



DATA PRIVACY IN SCHOOL NURSING Fact Sheet

Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws (Part I¹)

School nurses collect and are responsible for a vast amount of personal information related to students and their health. This document is designed to help school nurses understand what information they can share, when, and with whom in accordance with federal privacy laws. The primary federal law that governs confidentiality and information sharing by schools is the Family Educational Rights and Privacy Act (FERPA), while the main federal law that controls data privacy and sharing by health care professionals is the Health Insurance Portability and Accountability Act (HIPAA). This document will:

- present a brief overview of each federal law as it relates to the practice of school nursing;
- explore how these laws affect health information privacy and sharing by school nurses with a goal of facilitating communication among schools, health care providers, and families for enhancing continuity of care and improving students' health management at school; and
- address several questions that were submitted by members of the National Association of School Nurses (NASN).

Each state also has its own data privacy laws that may affect data privacy and data sharing, therefore school districts should always refer to the most updated version of state law when deciding how a particular record should be handled. Contact the Network for Public Health Law for assistance on individual state laws.

Family Educational Rights and Privacy Act (FERPA)

FERPA is a federal law that was enacted in 1974 to protect the privacy of students' education records. It applies to educational entities that receive funding under any program administered by the U.S. Department of Education, which includes public elementary and secondary schools and school districts. Most private and religious schools at the elementary and secondary levels do not receive federal funding, and therefore are not



subject to FERPA.² Importantly, an entire private school is not made subject to FERPA if individual students receive federally funded services; the school itself must receive the funds. For example, if a student receives special education services provided with monies set aside under the Individuals with Disabilities Education Act for students placed in private schools³, that student's records are subject to FERPA, but not the records of the other students in the private school.

Registered nurses practicing in a public school setting will almost always be subject to FERPA, and not HIPAA, regardless of whether the health care is provided to students on school grounds or offsite.⁴ This is because HIPAA contains a provision that *expressly excludes* education records that are covered by FERPA, which existed 22 years before HIPAA.⁵ Under FERPA, an education record is one that directly relates to a student and is maintained by the school or an entity acting on a school's behalf. Education records include student health records, such as immunization records, physical exam records, nurses' exam notes in the student's file, health screening results, and records related to special education or student health plans.

FERPA gives parents the right to inspect, review and request amendments to educational records and ensures the privacy of personally identifiable information (PII) contained therein, but the law does provide some exceptions that allow school personnel to share certain PII without parental consent.⁶ For example, school nurses may share PII with appropriate officials in health and safety emergencies and with other school officials that have a "legitimate educational interest" in the information. Beyond the enumerated exceptions, FERPA prohibits schools from disclosing PII⁷ from students' education records without the consent of a parent or guardian (or a student who has reached age 18 or attends a post-secondary institution).⁸ Each year, schools must provide annual notice of students' privacy rights and how the school or school district defines the terms *school official* and *legitimate educational interest* for purposes of PII disclosure.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

HIPAA, along with its associated regulations known as the "Privacy Rule," comprise a federal law that establishes privacy requirements for oral, written, and electronic individually identifiable protected health information (PHI). HIPAA prohibits the sharing of personally identifiable health information by certain "covered entities," including health care providers that generate and receive standard electronic transactions.⁹ Schools may be covered entities if they employ a health care provider that delivers health services and engages in covered transactions, such as billing Medicaid for Medicaid-covered services in the school setting. Nonetheless, because the health information is maintained by the school—or by an entity acting on behalf of the school—it is considered part of the educational record. So, even if the school would be considered a covered entity under HIPAA, it would have to comply with FERPA's privacy requirements.¹⁰ If a school accepts no funding under any program of the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA (e.g., bills Medicaid for eligible health services), HIPAA standards would apply instead.

When HIPAA and FERPA Intersect

While school nurses are almost always subject to FERPA (and, therefore, not HIPAA), their external health care collaborators (e.g., a student's pediatrician or psychologist) must comply with HIPAA. For this reason, it is



important that all providers involved in the care coordination of a child have a working understanding of both laws in order to facilitate communication and sharing of health information.

School nurses often find themselves in a situation where they are interacting with a student's other health care providers, parents, social workers, counselors, etc. The privacy law framework can be confusing. For example, most nurses assume they are always subject to HIPAA, when in most cases they must comply with FERPA instead. The most important point to remember about the interplay of HIPAA and FERPA in the school setting is that health care providers may share health information with a school nurse under HIPAA for "treatment purposes" without parent authorization (the so-called "provider-to-provider" exception under HIPAA). So, a pediatrician may discuss the student's treatment record with the student's school nurse, and the school nurse may contact the physician to *clarify* the physician's recommendations. But once that information is entered into the student's school record, FERPA applies in determining permissible disclosures. FERPA does not contain a provider-to-provider exception, which limits the PII that school nurses can share with other providers. A consent form signed by the parent or guardian that allows schools to share health information with other health care providers would facilitate communication, continuity of care, and management of students' health conditions while they are at school.¹¹

The following questions are based on real inquiries from members of the National Association of School Nurses (NASN).

