPA generally limits access to all student records as described in this section.

8. Are records related to services under the Individuals with Disabilities Education Act (IDEA) treated differently than other types of information in the education file?

Student records maintained by a school or school employee, including IEP assessments, are part of the education file subject to FERPA.[81] Information related to services provided as part of the IDEA additionally is subject to the confidentiality protections in the IDEA. In some cases, the IDEA provides greater confidentiality protections than FERPA.[82] State law specifically addresses confidentiality, disclosure and access to special education records, with acknowledgement of both IDEA and FERPA.[83] Educational agencies should work with their legal counsel to understand how FERPA, IDEA and state law work together.

9. Does FERPA protect "de-identified" records?

No. FERPA controls disclosure of personally identifiable information from an education record. If information is de-identified, then FERPA no longer limits its release. In order to be considered "de-identified," all personally identifiable information must be removed, including any information that alone or in combination is linkable to an individual student and would allow a reasonable person in the school community to identify the student with reasonable certainty.[84] The risk of identification increases when reporting out aggregate data on small subpopulations in a school or system. The cumulative effect of multiple disclosures also can increase risk of identification as information from prior disclosures may be used in combination

[80] *See* DOE, *Letter to Representative Suzanne Bonamici Providing Clarification on the Applicability of the Family Educational Rights and Privacy Act (FERPA) to College and University Studetns' Medical Records, June 8, 2015*, https://studentprivacy.ed.gov/resources/letter-representative-suzanne-bonamici-providing-clarification-applicability-family, accessed March 1, 2023.

[81] Joint Guidance 2019, at 4.

[82] See 34 C.F.R. §§ 300.610 et al; §§ 303.400 et al. The DOE provides a side-by-side comparison of the legal provisions and definitions in IDEA and FERPA. https://studentprivacy.ed.gov/resources/ferpaidea-crosswalk

[83] Ark. Admin. Code §§ 005.18.16-16.02 – 16.15.

[84] 34 C.F.R. § 99.31(b)(1).

with information from later disclosures. There are certain techniques that a school or school system can adopt to help ensure that aggregate data cannot be used to identify an individual. Such techniques include "suppression," "perturbation," and "blurring," among others. Once information has been de-identified, it is possible to attach a re-identification code to it to allow for matching back to the source and adding additional information later on. There are certain requirements for selecting re-identification codes.[85]

10. What is the FERPA confidentiality rule?

Generally, FERPA prohibits educational agencies from releasing any individually identifiable information in the education record unless they have written permission for the release.[86] Releases must include specific elements to be valid. The requirements for a FERPA-compliant release can be found in Appendix B. There are exceptions that allow disclosure without a release in some cases. FERPA also assures access to educational records by a student's parents or by a student age 18 years or older.

11. Who must sign a release of records under FERPA?

In most cases, a "parent" must sign that release. FERPA defines parent broadly for this purpose to include a parent, guardian or person acting in the role of parent.[87] When students are eighteen years old or older, they are considered "eligible students" and as such, they must sign their own release forms.[88]

12. Do exceptions in FERPA allow release of information without an authorization?

FERPA contains exceptions that allow agencies and schools to disclose information absent a written release in some circumstances. For example, schools may share "directory information"[89]

[85] DOE, *De-identified data*, https://studentprivacy.ed.gov/content/de-identified-data, accessed March 6, 2023.
[86] 34 C.F.R. § 99.30(a).
[87] 34 C.F.R. § 99.3.
[88] 34 C.F.R. § 99.30(a).
[89] 20 U.S.C. §1232g(a)(5)(A); 34 C.F.R. § 99.3("Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.
(a) 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

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.[90] Another exception allows school staff to share information with "school officials"[91] in the same educational agency who have a "legitimate educational interest" in the information.[92] 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, for accreditation, in response to judicial orders, and for school transfers, among others.[93] The school official and emergency exceptions are discussed further below.

13. How does FERPA intersect with Arkansas law?

Examples of exceptions in FERPA:

- To "school officials" with "legitimate educational interests"
- To avert imminent danger to health or safety
- For research
- Pursuant to court orders
- To report child abuse as required by law

Arkansas has laws that address the confidentiality and disclosure of certain education records.[94] Arkansas also has laws that protect the confidentiality of certain types of health information, such as information related to counseling services, that may be contained in an education record.[95] Whenever possible, educational agencies should comply with both FERPA and state law, even where state law may provide greater protection. For example, DOE has clarified that many of the exceptions in FERPA, such as the legitimate educational interests/school official exception, are permissive rather than mandatory,

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.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.").

[90] 34 C.F.R. § 99.37. The U.S. Department of Education provides a Model Notice for Directory Information, available at https://studentprivacy.ed.gov/resources/model-notice-directory-information, accessed March 8, 2023.

[91] *See* 34 C.F.R. § 99.31(a)(1)(i).

[92] 20 U.S.C. §1232g (b)(1): 34 C.F.R. § 99.31(a)(1)(i)(A).

[93] See 34 C.F.R §§ 99.31.

[94] See. e.g. Ark. Admin. Code §§ 005.18.16-16.02 – 16.15.

[95] See e.*g.* Ark. Code § 17-27-311 (confidentiality of counseling records).

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."*[96]

To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. However, 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.[97]

14. May parents access their child's education record?

Parents of a student under age 18 may access their child's education record.[98] FERPA defines "parent" to include a parent, guardian or person acting in the role of parent.[99] The only exception is if a court order explicitly limits a parent's right to access the record. The school has a certain amount of time to make the record available after a request. If a school believes release of information may put a student at risk, then the school should contact the school district legal counsel for advice. Parents' access to the records of an eligible student (student 18 years or older) is restricted.

[96] DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016,* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.
[97] 34 C.F.R. § 99.61.
[98] 34 C.F.R. § 99.31(a)(8).
[99] 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.").

15. What is the "school official" exception in FERPA?

While FERPA typically requires a signed release to disclose information to third parties, an exception allows schools to share information in an education record with "school officials" within the same educational agency or institution who have a "legitimate educational interest" in the information.[100] This exception does not authorize the school official to see all information in a student record. The school official only may access information to which they have a legitimate educational interest. The DOE says that "legitimate educational interest" can be defined broadly to mean that the school official needs the information to perform their official or professional duties.[101]

In implementing legitimate educational interests, the educational agency or institution must implement "*reasonable methods to ensure school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective....*"[102]

The term "school official" is defined in question 3 of this section.

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 as well as what the school considers to be a legitimate educational interest.

16. What is the "health or safety" exception in FERPA?

While FERPA typically requires a signed release for disclosures from an education record, an exception authorizes disclosures to "appropriate parties" if "knowledge of the information is necessary to protect the health or safety of the student or other individuals. 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*

[100] 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31.
[101] DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016,* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.
[102] See 34 C.F.R. § 99.31(a)(1)(ii).

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. Any release must be narrowly tailored considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question."[103] The information may be disclosed to "any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals" as determined by the educational agency.

FERPA states: "*In making [this] determination, 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 the 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 [of Education] will not substitute its judgement for that of the educational agency or institution in evaluating the circumstances and making its determination*."[104]

17. What administrative requirements must a school satisfy to comply with FERPA?

If a school 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 form; providing the appropriate annual notices to parents, 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" and "parent;" and complying with recordkeeping requirements regarding release of information. It includes other considerations as well.[105] Requirements for a compliant release form can be found in Appendix C. The U.S. Department of Education provides several model notices of educational agencies, a link to which can be found at the end of this section.

