TELEHEALTH WEBINAR 7: CONSENT, CONFIDENTIALITY, & MANDATED REPORTING
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The webinar is being recorded

Supporting materials will be shared
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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Telehealth:
Consent, Confidentiality, and Child Abuse Reporting

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New Focus on Telehealth during COVID-19
What is Telehealth?

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

• Consent
• Confidentiality
  • Are you HIPAA or FERPA?
  • HIPAA
  • FERPA
  • Children’s Online Privacy Act
• Frequently Asked Questions
Health Care and Consent
<table>
<thead>
<tr>
<th>Consent</th>
<th>Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consent</td>
<td>Use Telehealth Technology</td>
</tr>
<tr>
<td>Consent</td>
<td>Bill Insurance</td>
</tr>
</tbody>
</table>
Consent for Treatment
CONSENT for MINOR’S CARE

General Rule
- Minors need parent or guardian to consent for care

Exceptions:
- Caregiver
- Special rules for court-involved youth
- Special rules for Emergencies
- Minor Consent
### MINORS OF ANY AGE MAY CONSENT

<table>
<thead>
<tr>
<th>Condition</th>
<th>Law/Details</th>
<th>May/Must the Healthcare Provider Inform a Parent About This Care or Disclose Related Medical Information to Them</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pregnancy</strong></td>
<td>“A minor may consent to medical care related to the prevention or treatment of pregnancy,” except sterilization. (Fam. Code § 6925).</td>
<td>The health care provider is not permitted to inform a parent of legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (Health &amp; Saf. Code §§ 123110(a), 123115(a)(1); Civ. Code §§ 56.10, 56.11).</td>
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<tr>
<td><strong>Contraception</strong></td>
<td>A minor may receive birth control without parental consent. (Fam. Code § 6925).</td>
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<td><strong>Abortion</strong></td>
<td>A minor may consent to an abortion without parental consent. (Fam. Code § 6925; American Academy of Pediatrics v. Lungren, 16 Cal.4th 307 (1997)).</td>
<td>The health care provider is not permitted to inform a parent of legal guardian without the minor’s consent. The provider can only share the minor’s medical information with them with a signed authorization from the minor. (American Academy of Pediatrics v. Lungren, 16 Cal.4th 307 (1997); Health &amp; Safet Code §§ 12310(a), 12315(c)(1); Civ. Code §§ 56.10, 56.11).</td>
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<td><strong>Sexual Assault Services</strong></td>
<td>“A minor who [may] have been sexually assaulted may consent to medical care related to the diagnosis, treatment and the collection of medical evidence with regard to the assault.” (Fam. Code § 6925).</td>
<td>The health care provider must attempt to contact the minor’s parent/guardian and note in the minor’s record the day and time of the attempted contact and whether it was successful. This provision does not apply if the treating professional reasonably believes that the parent/guardian committed the assault. (Fam Code § 6928).</td>
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<tr>
<td><strong>Rape Services for Minors Under 12 Yrs</strong></td>
<td>A minor under 12 years of age who may have been raped “may consent to medical care related to the diagnosis, treatment and the collection of medical evidence with regard to the rape.” (Fam. Code § 6924).</td>
<td>Both rape and sexual assault of a minor are considered child abuse under California law and mandated reporters, including health providers, must report it as such. Providers cannot disclose to parents that they have made this report without the adolescent’s authorization. However, adolescent patients should be advised that the child abuse authorities investigating the report may disclose to parents that a report was made. (See Pen. Co §§ 11165.1, 11165.6, 11166, 11167).</td>
</tr>
</tbody>
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Do consent for treatment rules change when providing telehealth services?

NO!

• “All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider’s license shall apply to that health care provider while providing telehealth services.” B&P Code 2290.5.
Consent for Telehealth
State law usually requires consent for telehealth, ....

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

HOWEVER, during COVID-19 Emergency....
In April 2020, Governor issued an executive order that relaxed requirements to facilitate delivery of telehealth services through duration of state of emergency.

- Included suspension of requirement that health provider obtain verbal or written consent for use of telehealth services and to document that consent.
So do we need consent for telehealth? Verbal? Written?

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

• California Association of School Psychologists

• California Department of Education

• When working with schools and students, guidance is to obtain signed written consent for telehealth services
Consent for Insurance Billing
Confidentiality
Are you HIPAA or are you FERPA?
What law applies to the records of a school-based health clinic?

• County and Community health clinic employees generally must follow HIPAA.

• The records of school employees are generally subject to FERPA.

• School-based health and mental health care?

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

If FERPA applies, HIPAA does not.

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

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

Case by case assessment. Relevant factors include:
- operational and administrative control
- services and functions provided
- financing

Joint Guidance from federal Department of Health and Human Services and federal Department of Education
This is hard. Can’t we just designate a provider as HIPAA or FERPA in an MOU or contract?

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

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

Practical implications include:

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

A Primer on Sharing School Health Information in California

Second Edition

HIPAA or FERPA

Information in Primer also available on CSHA website

School-Based Health Center Staff

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

School Principal

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

Behavioral Health Provider

“Keeping confidentiality helps me build close relationships with students and families, but sometimes it would help if I could talk with school staff.”
"HIPAA" and California Medical Confidentiality Laws

• Health Insurance Portability and Accountability Act (HIPAA) – Federal

• Confidentiality of Medical Information Act (CMIA) – California

• Other federal and state laws may apply based on funding stream, provider or type of services provided
What is PHI?

Individually identifiable health information:

(i) Transmitted by electronic media;

(ii) Maintained in electronic media; or

(iii) Transmitted or maintained in any other form or medium.
HIPAA Privacy Rule

- Protects disclosure of personal health information (PHI)
- Generally requires written authorization to release PHI
- Exceptions to authorization requirement
HIPAA/CA Law: Who Signs the Authorization?