Who owns the data that school nurses collect?

Privacy law does not place importance on data ownership, but rather on who collects and maintains it (i.e., the data steward). Regardless of who owns the data, privacy laws acknowledge that the person identified by the data retains certain rights to whether and how that information is shared. Thus, state and federal laws grant permissions and impose restrictions on school districts or private schools regarding the maintenance, disclosure, and destruction of school records, which includes data collected by school nurses.¹² For example, FERPA gives parents and students certain rights to access students' educational data and allows schools to charge a fee for copies of the records. This suggests that, while schools may have some ownership interest in the records, such that they can charge a fee for copies, privacy laws impose certain requirements on the possession and disclosure of such data.

If a school nurse maintains personal notes, are they part of the educational record and thus subject to FERPA?

FERPA does not consider a school nurse's personal notes to be part of a student's educational record only if all of the following criteria are met:

1. The notes are used only as a memory aid;
2. They remain in the sole possession of the writer; *and*
3. They are shared with no one except a temporary substitute RN.¹³



If a coordinated care plan is in place among a student's school nurse, parents, and doctor, is the school nurse responsible for notifying a doctor or parent about a student's health issue that occurs after school hours?

Where there is a coordinated care plan in place with the necessary data sharing permissions, school nurses are authorized under FERPA (and HIPAA, if applicable) to share health information with authorized individuals according to the care plan. Whether the school nurse would be "responsible" to share such information is a question of standard of care and professional ethics. Note that parents or guardians may withdraw permission to share a student's health information at any time.

A school nurse provides contraception and related counseling to high school students. A parent calls and demands to know whether his child was given contraception. Is the nurse required to tell him?

It depends on state law. Generally, both FERPA and HIPAA provide a minimum level of required data privacy protection, but both laws allow states to pass laws that provide additional or stronger protections. Under FERPA, if a school nurse has recorded information about individual students, it is considered part of the student's educational record¹⁴ and FERPA *requires* that parents have the right to access their dependent child's (under age 18) education record. (A possible exception is if a school nurse's notations on contraception counseling can be considered "personal notes," as described above.) State law can grant or prohibit parental access to certain health information. Some states allow minors to consent to certain health services, but preserve a parent's right to access related medical records.¹⁵ Other states allow for minors' consent to certain health services *and* prohibit access or disclosure of this information to anyone without the minor's consent. In these states, parents are not entitled to this information without the minor's consent or a court order.¹⁶

If a school accepts no funding under any program of the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA (e.g., bills Medicaid for eligible health services), HIPAA standards would apply instead. HIPAA generally allows parental access to their children's medical records as the minor's "personal representative," but HIPAA defers to state law on the issue of parental access. HIPAA does not consider a parent to be the minor's personal representative where parental consent is not required for certain health services and the minor is the one who consents to care. Nonetheless, if state law allows for parental access in these situations, then HIPAA would also allow access. If state law prohibits parental access, then HIPAA also prohibits access. And where state law is silent regarding parental access, licensed health care providers may exercise professional judgment to grant or deny parental access to a minor's PHI.¹⁷

Are school nurses allowed to use personal cellphones to exchange information about student's health?

Sharing information about a student's health via personal cellphones is typically inadvisable without a written FERPA-compliant consent form signed by the parent or guardian. Text messages generally are not secure because they lack encryption and the sender does not know with certainty that the message is received by the intended recipient. Wireless carriers also may store the text messages. Relatedly, HIPAA allows providers to communicate health information with patients via texts if either (1) the texts are encrypted and/or are otherwise secure; or (2) the covered entity first warns the patient that the communication is not secure and the patient (or parent/guardian) consents to communicate via unsecure text.¹⁸



If schools employ measures that establish a secure communication platform on school nurses' mobile devices, or somehow encrypt messages, communications using these devices may be permissible, but only to recipients otherwise authorized to receive the information (i.e., parents, school officials with a legitimate educational interest, etc.)

Can a list of students' health issues be distributed to teachers or other staff?

