

**An Overview of HIPAA and FERPA<sup>1</sup>**  
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**HIPAA – Health Insurance Portability and Accountability Act of 1996**

42 U.S.C. § 1320d, 45 C.F.R. Parts 160, 162, & 164 (regulations)

**FERPA --The Family Educational Rights and Privacy Act**

20 U.S.C. §1232g, 34 CFR Part 99 (regulations)

Introduction and Definition of Terms

HIPAA is a federal law that, among other things, authorized the US Department of Health & Human Services to adopt rules to protect the privacy and security of medical information. The HIPAA Privacy Rule applies only to “covered entities” and covers only “protected health information.”

A “covered entity” is a health plan, a health care clearinghouse, or a health care provider who transmits health information electronically in connection with particular transactions (mostly having to do with obtaining information or reimbursement from public or private health insurance plans). Local education agencies (LEAs) may or may not be covered entities.<sup>2</sup> School-based health centers are covered entities if they transmit health information electronically in connection with the transactions covered by HIPAA.

“Protected health information” (PHI) is defined as individually identifiable health information that relates to an individual’s physical or mental health status or condition, the provision of health care to an individual, or payment for the provision of health care to an individual. However, the

FERPA is a federal law that gives parents or eligible students the right to have access to a student’s education records, the right to seek to have the records amended if the parent believes the records contain inaccurate or misleading information, and the right to have some control over the disclosure of information from the records.

“Education records” are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a party acting for the agency or institution.<sup>3</sup> FERPA covers only educational agencies and institutions that receive federal financial assistance.<sup>4</sup> FERPA applies only to education records and the information in them. It does not apply to information known or learned from sources other than education records, such as personal observations or verbal communication with parents.

“Parent” includes a natural parent, a guardian, or an individual acting in place of a parent in the absence of a parent or guardian. When a student turns 18 or enters a postsecondary institution at any age, the

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<sup>1</sup> This is an updated version of a document prepared by Jill Moore and Christine Scheef for the NC School Attorneys’ Conference, UNC School of Government (February 2015).

<sup>2</sup> See US Department of Health & Human Services & US Department of Education, Joint Guidance on the Application of FERPA and HIPAA to Student Records (November 2008), available at [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/ferpa-hipaa-guidance.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-hipaa-guidance.pdf); see also Jill Moore & Aimee Wall, *Must Schools Comply with the HIPAA Privacy Rule?*, School Law Bulletin Vol. 34 No. 2 (Spring 2003), pp. 1-9, available at [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/article1\\_17.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/article1_17.pdf).

<sup>3</sup> Accordingly, records maintained by a school nurse employed by or under contract with, or otherwise under the direct control of, the school system are education records subject to FERPA because they are directly related to a student and are maintained by the school or a party acting for the school. In contrast, records created by a nurse who is not acting on behalf of the school, such as a public health nurse providing immunizations at a school site, are not “education records” under FERPA .

<sup>4</sup> Private and religious elementary and secondary schools generally do not receive funds from the Department of Education and therefore are not typically subject to FERPA.

definition specifically exempts information contained in education records that are covered by FERPA.

An “individual” is a person who is the subject of protected health information.

student becomes an “eligible student” and FERPA rights transfer to the student. FERPA allows sharing of information with parents of eligible students under some circumstances.

Student health records maintained by school employees are part of the education record with only one exception: “Treatment records” of an “eligible student” (i.e., one who is at least 18 or attending a postsecondary school) are not considered part of the education record. “Treatment records” are those made, maintained, and used only in connection with the student’s treatment and not disclosed to anyone other than individuals providing treatment.<sup>5</sup> If disclosed for non-treatment purposes, the records become part of the education record and are subject to all FERPA requirements.

#### Disclosure of Information

The HIPAA Privacy Rule: (1) gives individuals the right to access their own PHI, and (2) establishes the general rule that an individual’s PHI may not be disclosed without the individual’s permission.

If an individual lacks the legal capacity to consent to their own health care, the person who may access the individual’s PHI, or give permission for disclosure of the individual’s PHI, is the individual’s “personal representative.” HIPAA describes “personal representative” as someone who has the legal authority to make health care decisions for the individual, such as the parent of an unemancipated minor child.<sup>6</sup> When an individual is an unemancipated minor, as most K-12 students are, permission to disclose PHI usually must be obtained from the student’s parent.<sup>7</sup> However, if an unemancipated minor

FERPA was enacted in 1974 for two purposes: (1) to provide access to education records for parents and eligible students and (2) to require written consent for disclosure of a student’s personally identifiable information to third parties unless disclosure is allowed by a specific statutory exception to the consent requirement.

