HIPAA/FERPA REFRESHER
The Youth Opioid Response (YOR) California project is part of the California Statewide Opioid Response.

This presentation is funded by YOR CA and Anthem Blue Cross.
GOALS

• Provide attendees with a basic understanding of federal HIPAA and FERPA regulations and relevant California laws.
• Understand errors and pitfalls common to those working in school health settings.
• Provide examples of appropriate information sharing across disciplines with an emphasis on substance use.
• Briefly introduce an online toolkit where school health collaborators can go to find more information.
For audio, dial (415) 655-0003
Access code 668 343 534

The webinar is being recorded

Supporting materials will be shared
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The California School-Based Health Alliance is the statewide non-profit organization dedicated to **improving the health & academic success** of children & youth by **advancing health services in schools**.

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HIPAA or FERPA?: School Health Information Sharing in California

Rebecca Gudeman
National Center for Youth Law
John is in 9th grade. He has been distracted and fidgeting in advisory recently. His teacher refers John to the mental health counselor from a local nonprofit who comes to campus once a week. The counselor discovers that John’s aunt recently passed away and that John is scared about losing other family members. He hasn’t been sleeping well and is feeling anxious. He’s been using some pills he found in his mom’s bathroom to sleep. The counselor wants to refer him for additional services. John’s teacher reaches out to the counselor to ask if there is anything she can do to help John.
Disclosure vs Privacy
Balanced exchange is possible!

All confidentiality laws allow exchange of some information in different ways.
Confidentiality Laws

Federal and State statutes establish:
– What **must not** be disclosed
– What **may** be disclosed*
– What **must** be disclosed

MUST NOT disclose

MAY disclose, or keep confidential

MUST disclose

* This section may be covered later in the presentation.
Questions Presented Today:

1. What law(s) control release of health records?
2. What law(s) control release of school records?
3. What law(s) control release of school based health service records?
4. Given the laws, what and how can agencies appropriately share information?
Updated Primer on Sharing

HIPAA or FERPA?
A Primer on Sharing School Health Information in California
Second Edition

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Available on a new website!

https://www.schoolhealthcenters.org/hipaa-ferpa
Confidentiality and Disclosure of Health Information

Health and Mental Health Care Providers

- Families
- Other agencies

Schools
“HIPAA” and Other Medical Confidentiality Laws

- Health Insurance Portability and Accountability Act (HIPAA) – Federal
- Confidentiality of Medical Information Act (CMIA) – California
- Lanterman-Petris-Short Act (LPS) – California
- Other federal and state laws may apply based on funding stream, provider or type of services provided
Who must comply with HIPAA?

- **HIPAA Rules apply to** covered entities and business associates

- **Covered entities include:**
  - Health plans
  - Health care clearinghouses
  - Health care providers who conduct certain financial and administrative transactions electronically.

- **Business associates include:**
  - Subcontractors that receive or transmit protected health information on behalf of the business associate
General Rule in HIPAA and California law:

- Health care providers must protect the confidentiality of personal health information.
- Providers must have a **signed “authorization”** in order to share protected health information.

Exceptions allow or require disclosure of records absent signed release in some cases:

- e.g. to other providers for treatment purposes, child abuse reporting, reporting certain violence.
Remember

- You can always share information if there is a valid written authorization to release.

- Otherwise, you only may share if there is an exception that allows or requires disclosure.
HIPAA/CA Law: Authorizations

Who signs the authorization?

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

In all other cases:

- CMIA says the minor’s “legal representative” must sign.
- LPS says the minor’s “parent, guardian, guardian ad litem, or conservator” must sign.
CONSENT: Minor Consent

Includes:

- Pregnancy related care, including abortion and contraception AT ANY AGE
- Outpatient mental health counseling, 12 and older
- STD/communicable disease testing/treatment/prevention, 12 and older
- Substance abuse treatment, 12 and older
- Sexual assault treatment AT ANY AGE
- 15 and older, living apart from parents, and managing own financial affairs

Case Example: Jordan

Jordan, a 9th grader, comes to the SBHC because they are using their parent’s prescription for benzodiazepines (an opioid commonly prescribed to control anxiety) for anxiety since they started high school. Jordan is running low and is starting to feel anxious about not having any more. The SBHC provider talks with Jordan about substance misuse and Jordan decides they would like to be connected to services but do not want their parent to know.

Can Jordan access services without parent/guardian consent?
CASE EXAMPLE: JOEY

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

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

If a written “authorization” is necessary, who signs it?
Some exceptions to confidentiality allow providers to release medical information even in absence of signed release. Examples:

- Sharing for Payment Purposes
- Treatment exception
- Care Coordination exception
- Emergency exception
- Child Abuse Reporting exception
- Court Order/Subpoena exception
- Other
Liam and his parents visit Nancy Nurse to discuss the headaches he has been having more and more frequently. Liam’s parents mention that he just started taking some new allergy medication prescribed by Patty Provider at the local clinic, but can’t remember which one. While in the exam room, Nancy calls Patty to ask for the name of the prescription.

What, if anything, may Patty tell Nancy Nurse on the phone?
HIPAA/CA Law: Discretion to release to other health and mental health providers

Physical health/Mental Health Records (CMIA): Providers may share information with providers of health care, health care service plans, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient, all but psychotherapy notes. Civ. 56.10 et seq.