A global transmittal of students' health issues that contains identifiable, personal information is not permissible under privacy laws and does not constitute best practice. (Aggregate or de-identified health data may be shared.¹⁹) However, disclosure is permitted to school officials with a legitimate educational interest, as defined by the school or school district. A "legitimate educational interest" generally refers to individuals in the school district who need to know information in the student's education record in order to perform their professional responsibilities.²⁰ If a school accepts no funding at all from the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA, the HIPAA standard would apply instead. That is, a list of student health issues could be distributed without authorization to other health care providers for treatment purposes or other covered entities to facilitate payment for services.²¹

If I am concerned that a student might hurt themselves or someone else, to whom can I report this information?

If a school nurse evaluates the information available at the time and feels that there is an "articulable and significant threat to the health or safety of a student or other individuals, [he or she] may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals."²² If a school accepts no funding at all from the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA, the HIPAA standard would apply instead. Like FERPA, HIPAA permits a health care provider to disclose information about a patient to law enforcement, family members, or other persons if the provider believes the patient poses a serious and imminent threat to self or others.²³

May a school nurse, without consent, disclose health records or other educational records maintained by a school to the public health department?

Yes, a school nurse may disclose PII to public health officials under certain circumstances:

- *Abuse or neglect:* School employees are required to report suspected abuse or neglect. FERPA does not override that responsibility.
- *Certain reportable diseases:* Some communicable diseases require emergent reporting while other diseases represent a less imminent public health threat. For example, the New Hampshire Department of Health and Human Services divides reportable disease into two categories: those that require reporting within 24 hours and those that must be reported within 72 hours. The Family Policy Compliance Office of the U.S. Department of Education has deemed reporting that must occur within 24 hours to constitute "imminent danger." As such, those illnesses may be reported without obtaining consent. The diseases on the 72-hour list do not pose imminent danger, so school officials must obtain consent before disclosing this information.
- *Concern that a student may hurt self or others:* If someone is in imminent danger, no consent is required. (See discussion above re: threat to self or others.)

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- *De-identified data*: It is permissible to share health-related data that does not contain information that makes the student's identity readily traceable.²⁴

Can school nurses and school-based health center staff work in the same space if hired by different entities?

This arrangement generally is not advisable, because the different constraints of HIPAA and FERPA make it very difficult for school nurses to achieve the confidentiality required by federal law. For example, school nurses need to be able to communicate openly and privately with students.²⁵ It is conceivable that physical spaces and record-keeping technologies could be configured to ensure privacy and separation. A HIPAA- and FERPA-compliant data privacy agreement between the hiring entities, in which both agree to conform to the requirements of the law, may address the problem, as well. School-based health clinic contracts with local education agencies should also specify whether clinic records and information is to be deemed separate from educational records.

If a school nurse is asked to attend a multi-disciplinary meeting about a student where community persons (e.g., mental health therapist), school-based health center staff, and/or school staff are present, what can that school nurse share about a child's health?

A school nurse may share pertinent information with school staff if there is a legitimate educational interest, and with non-school staff only if there is parental consent, unless an exception applies under FERPA.²⁶ If a school accepts no funding at all from the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA, the HIPAA standard would apply instead. Under HIPAA, health care providers may disclose PHI without authorization to social services (e.g., counseling, public benefits, social work) or other health care providers for the purpose of treatment, coordination, or management of health care services.²⁷

If a community group conducts a health screening that the school arranges, who controls the records? Can a school nurse share information about a student's health with a volunteer from the organization?

It depends on the relationship between the school and the community organization. If the community group is employed by, under contract with, or otherwise acting on behalf of the school, the school “controls” the records and the screening becomes part of the educational record and thus subject to FERPA. If not, then these records are under the control of the community group, and are not education records and thus not subject to FERPA. Without written consent, a school nurse cannot share a student’s health information with a volunteer (unless there is a data sharing agreement between the volunteer organization and the school that binds the volunteers to federal and state privacy law requirements).²⁸ If a school accepts no funding at all from the U.S. Department of Education (e.g., a private or religious school) *and* qualifies as a covered entity under HIPAA, the HIPAA standard would apply instead. HIPAA requires that all covered entities and their business associates provide training to all members of its workforce—including volunteers—on policies and procedures for protecting PHI.²⁹ A HIPAA-compliant data sharing agreement should be in place between the school and the community organization. School nurses could share PHI with volunteers who have been trained on the school’s HIPAA-compliant privacy policies and procedures for the purpose of treatment, coordination, or health care services.



What are the consequences of violating FERPA? Is there a potential consequence to a nurse's licensing?