[103] 34 C.F.R. § 99.36; DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 8, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.

[104] 34 C.F.R. § 99.36(c).

[105] See 34 C.F.R. §§ 99.32(recordkeeping requirements), 99.7 (annual notification), 99.30 (written consent).

18. Are education records in an electronic record system also subject to FERPA?

Yes. FERPA applies equally to electronic records. 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.[106] Record means any information recorded in any way, including computer media.[107] Thus, education records in an electronic system are subject to FERPA.

Educational agencies must implement electronic record systems in a way that protects records from unauthorized disclosures. "Unauthorized disclosure" means that individually identifiable information from a student's education record is "made available to a third party who does not have legal authority to access the information." This can "happen inadvertently, as occurs when information about an individual is unintentionally revealed through, for example, a security breach of the electronic system."[108]

In its guidance, DOE says: "*While the law does not prescribe specific methods that should be used to protect education records from unauthorized access or disclosure, the prohibition in FERPA against disclosing or permitting access to education records without consent clearly does not allow an educational agency or institution to leave education records unprotected or subject to access by unauthorized individuals, whether in paper, film, electronic, or any other format. We interpret this prohibition to mean that an educational agency or institution must use physical, technological, administrative and other methods, including training, to protect education records in ways that are reasonable and appropriate to the circumstances in which the information or records are maintained*."[109]

Arkansas also has something called the "Student Online Personal Information Protection Act" that addresses the appropriate use and disclosure of the personally identifiable information

[106] 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."); 34 C.F.R. § 99.3 ("'Record' means any information recorded in any way, including but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.").

[107] 34 C.F.R. § 99.3.

[108] DOE, *Unauthorized Disclosure*, https://studentprivacy.ed.gov/content/unauthorized-disclosure, accessed March 9, 2023.

[109] DOE, *Letter to Tazewell County (VA) School Board re: Unauthorized Access to Education Record Systems,* October 2005, https://studentprivacy.ed.gov/resources/letter-tazewell-county-va-school-board-re-unauthorized-access-education-record-systems, accessed March 3, 2023.

of students in public schools by most websites, services and applications used by schools to help aid in the administration of school activities.[110]

19. Does DOE provide any guidance regarding confidentiality and disclosure of health information in an education record?

Yes. In 2016, DOE issued what is deemed "significant guidance" to institutions of higher learning regarding confidentiality and disclosure related to campus health care services where records created are subject to FERPA. The guidance states:

> *"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…*
>
> *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."*[111]

[110] Ark. Code § 6-18-109.

[111] DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016,* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.

Helpful Links and Resources

- The Code of Federal Regulations (CFR) is available online at www.ecfr.gov
- The Arkansas Code is available at https://www.arkleg.state.ar.us/ArkansasLaw/
- The Arkansas Administrative Code is available at https://www.law.cornell.edu/regulations/arkansas

From the Department of Education and Department of Health and Human Services

- Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records, December 2019, [Joint Guidance 2019]
- 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, [Joint Guidance 2008]

From the Department of Education

- Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016
- Privacy FAQs
- Model forms and notices
- School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)"
- *SLDS Technical Brief: Basic Concepts and Definitions for Privacy and Confidentiality of Student Education Records,*
- *Integrated Data Systems and Student Privacy*
- *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*

HIPAA or FERPA?

Is it possible for FERPA and the HIPAA Privacy Rule 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. Therefore, if FERPA applies, HIPAA does not, even if the school provider otherwise qualifies as a covered entity under HIPAA. Arkansas law may apply in either case.

It is important to distinguish between HIPAA and the HIPAA Privacy Rule. It is possible for an entity to be a "covered entity" under HIPAA but not have records subject to the HIPAA Privacy Rule. The 2019 Joint Guidance provides this example:

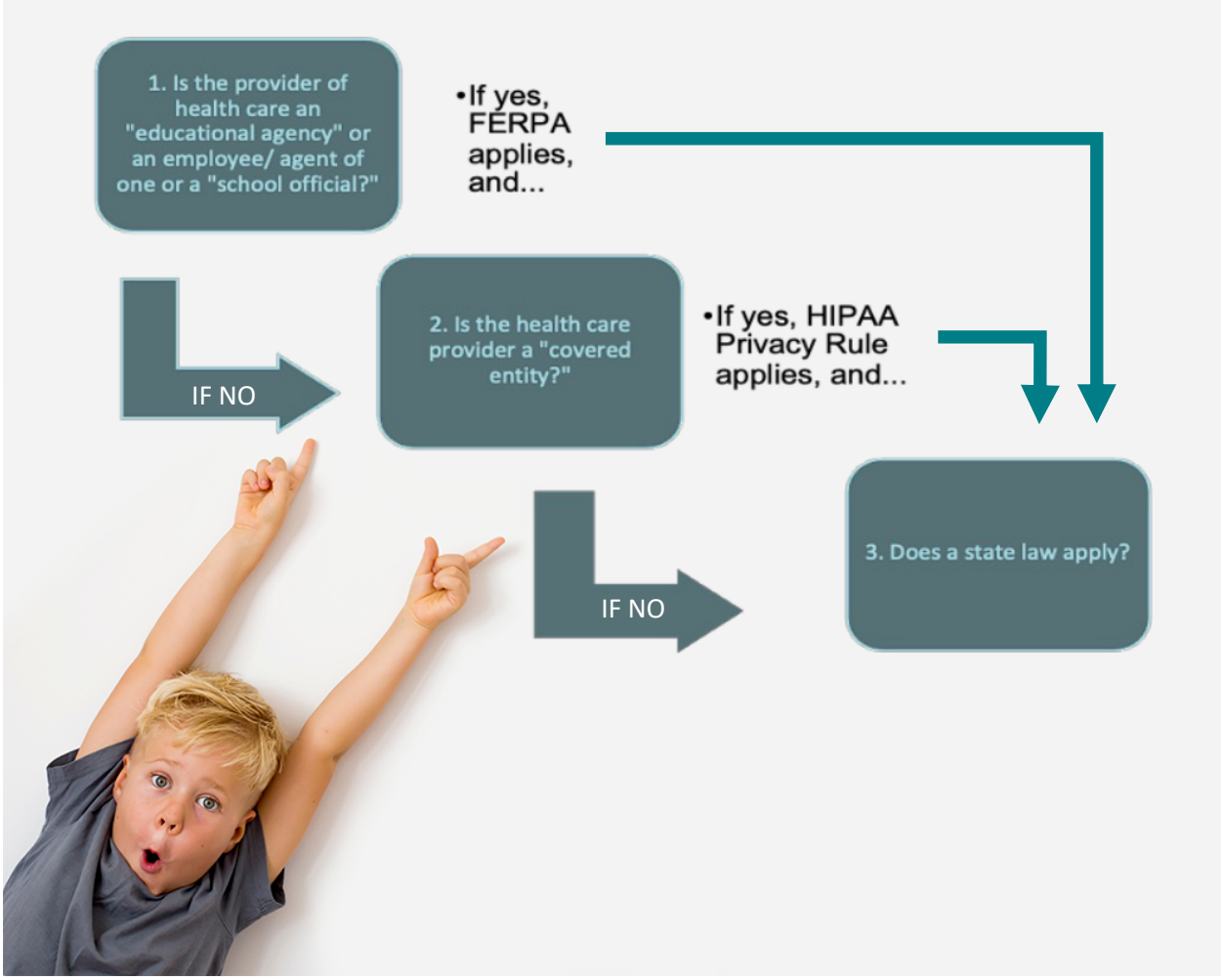
> *"Even if a school is a covered entity and must comply with…HIPAA…, the school would not be required to comply with the HIPAA Privacy Rules if it only maintains health information in FERPA "education records." For example, a public high school might employ a health care provider that bills Medicaid electronically for services provided to a student under the IDEA. The school is a HIPAA covered entity because it engages in one of the covered transactions electronically, and therefore, would be subject to the HIPAA transaction standard requirements. However, if the school provider maintains health information only in "education records" under FERPA, the school is not required to comply with the HIPAA Privacy Rule because the Privacy Rule explicitly excludes FERPA "education records."*[112]

[112] Joint Guidance 2019, at 8.