Mental health Records (LPS):
- Providers may share outpatient information “in communication between qualified professionals in the provision of services or referrals” -- all but psychotherapy notes.
- May share inpatient records with professional outside inpatient facility if professional has medical or psychological responsibility or patient’s care. WIC 5328(a).
Exception: Special protection for most substance abuse treatment records

Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act 42 C.F.R. Part 2

- CAAPTR restricts the disclosure and use of patient identifying information about individuals in substance abuse treatment

- **CANNOT disclose information unless** there is written authorization from patient or specialized court order, with few exceptions

- Strict limits on re-disclosure of information received

- Doesn’t apply to records from every agency
CASE EXAMPLE: Liam

Liam visits Nancy Nurse to discuss the headaches he has been having more and more frequently. As part of services, Liam admits to what he thinks is an addiction to pills to get through the school day. Nancy Nurse refers Liam to the local drug treatment program for assessment and possible services. They jointly make an appointment for him scheduled for the next day. Several days later, Nancy calls the treatment clinic to confirm that Liam showed up for his appointment. **What, if anything, may the clinic tell Nancy Nurse on the phone?**
CASE EXAMPLE: Liam

Liam is receiving substance use treatment for an addiction to pills. During a counseling session, the therapist notices burn marks on Liam’s arm. He admits that his dad got really pissed at him, while high, and burned Liam with a blunt. The substance treatment program is subject to federal drug treatment confidentiality law.

May the provider make a child abuse report, if the provider believes there is a reasonable suspicion of abuse?
Confidentiality and Disclosure of School Information

Health and Mental Health Care Providers

Families

Schools

Other agencies
If state law conflicts with FERPA, FERPA usually preempts state law.
What is FERPA?

Family Educational Rights and Privacy Act

Intended to:

1. Protect the privacy of educational records
2. At the same time, assure parental access to records
Who must comply with FERPA?

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

Others:
2. Can include organizations that contract with or consult with an educational agency
3. Any person acting for or employed by such agency
What is protected?

“Education Record”:

Records, files, recordings, other documents, which:

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

**Education Record** may include some health information. Examples:

- Immunization records
- IEP, including testing and evaluation records
General Rule:

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

- There are some exceptions.
Remember

- You can always share information if there is a valid written authorization to release.

- Otherwise, you only may share if there is an exception that allows or requires disclosure.
Who must sign a release for PII?

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

Who is a parent for this purpose?

- Parent “includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” (See local policy).
FERPA: Exceptions that allow disclosure absent signed authorization

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

Examples:
- Legitimate educational interests
- Parents exception
- Juvenile Justice exception
- Research exception
- Child Abuse Reporting exception
- Court Order
- Others
School officials may share PII with other school officials in the same school with legitimate educational interests in the information.

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

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

Important: How is this defined in local policy?
What law applies to the records of a school based health clinic?

Community health clinic employees generally must follow HIPAA.

The records of school employees are generally subject to FERPA.

School-based health and mental health care? *It depends!!*
HIPAA, FERPA, Both or Neither?
Is it possible to operate under FERPA and HIPAA at the same time?

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

If FERPA applies, HIPAA does not.
Is the provider of health care an educational agency or the employee or agent of one? (See page 22 to answer)

If yes  
FERPA Applies

If no

Is the provider of health care a covered entity? (See page 23 to answer)

If yes  
HIPAA Applies

If no

Neither FERPA nor HIPAA applies.

Check for application of California confidentiality laws. (See page 23 to answer)
1. Is the health provider an educational agency employee or agent of one?

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

Case by case assessment. Relevant factors include:

- operational and administrative control
- services and functions provided
- financing
This is hard. Can’t we just designate a provider as HIPAA or FERPA in an MOU or contract?

Not really. If all the legal factors align to make clear that FERPA (or HIPAA) applies to a set of records, this cannot be changed by contract. For example, a school can’t just contract its pupil records out of FERPA.

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

What are implications for access and confidentiality:

- Parent access
- Minor consent and confidentiality laws
- Access by other school staff or other medical providers
- School nurse/counselor’s ability to coordinate care
- Public health reporting
- Administrative rules
Case: Accessing School Records

Eleven year-old Andre has been receiving mental health counseling at his SBHC. The clinician believes Andre is progressing but wants to see if the progress is translating into better behavior in the classroom and better academic results. She asks to see the grades and class reports on Andre.
Case: Accessing School Records

1. May the school give the SBHC clinician access to that information?

2. May the clinician participate in team meetings and share general information about Andre’s treatment?
Case: Team meetings

Happy High School has a SBHC run by a local community clinic on campus. There is a monthly meeting with various school staff and other on-campus supports, including the SBHC. A student who is already receiving substance use services at the SBHC comes up in the meeting. The school counselor suggests that her meetings with the youth lead her to want to connect the student with one of the other on-campus supports (not the health center) for substance use services.

May the SBHC staffer inform the team that the youth is already receiving services from them?
Questions? More info?

Check out the Primer in interactive form at SchoolHealthCenters.org/hipaa-ferpa

Introduction

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

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

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

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

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