Consequences of violating FERPA may include loss of federal funding for the school involved³⁰ and possible sanctions by state nurse licensing entities.³¹ Violators may also face liability under state privacy or tort laws. There is no private right of action under FERPA, but anyone who believes their rights have been violated may file a complaint with the Education Department's Family Policy Compliance Office (FPCO).³²

What information can a school nurse release if served with a subpoena?

A school nurse may release only the information stipulated in and relevant to the subpoena.³³ However, the school must first make a reasonable effort to notify the parent (or eligible student) in advance of compliance, unless the court or other issuing agency has ordered that the contents of the subpoena not be disclosed, or that the protected education records not be included.³⁴

SUPPORTERS



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¹ The Network's Eastern Region recently presented this information for an online NASN training webinar (May 9, 2019. Available online at <https://www.pathlms.com/nasn/courses/12237>). Because it was so successful and there were a number of follow-up questions, a subsequent part of this fact sheet is planned to address those questions.

² 34 CFR § 99.1(d). See also U.S. DEP'T OF HEALTH AND HUMAN SERVS. & U.S. DEP'T OF EDUC., 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 RECORDS (Nov. 2008), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-hipaa-guidance.pdf at 1.

³ See U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *The Individuals with Disabilities Education Act: Provisions Related to Children With Disabilities Enrolled by Their Parents in Private Schools*, Washington, D.C., 2011.

⁴ See Ellen Campbell, *FERPA and Public Health*, November 12, 2010, presentation slides available online at <https://www2.ed.gov/about/offices/list/osdfs/ferpapunpubhealth.pdf>.

⁵ 45 CFR § 160.103 (2)(i) and (ii). Nurses practicing in private or religious schools that do not accept federal funding but qualify as HIPAA-covered entities must comply with HIPAA.

- 6 Under FERPA, education records may be disclosed without consent to: 1) school officials with legitimate educational interests, 2) schools in which a student seeks or intends to enroll, 3) state and local officials pursuant to a state statute in connection with serving the student under the juvenile justice system, 4) comply with a judicial order or subpoena (reasonable effort to notify parent or student at last known address), 5) accrediting organization, 6) parents of dependent student, 7) authorized representatives of federal, state, and local educational authorities conducting an audit, evaluation, or enforcement of education programs, 8) organizations conducting studies for specific purposes on behalf of schools, 9) in a health or safety emergency, 10) child welfare agency or tribal organization for those children in foster care, and 11) directory information.
- 7 “Personally identifiable information” is any information that, alone or in combination with other information, could be used to identify a specific student. PII includes but is not limited to the student’s name, the names of the student’s family members, address, personal identifiers such as the student’s social security number and birth date, and any information that is linkable to a specific student. See Family Educational Rights and Privacy Act Regulations, 34 CFR Part 99 (<https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferparegs.pdf>).
- 8 D Chrysler, *Revised FERPA Regulations May Impact Health Departments Access to Children’s Contact Information*, Network for Public Health Law Blog, May 25, 2012, (https://www.networkforphl.org/the_network_blog/2012/05/25/106/revised_ferpa_regulations_may_impact_health_departments_access_to_childrens_contact_information).
- 9 45 CFR § 160.103. Covered entities that are bound by HIPAA privacy standards include health plans, health care clearinghouses, health care providers who conduct certain transactions electronically, and their business associates. The Centers for Medicare & Medicaid Services have created a useful tool for determining whether an individual or organization is a “covered entity” under HIPAA: <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf>. (Updated June 2016).
- 10 U.S. DEP’T OF HEALTH AND HUMAN SERVS. & U.S. DEP’T OF EDUC., JOINT GUIDANCE, *supra* note 2, at 3-4. See also HHS.gov, Health Information Privacy, Does the HIPAA Privacy Rule apply to an elementary or secondary school? Available online at <https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html>.
- 11 Note that an oral agreement for disclosure of information is not sufficient under FERPA. 34 CFR § 99.30
- 12 U.S. DEP’T OF HEALTH AND HUMAN SERVS. & U.S. DEP’T OF EDUC., JOINT GUIDANCE, *supra* note 2, at 3-4.
- 13 NAT’L FORUM ON EDUC. STATISTICS, FORUM GUIDE TO THE PRIVACY OF STUDENT INFORMATION: A RESOURCE FOR SCHOOLS (2006), <https://nces.ed.gov/pubs2006/2006805.pdf>.
- 14 See Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (1974).
- 15 For example, Maryland law allows—but does not compel—health care providers “to give a parent, guardian, or custodian of the minor or the spouse of the parent information about treatment needed by the minor or provided to the minor...” even if the minor does not consent or objects. Md. Code Ann., Health-Gen. II § 20-102(f).
- 16 See, e.g., Cal. Health & Safety Code §§ 123110(a), 123115(a)(1); Cal. Civ. Code §§ 56.10, 56.11 and VA ST § 54.1-2969.
- 17 See HHS.gov, Health Information Privacy, Personal Representatives 45 CFR 164.502(g), available online at <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/personal-representatives/index.html>.
- 18 Kim C. Stanger, *HIPAA, E-mails, and Texts to Patients or Others*, THE NAT’L LAW REV. (Jul. 4, 2015), <http://www.natlawreview.com/article/hipaa-e-mails-and-texts-to-patients-or-others>.
- 19 *Id.*
- 20 NAT’L FORUM ON EDUC. STATISTICS, FORUM GUIDE TO THE PRIVACY OF STUDENT INFORMATION: A RESOURCE FOR SCHOOLS (2006), <https://nces.ed.gov/pubs2006/2006805.pdf>.
- 21 45 CFR 164.506.
- 22 34 C.F.R § 99.36(c) (1988).
- 23 45 CFR § 164.512(j). See also, Letter from Leon Rodriguez, Department of Health & Human Services, Office for Civil Rights, to Our Nation’s Health Care Providers (January 15, 2013) available online at <https://www.hhs.gov/sites/default/files/ocr/office/lettertonationhcp.pdf>.
- 24 The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(b) (1974); U.S. DEP’T OF EDUC., Letter to Univ. of N.M. re: Applicability of FERPA to Health and Other State Reporting Requirements (Nov. 29, 2004), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>;