HIPAA, FERPA, STATE LAW or None of the Above:

A Decision-making algorithm

How do you know which laws apply? Ask the following three questions:



1. Is the provider of health care an "educational agency," an employee or agent of one or contractor of one who can be considered a "school official?"

Health records are subject to FERPA if they are part of an education record. They become part of an education record if the person or agency that created the record is an educational

institution or the employee or agent of one or a contractor and can be considered a school official. A contractor, consultant or volunteer can be considered a "school official" whose records are subject to the use and disclosure requirements of FERPA if the contractor, consultant or volunteer:

- Performs an institutional service or function for which the agency or institution would otherwise use employees;
- Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- Is subject to the requirements of FERPA governing the use and redisclosure of personally identifiable information from education records; and
- Meets the criteria for being a school official with a legitimate educational interest in the records as specified in the school or local educational agency (LEA)'s annual notification.[113]

The existence of a contract is not sufficient on its own. DOE provides case examples that suggest factors that these agencies would look at to determine whether a provider of care meets the above criteria and should be considered a school official. These factors include administrative and operational control as well as financing.[114] DOE provides this example: "*The records of a campus-based student health center 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.*"[115]

2. Is the health care provider 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.[116]

"Health care providers" include individual providers such as physicians, nurses, clinical social workers, and other medical and mental health practitioners, as well as hospitals, clinics and other

[113] 34 C.F.R. § 99.31(a)(1)(i)(B); see also DOE, *Who is a "school official" under FERPA?*, https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa, accessed 9 March, 2023.
[114] See DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 3, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.
[115] DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 3, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.
[116] 45 C.F.R. § 160.103.

organizations.[117] Health care providers are only "covered entities," however, if they transmit health information regarding certain types of health transactions electronically.

The transactions that will make HIPAA applicable include but are not limited to 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. The U.S. Department of Health and Human Services (HHS) provides additional guidance on what is considered a "transaction."[118] The fact that a health care provider does not use electronic records onsite does not automatically mean it is exempt from HIPAA. Health care providers may be transmitting health information electronically 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. Indeed, in its 2019 Joint Guidance, the DOE and HHS suggest that many (but not all) school-employed health care providers will not be considered covered entities because of the electronic transaction requirement: "[*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*."[119]

HHS offers "Covered Entity Decision Tool" to use to determine whether a provider is a covered entity subject to HIPAA.[120]

3. Do state laws apply?

Whether FERPA applies, HIPAA applies, or neither, it is still possible for state confidentiality laws to apply. For example, Arkansas has a Personal Information Protection Act that protects individually identifiable health information, confidentiality regulations that apply to DHS agencies, and confidentiality regulations that apply to HMOs.[121] As well, Arkansas also has laws

[117] 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.")
[118] U.S. Department of Health and Human Services (HHS), *Transactions Overview*, https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Transactions/TransactionsOverview, accessed March 6, 2023
[119] Joint Guidance 2019, at 8.
[120] HHS, *Covered Entity Decision Tool*, https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf, accessed March 6, 2023
[121] Ark. Code §§ 4-110-101 et seq., 25-19-105, 23-76-129; Ark. Admin. Code §§016.14.7-4001.0.0 et seq.

that specifically limit access to and disclosure of certain types of health information, such as counseling records.[122]

Application of state law when FERPA applies: Whenever possible, educational agencies should comply with both FERPA and state law, even where state law may provide greater protection. For example, DOE has clarified that many of the exceptions in FERPA that allow disclosure without a written release, 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."*[123]

To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. However, 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.[124]

Application of state law when HIPAA applies: When state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law.[125] Further, state medical consent laws will influence who has the authority to sign authorizations to release information, as well as the right of parents to access the protected health information of a minor student.

Other state regulations and guidance: Finally, in addition to laws, licensed health professionals may practice under ethical and licensing principles and codes of conduct that also include obligations related to confidentiality. These principles may impose greater confidentiality obligations than HIPAA, FERPA, or state laws. Providers should do their best to comply with all obligations and consult legal counsel if they have questions or concerns about conflicts.

[122] See e.g. Ark. Code §§ 17-27-311, 17-27-416, 20-15-94.
[123] DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016,* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.
[124] 34 C.F.R. § 99.61.
[125] 45 C.F.R. §§ 160.203, 164.202.

Are records from health care services provided on a school campus always subject to FERPA?

No. Health records are subject to FERPA if they are part of an education record. This will not always be the case. HHS and DOE issued Joint Guidance in 2008 and 2019, addressing questions about the application of HIPAA and FERPA in school settings. The 2008 Joint Guidance provides this explanation: "*Some outside parties provide services directly to students and are not employed by or otherwise acting on behalf of the school. In these circumstances, the records created 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.*"[126] HHS and DOE provides these examples:

- "The records of a campus-based student health center 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."[127]

- "Student health records that are maintained by a health care provider that provides services directly to students and that is not acting for a FERPA-covered educational agency or institution do not constitute FERPA-protected education records. For example, the records created and maintained by a public health nurse who provides immunizations to students on a FERPA-covered elementary or secondary school's grounds, but who is not acting for the school, would not qualify as "education records" under FERPA."[128]

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If a school provider is funded by a third-party agency and not an educational institution, are the records created outside the scope of FERPA?

Not necessarily. The question is whether the provider can be considered a school official. The question on page 36 describes the key criteria for making such a decision, including whether the health professional is performing institutional services that otherwise would be

[126] Joint Guidance 2008, at 5.
[127] DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 3, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.
[128] Joint Guidance 2019, at 9.

performed by educational employees and whether their use and maintenance of records is under the direct control of the educational agency. The 2008 Joint Guidance provides this example:

"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."[129]

[129] Joint Guidance 2008, at 4.

Frequently Asked Questions

Records and Communications from School Employed Health Providers (such as School Nurses and Counselors)

For purposes of this section, "school employed health provider" means a health provider employed by an educational agency or institution, providing health services as directed by state law or local educational agency requirements.

1. Does FERPA or HIPAA apply to the records of school employed health providers?

Student health records created and maintained by school employed providers are part of the education record subject to FERPA.

Education records are covered by FERPA. Education records are records that contain information directly related to a student and are maintained by a school or school employee. In general, the records of school employed health providers fall into this category, because, by definition, they are school employees acting on behalf of the school and their records contain

information related to a student.[130] These records are not covered by the HIPAA Privacy Rule because HIPAA specifically exempts from its coverage health information in an education record.