School officials must use reasonable methods to authenticate the identity of anyone to whom they disclose education records.

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<sup>5</sup> 20 U.S.C. 1232g(a)(4)(B); 34 C.F.R. 99.3. Treatment records of eligible students may be disclosed to third parties without consent in order for the third-party to provide treatment to the student. Treatment records may not be disclosed for non-treatment purposes without written consent unless one of the exceptions to FERPA’s consent requirement applies.

<sup>6</sup> 45 C.F.R. 164.502(g).

<sup>7</sup> When an unemancipated minor is being raised by an adult other than the parent, such as a legal guardian or a person who is standing in loco parentis, the adult who is responsible for the minor may be the minor’s representative. This can become complicated. For further information, please see Jill D. Moore, Consent to Health Care for Minor Children: Overview of North Carolina Law (May 2016), at

[https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc\\_warehouse/Consent%20to%20Medical%20Treatment%20for%20Minor%20Children%20%28updated%20May%202016%29.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/Consent%20to%20Medical%20Treatment%20for%20Minor%20Children%20%28updated%20May%202016%29.pdf).

receives health care under the NC minor’s consent law,<sup>8</sup> or if an unemancipated minor’s parent agrees to a confidential care relationship between the minor and a health care provider, then the parent is not treated as the personal representative of the minor. In such cases, the minor is the person who must give permission to disclose PHI about the treatment, and the parent does not have a personal representative’s right of access to information about the treatment.

When a person requests PHI from a covered entity, HIPAA requires the entity to verify the person’s identity and their authority to obtain the PHI, unless the identity and authority of the person are already known to the entity.<sup>9</sup>

### Exceptions to Disclosure Rules

There are numerous exceptions to the general rule that an individual’s permission is required to disclose PHI. This handout does not address all of them, but briefly describes three that are frequently invoked by health care providers who treat minors.

Disclosures for treatment purposes: In most cases, HIPAA-covered entities do not need express permission to disclose an individual’s PHI for purposes of “treatment,” as that term is defined by HIPAA.<sup>10</sup> “Treatment” means the provision, coordination, or management of health care and related services by one or more health care providers, including care coordination or management by a health care provider with a third party; consultation about a patient between health care providers; or the referral of a patient from one health care provider to another. A covered entity may disclose PHI for its own treatment activities or for the treatment activities of another health care provider.

There are a number of exceptions to the general rule that written consent of the parent or eligible student is required to disclose education records or personally identifiable information from education records. Four of the most frequently invoked exceptions allowing the release of protected student information to third parties without written consent are described below.<sup>18</sup>

Disclosure to other school officials within the agency or institution whom the agency or institution has determined to have legitimate educational interests: The agency or institution must set criteria for determining who is a school official and what constitutes a legitimate educational interest.

“School officials” includes contractors, consultants, volunteers, and other outside service providers used by a school district or postsecondary institution to perform institutional services and functions. A contractor (or other outside service provider) that is given access to education records under this provision must be under the direct control of the

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<sup>8</sup> In North Carolina, minors who have the capacity to make their own health care decisions may consent to services for the prevention, diagnosis, or treatment of pregnancy, venereal diseases, reportable communicable diseases, emotional disturbance, alcohol abuse, or abuse of controlled substances. G.S. 90-21.5.

<sup>9</sup> 45 C.F.R. 164.514(h).

<sup>10</sup> 45 C.F.R. 164.506. Some information may be protected by other laws that require specific consent to disclose information for treatment purposes.

<sup>18</sup> These exceptions are described in 20 U.S.C. 1232g(b) and 34 C.F.R. Part 99, Subpart D.