N.H. DEP'T OF EDUC., CONFIDENTIALITY AND PUBLIC SCHOOL HEALTH RECORDS (2012), https://www.education.nh.gov/instruction/school_health/faq_records.htm#safety.

²⁵ See U.S. DEP'T. OF EDUC., SCHOOL RESOURCE OFFICERS, SCHOOL LAW ENFORCEMENT UNITS, AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (Feb. 2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf; see also OR. DEP'T OF EDUC., HIPAA AND FERPA FAQ 1 (2008), <https://www.oregon.gov/ode/students-and-family/healthsafety/Documents/hipaaferpafaq.pdf>.

²⁶ 34 C.F.R. § 99.31; see also NAT'L FORUM ON EDUC. STATISTICS, FORUM GUIDE TO THE PRIVACY OF STUDENT INFORMATION: A RESOURCE FOR SCHOOLS (2006), <https://nces.ed.gov/pubs2006/2006805.pdf>.

²⁷ HHS.gov, Health Information Privacy, Does HIPAA permit health care providers to share PHI about an individual with mental illness with a third party that is not a health care provider for continuity of care purposes? Available online at <https://www.hhs.gov/hipaa/for-professionals/faq/3008/does-hipaa-permit-health-care-providers-share-phi-individual-mental-illness-third-party-not-health-care-provider-continuity-care-purposes/index.html>.

²⁸ U.S. DEP'T OF HEALTH AND HUMAN SERVS. & U.S. DEP'T OF EDUC., *supra* note 1, at 4-5.

²⁹ 45 C.F.R. § 164.530(b)(1) and 45 C.F.R. § 160.103.

³⁰ See Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (1974).

³¹ 20 U.S.C. § 1232f- "Secretary of Education is to take appropriate actions to enforce the section and deal with violations of the section"; Thomas E. Myers, *Your Top Ten FERPA Questions - Asked and (Hopefully) Answered*, NAT'L SCHOOL BOARDS ASS'N (Apr. 3, 2015), <https://www.nsba.org/sites/default/files/reports/Top%2010%20FERPA%20Questions%20Asked%20and%20Answered.pdf>.

³² See U.S. DEP'T. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE (FPCO) (Feb. 14, 2018), <https://www2.ed.gov/policy/gen/guid/fpco/index.html>; see also U.S. DEP'T. OF EDUC., FERPA GENERAL GUIDANCE FOR STUDENTS, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>.

³³ 34 C.F.R § 99.31(a)(9)(iii)(A) (1988). For private or religious schools that receive no federal funding and qualify as HIPAA covered entities, HIPAA requirements regarding disclosure of PHI pursuant to a court order or subpoena are very similar, requiring disclosure of only that information stipulated in the order and a good faith effort to contact the patient. 45 CFR 164.512(e)(1)(iii)-(vi).

³⁴ *Id.*; see also NAT'L FORUM ON EDUC. STATISTICS, FORUM GUIDE TO THE PRIVACY OF STUDENT INFORMATION: A RESOURCE FOR SCHOOLS (2006), <https://nces.ed.gov/pubs2006/2006805.pdf>.