Arkansas confidentiality law, including licensing rules, also may apply to some information held by a school employed provider. If FERPA and Arkansas law provide conflicting obligations regarding disclosure or protection, SSP should seek guidance from their legal counsel about which rule to follow.

2. May a school employed provider maintain a separate confidential health file at school?

Generally, treatment records of a minor student created by a school employed health provider are subject to FERPA, even if the records are kept in a separate file cabinet or file. Thus, while a school employed provider may maintain a separate file as a means to limit accidental and unauthorized disclosures, the file still is subject to FERPA in most cases, in terms of who may and may not access the information contained therein. That said, there are certain types of records that are exempt from FERPA. These 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, 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.[131]

More information about the "sole possession" exemption can be found earlier in this Primer. Whether and when either of these two exceptions applies is something to address with legal counsel. If FERPA does not apply, HIPAA may. School employed providers and their legal counsel should evaluate whether the school employed provider can ever be considered a covered entity subject to HIPAA. The Joint Guidance from 2019 provides an example of such a situation.[132] In such a case, the Privacy Rule only applies if information is not part of the education record.

Arkansas confidentiality law, including licensing rules, also may apply to some information held by a school employed provider. If FERPA and Arkansas law provide conflicting obligations regarding disclosure or protection, SSP should seek guidance from their legal counsel about which rule to follow.

[130] See Joint Guidance 2019, at 7-9.
[131] 34 C.F.R. § 99.3(b).
[132] Joint Guidance 2019, at 8 ("a public high school might employ a health care provider that bills Medicaid electronically for services provided to a student under the IDEA. The school is a HIPAA covered entity because it engages in one of the covered transactions electronically…").

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

Yes, FERPA still applies because, a school employed provider by definition is providing an institutional service and their use and disclosure of records is under the direct control of an educational agency, making them a school official. The 2008 Joint Guidance from DOE and HHS address 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.*"[133]

4. May a health care provider whose information is subject to the HIPAA Privacy Rule disclose protected heath information to a school employed health provider?

Case examples:

- Pediatrician wants to share medication dosage information with school nurse for a student who is required to take medication during the school day.
- Community-based pediatrician wants to confirm for a school psychologist that pediatrician believes the student would benefit from a screening for anxiety.
- Provider from school-based health center (whose records are subject to HIPAA) wants to let school nurse know that a student will have weekly appointments with the health center.

In most cases, yes, a health provider in situations like those described above would be able to disclose protected health information to the school employed health provider. The information always may be disclosed pursuant to a HIPAA and Arkansas law compliant written authorization. If there is no such authorization in place, HIPAA also permits health

[133] Joint Guidance 2008, at 4.

care providers to disclose protected health information pursuant to certain exceptions. For example, HIPAA allows providers to disclose information to other health care providers for "treatment" purposes in most cases. HIPAA defines "treatment" broadly in this context to include coordination or management of health care, consultation, and referral as well as direct treatment.[134] The treatment exception under HIPAA is described in more detail earlier in the Primer.

DOE and HHS provide this example of the HIPAA treatment exception in application: "*[A] student's primary care physician may discuss the student's medication and other health care needs with a school nurse who will administer the student's medication and provide care to the student while the student is at school.*"[135]

It is important to talk to legal counsel about which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed for treatment purposes, as in some cases, such as disclosure of certain counseling records, state law may be more protective than HIPAA and limit use of this exception.

Providers whose records are subject to HIPAA also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain emergencies using the HIPAA emergency exception. The Joint Guidance from 2019 provides this example: "*A parent tells their child's therapist they are worried because the child threatened to kill a teacher and has access to a weapon. HIPAA permits the therapist to contact school officials if, based on a credible representation by the parent, the therapist believes the disclosure to school officials is necessary to prevent or lessen a serious and imminent threat to the teacher.*"[136] The HIPAA emergency exception is described earlier in the Primer. It is important to talk to legal counsel about which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed in an emergency, as well as how emergency is defined under the applicable state law, as in some cases, such as disclosure of certain counseling records in an emergency, state law may vary slightly from, and be more protective, than HIPAA.

It also is important to note that once disclosed to the school employed provider, if the school employed provider places the information in the education record, FERPA likely will apply when determining access to the information in the file, not HIPAA.[137]

[134] 45 C.F.R. §164.501.
[135] Joint Guidance 2019, at 16.
[136] Joint Guidance 2019, at 16.
[137] Joint Guidance 2008, at 2.

5. May a school employed provider disclose information from the education record to a health care provider not employed or in contract with the school?

Case examples:

- School nurse wants to share student's seizure action plan with the student's primary care physician.
- In order to make a referral, school nurse wants to share name of student and relevant health information with the school-based health center (an agency not considered a school official and whose records are subject to HIPAA).
- School nurse wants to share student's diagnosis with emergency medical personnel called to campus after student passes out. (See next question as well)

May a school employee share information in the above situations?

The answer in the above case scenarios depends on whether there is a FERPA-compliant written authorization in place or one of the limited exceptions to FERPA otherwise allow the disclosure. The information always may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed to an outside party who is not a school official pursuant to an exception in FERPA. For example, the school could provide the health provider access to directory information about a specific student. What that would include will depend on how directory information has been defined by the educational agency in its annual notice to parents and whether parents have opted out of directory information disclosures.

The school employed provider also may disclose information that is not contained in the education record, such as information from personal observation that has not been recorded, as long as the disclosure does not violate any applicable Arkansas confidentiality law, professional code of conduct, or contract obligation.

In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the health or safety exception in FERPA, if disclosure to the health care provider is necessary to protect the health or safety of the student or other persons. The health or safety exception is described earlier in the Primer and below.

6. May a school employee disclose information from the education record, including health information, in an emergency?

Case example:

- Student has a seizure at school and falls. The school calls 911 and parents. When the ambulance arrives, the school nurse tells the emergency medical technicians that the student has epilepsy, after determining that this disclosure is necessary to protect the student's health or safety from imminent threat.

May a school employee share information with others in situations like this?

Whether the provider may share information in the above case scenario depends on whether there is a FERPA-compliant written authorization in place or one of the limited exceptions to FERPA otherwise allow the disclosure. The information always may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed to an outside party who is not a school official pursuant to an exception in FERPA. For example, an exception authorizes disclosures to "appropriate parties" if "knowledge of the information is necessary to protect the health or safety of the student or other individuals. 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. Any release must be narrowly tailored considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question.*"[138] The information may be disclosed to "any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals" as determined by the educational agency.

FERPA states: "*In making [this] determination, 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*

[138] 34 C.F.R. § 99.36; DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 8, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.

disclose information from the 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 [of Education] will not substitute its judgement for that of the educational agency or institution in evaluating the circumstances and making its determination."[139]

Providers also should consult their ethical and licensing rules for applicable guidance. It is important to talk to legal counsel about which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed, as in some cases, such as disclosure of certain counseling records, state law may be more protective than FERPA. At the same time, Arkansas law also may include protection for disclosure in some circumstances; for example, a provision in state law offers immunity from liability and suit for damages to school personnel who communicate information "concerning drug abuse by any pupil to that pupil's parents, to law enforcement officers, or to healthcare providers."[140] For this reason, consultation with legal counsel is important to understand how FERPA and state law intersect regarding disclosures related to emergencies.

