

## FERPA, HIPAA and Your Health Center: Get the Facts!

Notes from the online roundtable session held Tuesday, December 9, 2008 at 2:00 p.m. EST. Presenter: LeRoy Rooker, U.S. Dept. of Education

### Overview

- There are three main sets of information privacy laws relevant to your student health or counseling center:
  - FERPA
  - HIPAA
  - State laws
- Family Education Rights and Privacy Act (FERPA) applies to all educational institutions that receive funds under any program administered by the Secretary of Education.
- FERPA governs the privacy of education records.
- However, FERPA excludes what it calls “treatment records” (see Definitions section below) from its definition of education records
- This exclusion is dependent upon the records only being used in connection with treatment. “Treatment” includes counseling and therapy, but does **not** include remedial educational activities.
- As soon as these records are released to someone either i) not connected with treatment of the student or ii) outside your institution, they are no longer considered to be treatment records and instead become education records.
- Health Insurance Portability and Accountability Act (HIPAA) sets standards and requirements to protect the privacy of individually identifiable health information.
- HIPAA however excludes from the definition of “protected health information” **both** “education records” and “treatment records” as defined by FERPA (see Definitions section for complete wording).
- If your college or university bills electronically, it is still considered a “covered entity” by HIPAA.
- As a covered entity, you are required to comply with the HIPAA Administrative Simplification Rules for Transactions and Code Sets and Identifiers for those transactions.

### Understanding the basics of how these rules apply to you:

- FERPA never applies to non-students.
- FERPA’s rules about education records are only applicable when the student’s treatment records are released.
- **HIPAA will not apply to your health center** – even if you treat non-students - **unless** you perform electronic transactions (bill electronically).
- If you perform electronic transactions, your health center must comply with HIPAA rules about using standard code sets (part of the Administrative Simplification Rules), but need only comply with HIPAA **privacy laws** for those transactions relating to non-students.
- State laws are applicable whether or not other federal laws apply – consult with your legal counsel on campus to make sure you are fully aware of these laws.
- If state law and FERPA have differing requirements for a particular situation, the most stringent law applies.
- Treatment records only become education records when they are released, not when someone requests their release. You can deny a request for release of treatment records without violating FERPA – just make sure you’re in accordance with state laws.

## Questions about practical examples:

### **Q: Aren't treatment records required to follow FERPA?**

**A:** Treatment records are specifically excluded from FERPA's definition of education records and so state law will generally be the only law that needs to be followed until these records are released for any reason.

### **Q: Do psychotherapy notes and treatment records fall under FERPA if shared with other providers?**

**A:** Psychotherapy treatment records are still considered "treatment records" by FERPA and therefore can be shared with other providers within your health and counseling center for the purposes of treatment without becoming "education records".

### **Q: Can counseling centers and the student health center discuss a student's treatment without a consent?**

**A:** Yes. If the discussion relates to treatment of the student, the records remain "treatment records".

### **Q: Can faculty share information regarding a student's progress to a Risk Assessment committee?**

**A:** Yes, absolutely. However, this sharing of information will cause their "treatment record" to become an "education record" and therefore subject to FERPA's regulation of education records.

### **Q: If the assistant dean of student affairs calls the health clinic and asks if a particular student has made or followed through with a mental health visit with a CNP or counselor, can the health clinic discuss this information without a release?**

**A:** Under FERPA, if you believe the assistant dean has a legitimate educational interest, you may discuss this information without the student's consent, although your release of this information will mean the student's "treatment record" becomes an "education record" under FERPA. However, **FERPA only applies once you release the records**, so you're not required by FERPA to give the assistant dean this information just because he or she has asked. State law and your institution's guidelines may inform your decision about what to do in these kinds of situations.