Disclosures that are required by law: Covered entities may disclose PHI without an individual's permission when disclosure is required by a law other than HIPAA.<sup>11</sup> For example, a NC law requires any person who has cause to suspect child abuse or neglect to make a report to the county department of social services.<sup>12</sup> For a health care provider, this may involve the disclosure of PHI. Other common "required by law" disclosures that involve PHI include:

- Reporting certain communicable diseases to the local health department.<sup>13</sup>
- Releasing immunization information upon request to certain entities, including K-12 schools.<sup>14</sup>
- Reporting certain serious injuries or illnesses to law enforcement.<sup>15</sup>

Disclosures for public health purposes that are authorized by law: Covered entities may disclose PHI to public health agencies and officials that are authorized by law to collect or receive the information for specific public health purposes, such as controlling or preventing disease or injury.<sup>16</sup> The permission of the individual or personal representative is not required for these disclosures.

Disclosures to minors' parents: Parents are often the personal representatives of their minor children and as such have a right of access to their children's PHI. However, when a minor is treated on his or her own consent under the NC minor's consent law, the health care provider may not disclose information about the minor's care to the parent without the minor's consent unless one of the following applies:

- The health care provider determines that notifying the parent about the minor's treatment is essential to the life or health of the minor.

disclosing institution and subject to the same conditions on use and redisclosure of education records that govern other school officials. In particular, the contractor must ensure that only individuals with legitimate educational interests (as determined by the district or institution, as appropriate) obtain access to personally identifiable information from education records it maintains (or creates) on behalf of the district or institution. Further, the contractor may not redisclose personally identifiable information without consent unless the district or institution has authorized the redisclosure under a FERPA exception and the district or institution records the subsequent disclosure.

Disclosure in connection with a health or safety emergency: Disclosure to appropriate parties<sup>19</sup> is permissible in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. The record holder may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individual. If a health or safety emergency exists, disclosure may be made to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, at the time of the disclosure, the school had a rational basis for its conclusion, the Department of Education will not substitute its judgment for that of school officials. The agency must record the articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure as well as the parties to whom the agency or institution disclosed the information.

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<sup>11</sup> 45 C.F.R. 164.512(a).

<sup>12</sup> G.S. 7B-301.

<sup>13</sup> G.S. 130A-35. More than 70 communicable diseases are reportable in NC. The full list is at 10A NCAC 41A.0101.

<sup>14</sup> 10A N.C.A.C. 41A.0406.

<sup>15</sup> G.S. 90-21.20. For children under 18, serious physical injuries or recurrent illnesses due to nonaccidental trauma must be reported to law enforcement, even if they are also reported to DSS.

<sup>16</sup> 45 C.F.R. 164.512(b).

<sup>19</sup> "Appropriate parties" in this context are normally parties that could provide specific medical or safety attention, such as public health officials, trained medical personnel, a student's parents, and law enforcement officials.

- The parent contacts the health care provider and inquires about the treatment, in which case the health care provider is not required to provide information about the treatment but may do so unless another law prohibits it.<sup>17</sup>

This exception is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student's records.<sup>20</sup>

Disclosure of directory information: "Directory information" is information in a student's education record that generally would not be considered harmful or an invasion of privacy if disclosed. A student's name, address, email address, dates of attendance, grade level, participation in officially recognized activities, and honors are examples of directory information. This exception does not permit a school to disclose directory information on students that is linked to non-directory information. For example, a school may not disclose the names of all students who have been absent from school.

Parents and eligible students must be given notice of what information an educational agency or institution has identified as directory information. They must also be given an opportunity to prohibit the release of directory information pertaining to their child.

Disclosure in response to a subpoena or judicial order: Information may be disclosed to comply with a judicial order or lawfully issued subpoena. A school employee should consult with appropriate administrators before disclosing information. In almost all cases, school administrators must make reasonable efforts to notify parents of the order or subpoena before disclosing the record so that the parents may ask the court to intervene to stop the disclosure.

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<sup>17</sup> G.S. 90-21.4(b).

<sup>20</sup> An emergency does not include the threat of a *possible* or *eventual* emergency for which the likelihood of occurrence is unknown, such as would be addressed in general emergency preparedness activities and does not include efforts to determine *whether* an emergency exists (such as tracking absences due to communicable diseases using personally identifiable information). Disclosures must be "in connection with an emergency," such as an outbreak of an epidemic disease, a natural disaster, a terrorist attack, or a campus shooting. See U.S. Department of Education, Family Educational Rights and Privacy Act (FERPA) and H1N1 (October 2009), available at [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/ferpa-h1n1.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-h1n1.pdf)