7. May a school employee disclose information from the education record to other school staff, such as sharing information about a chronic health condition to a teacher or other school personnel?

[139] 34 C.F.R. § 99.36(c).

[140] Ark. Code § 6-17-107.

Case examples:

- School nurse wants to share a student's epilepsy diagnosis with the student's teachers.
- School principal believes P.E. coach should be informed of student's heart condition listed on school sports physical form returned to school by student.
- A school nurse has been provided with confidential information that a student in 10th grade has been diagnosed with HIV. The student is taking medication to manage their condition and this is documented in the student's education file. The parent has expressed concerns about the disclosure of this information to others in the school.

May a school employee share information with other school employees in the above situations?

The answer in the above case scenarios depends on whether there is a FERPA-compliant written authorization in place or one of the exceptions in FERPA otherwise allow the disclosure. The information always may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed to school staff pursuant to an exception in FERPA. For example, FERPA permits disclosures from the education record to other school officials as long as they have a legitimate educational interest in the information. This exception does not authorize the school official to see all information in a student record. The school official only may access information to which they have a legitimate educational interest. The DOE says that "legitimate educational interest" can be defined broadly to mean that the school official needs the information to perform their official or professional duties.[141]

In implementing legitimate educational interests, the educational agency or institution must implement "*reasonable methods to ensure school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective*…."[142]

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

[141] DOE, *Dear Colleague Letter to School Officials at Institutions of Higher Learning, August 2016,* https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.

[142] See 34 C.F.R. § 99.31(a)(1)(ii).

officials and, if so, which parties are considered school officials for this purpose as well as what the school considers to be a legitimate educational interest.

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" in response to a specific situation that poses an imminent danger under the health or safety exception to FERPA, described earlier in the Primer. 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." The person receiving the information will be required to protect the information subject to FERPA.

For more questions relevant to school employed providers, see the section in this Primer entitled "More FERPA, HIPAA and Consent Questions."

Records and Communication from Community-Based Health Providers

1. We are a community-based health provider (CBHP) that runs a School-Based Health Center (SBHC) on a local school campus. Are the SBHC records subject to FERPA?

As discussed in the section entitled "HIPAA or FERPA?", the answer to this question depends on whether the CBHP can be considered an agent or contractor of the educational institution acting as a school official. Health records are subject to FERPA if they are part of an education record. They become part of an education record if the person or agency that created the record is an education institution or the employee or agent or contractor of one and can be considered a school official.

A contractor, consultant, or volunteer could be considered a "school official" whose records would be subject to the use and disclosure requirements of FERPA if the contractor, consultant or volunteer:

- Performs an institutional service or function for which the agency or institution would otherwise use employees;
- Is under the direct control of the agency or institution with respect to the use and maintenance of education records;
- Is subject to the requirements of FERPA governing the use and redisclosure of personally identifiable information from education records; and
- Meets the criteria for being a school official with a legitimate educational interest in the records as specified in the school or local educational agency (LEA)'s annual notification.[143]

The existence of a contract between an educational agency and a health provider on its own is not determinative.[144] The above criteria must be demonstrated as well. DOE provides case examples that suggest factors that these agencies would look at to determine whether a provider of care meets the above criteria and could be considered a school official. These factors include administrative and operational control as well as financing.[145]

The 2019 Joint Guidance provides this example in which a CBHP would be an agent of the school whose records are subject to FERPA:

- *"Health records that directly relate to students and are maintained by a health care provider, such as a third party contractor, acting for a FERPA-covered elementary or secondary school, would qualify as education records subject to FERPA regardless of whether the health care provider is employed by the school."*[146]

DOE and HHS provide these as two examples in which a CBHP would not be an agent of the school and their records would not be subject to FERPA:

- "*The records of a campus-based student health center 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."*[147]

- "*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*

[143] 34 C.F.R. § 99.31(a)(1)(i)(B); see also DOE, *Who is a "school official" under FERPA?*, https://studentprivacy.ed.gov/faq/who-%E2%80%9Cschool-official%E2%80%9D-under-ferpa, accessed 9 March, 2023.

[144] DOE, *Letter to Clark County School District (NV) re: Disclosure of Education Records to Outside Service Providers, June 28, 2006.*

[145] See DOE, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004*, at 3, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting, accessed March 9, 2023.

[146] Joint Guidance 2019.

[147] DOE, *Letter to Ms. Melanie P. Baise, University of New Mexico*, November 29, 2004, https://studentprivacy.ed.gov/resources/letter-university-new-mexico-re-applicability-ferpa-health-and-other-state-reporting

> *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."*[148]

If FERPA does not apply, the health care provider should evaluate whether HIPAA does. HIPAA applies if the health provider can be considered a "covered entity." The 2008 and 2019 Joint Guidance from HHS and DOE addressed questions about application of HIPAA and FERPA in school settings. The 2019 Joint Guidance includes this reminder: "*HIPAA would apply to student records maintained by a health care provider that are not subject to FERPA only if the provider transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, e.g., health care claims, and the records contain PHI."*[149]

2. May a school or district share information from student education records with a CBHP that is not a school official, for purposes of service provision?

Case examples:

- School nurse wants to refer a student and their family to a health care specialist in the community and wants to send the student's name and family contact information to the provider's office.
- School nurse wants to coordinate with a student's primary care physician on diabetes management.
- SBHC that is not a school official for purposes of FERPA asks for access to a student's class schedule so that it can coordinate SBHC appointments for the student.

May a school employee share information from student education records in the above situations?

The information always may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed pursuant to an exception in FERPA. For example, the school could provide the health provider access to directory information about a specific student. What that would include will depend on how

[148] Joint Guidance 2008, at 5.
[149] Joint Guidance 2019, at 9.

directory information has been defined by that school district in its annual notice to parents and whether parents have opted out of directory information disclosures.

School staff also may disclose information to the CBHP that is not contained in the education record, such as information from personal observation that have not been recorded, as long as the disclosure does not violate any applicable Arkansas confidentiality law, professional code of conduct, or contract obligation.

In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the health or safety exception, if disclosure to the health care provider is necessary to protect the health or safety of the student or other persons, as described above.

3. May a CBHP whose records are subject to HIPAA share information 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:

- Is necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public; and
- 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.[150] Mental health providers are permitted to disclose psychotherapy notes without authorization under emergency circumstances.[151]

It is important to review which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed in an emergency, as well as how emergency is defined under the applicable law, as in some cases,

[150] 45 C.F.R. § 164.512(j)(1), (4).

[151] 45 C.F.R §§ 164.508(a)(2)(ii), 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.").

such as disclosures of mental health or alcohol and drug abuse counseling records in an emergency, state law may vary slightly from HIPAA.[152]

4. May a CBHP whose records are subject to HIPAA disclose protected health information to a school employed health provider?

Case examples:

- Pediatrician wants to share medication dosage information with school nurse for a student who is required to take medication during the school day.
- Provider from school-based health center (whose records are subject to HIPAA) wants to let school nurse know that a student will have weekly appointments with the health center.

May a CBHP share information with the school employed health provider in the above situations?