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

In other cases, parent, guardian or legal representative must sign.
Telehealth FAQ: Can we use electronic signatures for HIPAA Authorizations?

**Hipaa guidance from federal DHHS:**

- The Privacy Rule allows HIPAA authorizations to be obtained electronically from individuals, provided any electronic signature is valid under applicable law.

- “No standards exist under HIPAA for electronic signatures. In the absence of specific standards, covered entities must ensure any electronic signature used will result in a legally binding contract under applicable State or other law.”
Electronic Signatures

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

• Legal Compliance
• User Authentication.
• Message Integrity.
• Non-Repudiation.
• Ownership and Control.
HIPAA Security Rule

- Protects electronic PHI
- Requires covered entities to ensure integrity of ePHI
- Requires protecting against reasonably anticipated threats to security of information
- Requires implementing administrative, physical and technical safeguards
HIPAA Security Rule during COVID?

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

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

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

- In April 2020, Governor issued an executive order that relaxed certain requirements to facilitate delivery of telehealth services through duration of state of emergency
- Requires covered entities to ensure they comply with DHHS Notification related to HIPAA
FAQ: Does HIPAA allow me to use text, video or phone to do telehealth?

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

HIPAA guidance from DHHS
FAQ: Should I use text, video or phone to do telehealth?

• “Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications” HIPAA guidance from DHHS

• All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider’s license shall apply to that health care provider while providing telehealth services. B and P Code 2290.5.
FAQ: Do Abuse Reporting Rules still apply in the same way?

• All laws and regulations governing professional responsibility, unprofessional conduct, and standards of practice that apply to a health care provider under the health care provider’s license shall apply to that health care provider while providing telehealth services.

• B and P Code 2290.5.

• See COVID-19, Telehealth and Mandated Child Abuse Reporting
Family Educational Rights and Privacy Act

• Intended to:
  • Protect privacy of educational records
  • At the same time, assure parental access to records

• Educational Institutions and Agencies
  • Can include organizations that contract with or consult with educational agency
  • Any person acting for or employed by such agency
Family Educational Rights and Privacy Act

What is Protected?

“Education Record”

- Any information directly related to a student
- Maintained by an educational agency or institution or by a person acting for such agency or institution
- Includes IEP, testing and evaluation records
- Includes health records, including nursing records and any other student health pupil records
• What is not an “Education Record”? 
  • Oral communications, personal impressions 
  • Records of instructional, supervisory and administrative personnel in the sole possession of the maker which are not accessible to any other person except a substitute 
  • Records of student 18 or older made by a physician, psychologist or other health professional that are used only in connection with the provision of medical treatment 
  • See Primer for more information
• What is the rule?
  • Generally FERPA prohibits educational agencies from releasing any personally identifiable information (PII) in the education record without written consent. A written consent to release must include certain elements to be valid.
Family Educational Rights and Privacy Act

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

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

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

• For students with IEPs, this consent is on IEP form
Who signs informed consent to release information?

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

Who is parent for this purpose?
- Parent includes “a natural parent, a guardian, individual acting as a parent in the absence of a parent or guardian.”
Children’s Online Privacy Protection Acts
What is the Child Online Privacy Act?

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

• Student Online Personal Information Protection Act (SOIPPA)
• (California Business & Professions Code 22584 et seq.
• Education technology providers must comply with baseline privacy and security protections, such as prohibiting targeted advertising using information acquired from students, protecting the privacy of student records, and prohibiting the sale of student information
Education Code Privacy Protections for Technology Contracts
Student Privacy – Additional Legal Framework

- California Education Code Section 49073.1
- Permits LEAs to enter into contracts with third parties to provide services for digital storage, management, and retrieval of pupil records and to provide digital educational software that authorizes the provider to access, store and use pupil records
• Nine minimum contract requirements, including, but not limited, to (1) provisions addressing the ownership and control of pupil records, (2) a prohibition against unauthorized use of pupil records, and (3) a description of actions the third party provider will take to ensure the security and confidentiality of pupil records
Student Privacy: Best Practice in Informed Consent and Treatment for Telehealth under FERPA and Related California Law
Notice to Parents of Privacy Rules and Limitations

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

- When providing psychological services through telehealth for students with IEP consent for service, is a new separate consent necessary for telehealth delivery method?

  - Written consent for service is required and should include notice service will be delivered remotely and limitations of privacy in telehealth
  - Refer to CASP Technology Checklist for School Telehealth, April 2020, casponline.org
FAQ: Remote Consent for IEP Telehealth Services

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

- Informed consent to treatment is important to maintaining confidentiality during sessions
- Participants should be in confidential space without distraction and/or access to others
- Participants should be notified session may be discontinued if there is a breach of confidentiality during session
- Participants should be notified no recording unless consent
FAQ: Can I use text, video or phone when I provide school services??

• As covered above, telehealth services can be offered within a FERPA governed system

• However, FERPA controls the privacy of any and all records which are generated

• As such, consumers and parents must be notified of information sharing practices through informed consent to telehealth treatment and to release of information

• Electronic medium which generates records which will be maintained in the regular course of business and is identifiable to the pupil is subject to FERPA
Best Practice Resources from CSBHA:

Telehealth webinar 1: Behavioral Health

Telehealth webinar 2: Billing and Reimbursement

Telehealth webinar 3: Telehealth Platforms

Telehealth webinar 4 on clinical considerations and technology for telemedicine
Best Practice Resources:

California Telehealth Resource Center:
• Telehealth Implementation Workshops
• COVID 19 Telehealth Toolkit
• Telehealth 101
• CTRC Sample Forms, including consent to participate in telemedicine
• Telehealth Best Practices
STAY CONNECTED

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