In most cases, yes. The information always may be disclosed pursuant to a HIPAA and Arkansas law compliant written authorization. If there is no such authorization in place, HIPAA also permits health care providers to disclose protected health information pursuant to certain exceptions. For example, HIPAA and Arkansas law allow providers to disclose information to other health care providers for "treatment" purposes in most cases. HIPAA defines "treatment" broadly in this context to include coordination or management of health care, consultation, and referral as well as direct treatment.[153] The treatment exception under HIPAA is described in more detail earlier in the Primer.

DOE and HHS provide this example of the HIPAA treatment exception in application: "*[A] student's primary care physician may discuss the student's medication and other health care needs with a school nurse who will administer the student's medication and provide care to the student while the student is at school.*"[154]

It is important to talk to legal counsel about which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed for treatment purposes, as in some cases, such as disclosure of certain counseling records, state law may be more protective than HIPAA.

[152] See e.g. Ark. Code §§ 17-27-416, 17-27-311, 17-97-105.
[153] 45 C.F.R. §164.501.
[154] Joint Guidance 2019, at 16.

Providers whose records are subject to HIPAA also are allowed to disclose information to other providers absent authorization in a few other circumstances, such as in certain emergencies using the HIPAA emergency exception. The Joint Guidance from 2019 provides this example: "*A parent tells their child's therapist they are worried because the child threatened to kill a teacher and has access to a weapon. HIPAA permits the therapist to contact school officials if, based on a credible representation by the parent, the therapist believes the disclosure to school officials is necessary to prevent or lessen a serious and imminent threat to the teacher.*"[155] The HIPAA emergency exception is described earlier in the Primer. It is important to talk to legal counsel about which Arkansas law may apply to the records in question and under what circumstances and to whom disclosure absent written authorization is allowed in an emergency, as well as how emergency is defined under the applicable state law, as in some cases, such as disclosures of certain counseling records in an emergency, state law may vary slightly from, and be more protective, than HIPAA.

It also is important to note that once disclosed to the school employed provider, if the school employed provider places the information in the education record, FERPA likely will apply when determining access to the information in the file, not HIPAA.[156]

[155] Joint Guidance 2019, at 16.
[156] Joint Guidance 2008, at 2.

More FERPA, HIPAA and Consent Questions

1. What is the difference between consent to treatment and consent to release information?

Consent to treatment means granting permission to a provider to engage in a health test, exam, or service. A health care provider generally must obtain consent before providing care. While an adult (age 18 years or older) typically consents for their own health care, federal, state, and common law help establish which individuals have the legal authority to provide consent on behalf of minors (young people under age 18 years).

Once a provider engages in delivery of health services, the interaction creates protected information. Confidentiality laws control the release of this information. Confidentiality laws sometimes require that a provider obtain consent to release protected health information and specify which individuals may or must give that permission. In many cases, the laws require that this release be in writing. Often, the person with authority to consent to care is the same person

with authority to sign for release of information—but not always. In order to avoid confusion between consent to treatment and consent to release information, HIPAA uses the term "authorization" to describe "consent to release."

2. What are the age of consent laws in Arkansas?

Arkansas, just like every other state, has laws that allow adolescent minors to consent for their own health care in specific circumstances. These laws give minors the authority to consent for their own care based either on the minor's status or living situation, or on the specific health service they are seeking. States have minor consent laws to enable young people in need of essential health care to receive it even in circumstances when it would not be possible to obtain parent or guardian consent. An overarching dual goal of doing so is to protect the health of the young people who need the care as well as the public health.

Arkansas's minor consent laws can be found in Appendix C. As a few examples, minors may consent for "any surgical or medical treatment or procedure not prohibited by law that is suggested, recommended, prescribed, or directed by a licensed physician" if they are "of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures, for himself or herself."

In addition, minors in Arkansas may consent for "any surgical or medical treatment or procedure not prohibited by law that is suggested, recommended, prescribed, or directed by a licensed physician" if they are married or emancipated or incarcerated in the Division of Correction or the Division of Community Correction. Also, female minors may consent for care given in connection with pregnancy or childbirth (except abortion), and all minors may consent to provision of medical or surgical care when the minor "believes himself or herself to have a sexually transmitted disease."

3. How do Arkansas's age of consent laws apply in a school health setting?

In general, consent rules are the same no matter where health care is being provided. However, there is an exception to this general rule. Arkansas has special consent rules for services provided in "school-based health clinics." Specifically, Arkansas law states that "no child shall receive school-based health clinic services without parental consent." So even where a minor may have a right to consent to care in another health setting, the minor needs parent

consent to obtain that care in a "school-based health clinic." Further, if contraceptive services are provided or condoms distributed, parent consent must be "specific, in writing, and maintained in the student's health records."[157] Providers in "school-based health clinics" should review the state law for the specifics on this rule and consult legal counsel about application in practice.

4. May a school or district share information from the education record, such as the student's schedule, attendance, or grades, with a school employed health provider for purposes of health care provision?

It depends. This information always can be disclosed with parental consent. Without that written authorization, FERPA permits a school to disclose information in the education records to other school officials as long as they have 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 records to school officials and, if so, which parties are considered school officials for these purposes and what the school considers to be a "legitimate educational interest." As long as a school employed health provider is listed in this annual notice, the school may share the information with the school employed health provider if that individual has a legitimate educational interest in access to the information, as legitimate educational interest is defined by the district.

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" 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

[157] Ark. Code § 6-18-703.

information in order to avert or diffuse serious threats to the safety or health of a student or other individuals." The person receiving the information will be required to protect the information subject to FERPA.

5. May a school disclose information held in an individual student's education record, such as the student's schedule, attendance or grades, with an individual or agency contracting to provide health care at the school?

Case examples:

- A CBHP providing health services on the school campus asks to access the school's online records so that it can see student schedules and coordinate appointments.
- A CBHP providing health services on the school campus asks the school to share the attendance history of a particular student so that the clinic can evaluate whether its services are improving school outcomes for this youth.

May a school employee share information with the contracted CBHP in the above situations?

Yes, but how and how much will depend on whether or not the CBHP is considered a school official.

When the CBHP is an agent of the school and can be treated as a school official:

Information always can be disclosed with parental consent. If there is no authorization in place, 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. 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." Thus, the school may share the information with the CBHP if the annual notice contemplates them in the definition of school official and the CBHP has a legitimate educational interest in access to the information in question, as legitimate educational interest is defined by the district.

When the CBHP is not a school official or agent of the school:

The information always may be disclosed pursuant to a FERPA compliant written authorization. If there is no authorization in place, information can only be disclosed pursuant to an exception in FERPA. For example, the school could provide the health provider access to directory information about a specific student. 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 of directory information disclosures.

School staff also may disclose information to the CBHP that is not contained in the education record, such as information from personal observation that have not been recorded, as long as the disclosure does not violate any applicable Arkansas confidentiality law, professional code of conduct, or contract obligation.

In an emergency, information in the education record may be disclosed to appropriate persons pursuant to the health or safety exception, if disclosure to the health care provider is necessary to protect the health or safety of the student or other persons, as described above.

6. May school employed health providers assure minor students that parents will not have access to their health records in the education file?

For the most part, no. The records of school-employed health providers are part of the education record, and as described above in FERPA Basics, parents of a student under age 18 may access their child's education record.[158] "Parent" includes a parent, guardian or person acting in the role of parent.[159] The only exception is if a court order explicitly limits a parent's right to access the record. The school has a certain amount of time to make the record available after a request. If a school believes release of information may put a student at risk, then the school should contact school district legal counsel for advice.

[158] 34 C.F.R. § 99.31(a)(8).

[159] 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.").

7. May school employed health providers assure minor students that teachers and other school staff will not have access to their health records in the education file?

For the most part, no. The records of school services personnel are part of the education record and as described herein, there are several exceptions in FERPA, including the "school official" and "health or safety" exception, that might allow school staff to see health information in the education record. That said, DOE encourages educational institutions to remember that most of these exceptions are "permissive" rather than "mandatory" and to take this into consideration when determining disclosure policies so that students and families feel encouraged to fully realize the benefits of health care at a school site. DOE offers this advice:

> *"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…*
>
> *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."*[160]

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

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

Integrated data systems (IDS) allow linkage of administrative data from multiple government agencies. They may be used to "better understand the complex needs in communities, inform the design of new strategies and interventions, and evaluate the effectiveness of programs and policies on the desired outcomes."[161] Each IDS has a "lead" organization. This is the organization that will receive protected information from the other participating agencies and 'integrate' it. The lead organization may be a university, school district, or any other agency, as long as that agency can provide the appropriate data protections required by HIPAA, FERPA or other applicable law and the appropriate written agreements are in place. A school or school system may participate in an integrated data system and release individually identifiable information from education records to the IDS lead agency if the disclosure complies with FERPA.

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/DCL_Medical%20Records_Final%20Signed_dated_9-2.pdf, accessed on March 6, 2023.

[161] DOE., *Integrated Data Systems and Student Privacy*, PTAC-IB-4 January 2017, https://studentprivacy.ed.gov/sites/default/files/resource_document/file/IDS-Final.pdf, accessed March 10, 2023.

Appendices

A: Key Points about FERPA and HIPAA in Arkansas

Basics

- FERPA and HIPAA can never apply to the same records at the same time.
- FERPA and Arkansas confidentiality law can apply to the same records at the same time.
- HIPAA and Arkansas confidentiality law can apply to the same records at the same time.
- HIPAA or FERPA may apply to 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 it 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 protected health information without a release differ under HIPAA and FERPA.
- The administrative rules, including requirements for release of information forms, differ under HIPAA, FERPA and Arkansas law.

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 C.F.R. 99.30 (as of January 2023)

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 CFR 164.508 (as of January 2023)

1. A valid authorization under this section must contain at least the following elements:

   - A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
   - The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
   - The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
   - A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
   - An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.
   - Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

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

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

3. The authorization must be written in plain language.
4. If a covered entity seeks an authorization from an individual for a use or disclosure of protected health information, the covered entity must provide the individual with a copy of the signed authorization.

C: Arkansas Consent to Treatment Laws

Arkansas law authorizes minors (persons under age 18) to consent to their own health care in certain circumstances. Relevant statutes are listed below, current as of March 2023:

Arkansas Code Annotated § 20-9-602: Consent generally (including minor consent)

"It is recognized and established that, in addition to other authorized persons, any one (1) of the following persons may consent, either orally or otherwise, to any surgical or medical treatment or procedure not prohibited by law that is suggested, recommended, prescribed, or directed by a licensed physician:

(1) Any adult, for himself or herself;

(2)(A) Any parent, whether an adult or a minor, for his or her minor child or for his or her adult child of unsound mind, whether the child is of the parent's blood, an adopted child, a

stepchild, a foster child not in custody of the Department of Human Services, or a preadoptive child not in custody of the department.

(B) However, the father of an illegitimate child cannot consent for the child solely on the basis of parenthood;

(3) Any married person, whether an adult or a minor, for himself or herself;

(4) Any female, regardless of age or marital status, for herself when given in connection with pregnancy or childbirth, except the unnatural interruption of a pregnancy;

(5) Any person standing in loco parentis, whether formally serving or not, and any guardian, conservator, or custodian, for his or her ward or other charge under disability;

(6) Any emancipated minor, for himself or herself;

(7) Any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures, for himself or herself;

(8) Any adult, for his or her minor sibling or his or her adult sibling of unsound mind;

(9) During the absence of a parent so authorized and empowered, any maternal grandparent and, if the father is so authorized and empowered, any paternal grandparent, for his or her minor grandchild or for his or her adult grandchild of unsound mind;

(10) Any married person, for a spouse of unsound mind;

(11) Any adult child, for his or her mother or father of unsound mind;

(12) Any minor incarcerated in the Division of Correction or the Division of Community Correction, for himself or herself;

(13)(A) Any foster parent or preadoptive parent, for a child in custody of the department in:

(i)(a) Emergency situations.

(b) As used in this subdivision (13)(A)(i), "emergency situation" means a situation in which, in competent medical judgment, the proposed surgical or medical treatment or procedures are immediately or imminently necessary and any delay occasioned by an attempt to obtain consent would reasonably be expected to jeopardize the life, health, or safety of the person affected or would reasonably be expected to result in disfigurement or impaired faculties;

(ii) Routine medical treatment;

(iii) Ongoing medical treatment;

(iv) Nonsurgical procedures by a primary care provider; and

(v) Nonsurgical procedures by a specialty care provider.

(B) The department shall be given timely notice of all admissions and discharges consented to by a foster parent or preadoptive parent for a child in custody of the department.

(C) The consent of a representative of the department is required for:

(i) Nonemergency surgical procedures;

(ii) Nonemergency invasive procedures;

(iii) End-of-life nonemergency procedures, such as do-not-resuscitate orders, withdrawal of life support, and organ donation; and

(iv) Nonemergency medical procedures relating to a criminal investigation or judicial proceeding that involves gathering forensic evidence; and

(14) A local educational agency liaison for homeless children and youths under the federal McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11432 et seq., as existing on January 1, 2019, when the minor patient:

(A) Meets the definition of a homeless child or youth under the federal McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11432 et seq., as existing on January 1, 2019;

(B) Is not in the care or custody of a parent or guardian; and

(C) Is not in the care or custody of the department."

Arkansas Code Annotated § 20-16-508: Consent by minor (Sexually transmitted disease)

"(a)(1) When a minor who believes himself or herself to have a sexually transmitted disease consents to the provision of medical care or surgical care or services by a hospital or public clinic or consents to the performance of medical care or surgical care or services by a physician who is licensed to practice medicine in this state, the consent:

(A) Is valid and binding as if the minor had achieved his or her majority; and

(B) Is not subject to a later disaffirmance by reason of his or her minority.

(2) The consent of a spouse, parent, guardian, or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize hospital care or services or medical or surgical care or services to be provided to the minor by a physician licensed to practice medicine.

(b) Upon the advice and direction of a treating physician or in the case of a medical staff any one (1) of them, a physician or member of a medical staff may inform the spouse, parent, or guardian of any minor as to the treatment given or needed but shall not be obligated to do so. The information may be given to or withheld from the spouse, parent, or guardian without the consent and over the express objection of the minor."

Other important laws that impact minors access and consent to care in Arkansas:

- **42 CFR 59.5(a)(4)** (Minors consent for Title X funded family planning services on their own accord.)

- **Arkansas Code Annotated § 6-17-107: Assistance to suicidal youth**

"(a) Teachers and other school personnel in this state shall be immune from liability and suit for damages for communicating information in good faith concerning drug abuse by any pupil to that pupil's parents, to law enforcement officers, or to healthcare providers.

(b)(1) Teachers, school counselors, school healthcare providers, and other school personnel shall be immune from any civil liability for providing counseling, referral, emergency medical care, or other assistance offered in good faith to suicidal students or other suicidal youth.

(2) "Suicidal" refers to a person who poses a substantial risk of physical harm to himself or herself as manifested by evidence of, threats of, or attempts at suicide or self-inflicted bodily harm or by evidence of other behavior or thoughts that create a grave and imminent risk to his or her physical condition.

(c) This section shall not preclude liability for civil damages where the individual negligently performs professional counseling or nursing services which he or she is licensed under state law to perform.

(d) This section shall not preclude liability for civil damages as the result of gross negligence."

- **Arkansas Code Annotated § 6-18-703: School-based health clinics**

"(a)(1)(A)(i) No school-based health clinic may be established in a public school until requested by resolution by the school district board of directors, and no child shall receive school-based health clinic services without parental consent.

(ii) Parental consent to contraceptive services and condom distribution shall be specific, in writing, and maintained in the student's health records.

(B)(i) All school-based clinics shall maintain accurate records of the distributing and prescribing of contraceptives and condoms.

(ii) The number of pregnancies and sexually transmitted diseases among students in the schools with school-based clinics shall be transmitted annually to the school district board of directors.

(iii) Records maintained under this section are part of the confidential medical record of the student.

(iv) Numerical or statistical data required to be maintained under this subsection may not be released in a manner that reveals the identity of or any other information contained in the file of the student.

(2) If the board of directors establishes a school-based health clinic, the board of directors shall retain absolute control over the operations and programs offered by the clinic.

(3) Schools that offer sex education in school-based health clinics shall include instruction in sexual abstinence, and no funds shall be utilized for abortion referral.

(b) When any local school district board of directors elects to maintain a school-based health clinic in the school, any Department of Health employee working in the clinic shall be subject to the supervision and control of the school district board of directors.

(c)(1) No state funds shall be used for the purchase or dispensing of contraceptives or abortifacients in public schools.

(2) Local school district boards of directors retain the sole authority over whether and to what extent family planning education is provided in clinics, including any purchase or distribution of contraceptives.

(3) Notice of family planning clinic intentions by a school district shall be given thirty (30) days in advance of a public meeting of the school district board of directors.

(d)(1) It is hereby recognized that sexual activity by students places our youths at increased risk of pregnancy and the contraction of acquired immune deficiency syndrome and other sexually transmitted diseases, and it is the policy of the State of Arkansas to discourage such sexual activity.

(2) The school district board of directors of every school district that associates itself with distributing, recommending, or prescribing condoms or contraceptives shall adopt a resolution acknowledging that there are risks associated with teen sexual activities.

(3) It is further required that every public school and public health department sex education and acquired immune deficiency syndrome prevention program shall emphasize premarital abstinence as the only sure means of avoiding pregnancy and the sexual contraction of acquired immune deficiency syndrome and other sexually transmitted diseases.

(e) State funds shall not be used for abortion referrals or abortion services in public schools."

- **Arkansas Code Annotated § 20-16-304: Policy-Authority, Family Planning**

"It shall be the policy and authority of this state that:

(1) All medically acceptable contraceptive procedures, supplies, and information shall be available through legally recognized channels to each person desirous of the

procedures, supplies, and information regardless of sex, race, age, income, number of children, marital status, citizenship, or motive;

(2) Medical procedures for permanent sterilization, when performed by a physician on a requesting and consenting person eighteen (18) years of age or older, or less than eighteen (18) years of age if legally married, be consistent with public policy;

(3) Dissemination of medically acceptable contraceptive information in this state and in state and county health and welfare departments, in medical facilities, at institutions of higher education, and at other agencies and instrumentalities of this state be consistent with public policy;

(4) Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information; and

(5) No private institution or physician, nor any agent or employee of the institution or physician, nor any employee of a public institution acting under directions of a physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when the refusal is based upon religious or conscientious objection. No such institution, employee, agent, or physician shall be held liable for the refusal."

- **Arkansas Code Annotated § 20-9-604: Emergency consent by courts**

  "(a)(1) Except as provided in subsection (e) of this section, consent may be given by a court when:

  (A) An emergency exists;

  (B) There has been a protest or refusal of consent by a person authorized and empowered to do so; and

  (C) There is no other person immediately available who is authorized, empowered, or capable of consent.

  (2) The consent shall be given upon the presentation of a petition accompanied by the written advice or certificate of one (1) or more licensed physicians that in their professional opinion there is an immediate or imminent necessity for medical or surgical treatment or procedures.

  (3) Any circuit judge may summarily grant injunctive and declaratory relief ordering and directing that the necessary surgical or medical treatment or procedures be rendered, provided that the affected person is:

  (A) A pregnant female in the last trimester of pregnancy;

(B) A person of insufficient age or mental capacity to understand and appreciate the nature of the proposed surgical or medical treatment and the probable consequences of refusal of the treatment; or

(C) A parent of a minor child, provided that the court in its discretion finds that the life or health of the parent is essential to the child's financial support or physical or emotional well-being.

(b) Any circuit judge granting the declaratory and injunctive relief directing the provision of surgical or medical treatment or procedures pursuant to this section shall be immune from liability based on any claim that the surgical or medical treatment or procedures for the affected person should not have been administered.

(c) The reasonable expense incurred for emergency surgical or medical treatment or procedures administered pursuant to this section shall be borne by:

(1) The estate of the person affected;

(2) Any person liable at law for the necessities of the person affected; or

(3) If the estate or person is unable to pay, the county of residence of the person receiving the surgical or medical care.

(d) Upon request of an attending physician, any other licensed physician, or a representative of a hospital to which a patient has been admitted or presented for treatment, it shall be the duty of the prosecuting attorney, or his or her designee, of the county in which the surgical or medical care is proposed to be rendered to give his or her assistance in the presentation of the petition, with medical advice or certificate, and in obtaining an order from the court of proper jurisdiction.

(e)(1) Consent may be given by a court when an emergency exists and there is no one immediately available who is authorized, empowered to, or capable of consent for a person of unsound mind or there has been a subsequent material and morbid change in the condition of the affected person who is in the custody of the Division of Correction or the Division of Community Correction.

(2) The consent shall be given upon the presentation of a petition accompanied by the written advice or certificate of one (1) or more licensed physicians that in their professional opinion there is an immediate or imminent necessity for medical or surgical treatment or procedures.

(3) Any circuit judge may summarily grant injunctive and declaratory relief ordering and directing that the necessary surgical or medical treatment or procedures be rendered."

D: Glossary of Key Terms

HIPAA

Authorization

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.

Business Associate

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.

Covered Entity

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.

Disclosure

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.

Health Care Provider

Health care provider means 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. It includes individual providers such as nurses, physicians and mental health practitioners, as well as clinics and other organizations. 45 C.F.R. § 160.103.

Psychotherapy Notes

Notes or 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

D: Glossary of Key Terms (HIPAA continued)

Treatment

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

Directory Information

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.

Disclosure

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.

Educational Agency or Institution

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.

Education Record

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.

Parent

A natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. 34 CF.R. § 99.3.

D: Glossary of Key Terms (FERPA continued)

Personally Identifiable Information

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.

Sole Possession Record

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.

Treatment Record

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.