### **Q: What circumstances allow a clinician to disclose a treatment record to other college staff under FERPA?**

**A:** 34 CFR §.99.31 gives the exceptions that permit you to disclose information from the student's records without prior signed consent, and one of these exceptions is if you're releasing it to school officials with a legitimate education interest. It might be for disciplinary purposes or accommodations purpose, or to a risk assessment team – it can be for various reasons, as long as they have a legitimate educational interest.

### **Q: How does this apply to student employees? Are their health records subject to FERPA or HIPAA?**

**A:** The health records of students, regardless of whether they are working at the university, are excluded from HIPAA. They would either be considered "treatment records" by FERPA or "education records" (if they had been released).

### **Q: How long should records be held at the student health center after the student has left college?**

**A:** It's up to the institution whether it maintains those records at all – FERPA does not require that these records be kept for any length of time. You would want to check your state laws though, in case they have any requirements. FERPA's only stipulation is that if a student has requested to see them, they should not be destroyed until this request has been fulfilled.

### **Q: Are charges for treatment posted on a student's bursar account considered as electronic billing?**

**A:** Billing records are considered to be education records rather than treatment records.

**Q: Are treatment records ever impacted by HIPAA?**

**A:** Not within your institution. If you share them with the student's physician outside the institution, then they would be subject to HIPAA, but they would still be considered treatment records back at the institution.

**Q: Is it OK for your college or university to be a hybrid entity?**

**A:** Yes, because that way your institution could be a covered entity under HIPAA and have electronic transactions of non-students subject to HIPAA, but still have student health records be subject to FERPA (whether as education records or under the treatment record exception).

**Q: Do students need to sign a consent to get a copy of their own student health record to keep for themselves or for another program in the college?**

**A:** They actually don't have any rights to access their "treatment records". If you choose to release them to the student, that's fine, and they don't need to sign a consent, but they become education records under FERPA.

**Q: Could you review the exceptions to needing consent to release information under FERPA?**

**A:** Under 34 CFR § 99.31, it states you **may** disclose (note that it's permissible, not required) without signed consent to a number of parties in a number of situations. These include, but are not limited to:

- To school officials at the institution determined to have a legitimate educational interest
- To another school at which a student seeks or intends to enroll
- To authorized representatives of the Secretary of Education, state and local educational authorities, comptroller general, even the attorney general. This can only be for the purposes of an audit or evaluation of an educational program, or for enforcement purposes.
- To accrediting organizations
- To parents of a dependent student (defined under IRS tax code, i.e. parents claim the student as a dependent on their tax return)
- In relation to financial aid
- To parents or other appropriate parties in connection with a health or safety emergency
- [Click here to read § 99.31 of Title 34 of the Code of the Federal Register for more guidance.](#)

**Q: What privacy law covers medical records that are provided to an institution by an outside individual and kept at the university for treatment purposes?**

**A:** They could meet the treatment record exception if they were provided by an outside physician to the health center at the institution because they were only shared in relation to treatment. Otherwise they would be considered education records subject to FERPA.

**Q: If a student signs a general consent with the institution's Registrar's Office allowing release of FERPA records to parents, does this allow for release of treatment records without an additional or more specific consent?**

**A:** Generally, if those treatment records haven't been turned into education records, then you would be well advised to get a separate consent that deals specifically with treatment records. If they've been shared and therefore are considered educational records under FERPA, they're included in that consent.

## Definitions

### Education records

Beneath is a partial definition - [click here for FERPA's complete definition of education records](#):

....(b) The term does not include:

.... (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;

(Authority: 20 U.S.C. § 1232g(a)(4))

### Protected health information

[Click here to read the complete definition from the Department of Health and Human Services in context](#)

**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 any medium described in the definition of electronic media at § 162.103 of this subchapter; or
- (iii) Transmitted or maintained in any other form or medium.

(2) **Protected health information** excludes individually identifiable health information in:

- (i) Education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. 1232g; and
- (ii) Records described at 20 U.S.C. § 1232g(a)(4)(B)(iv).

## Other sources of information

The Family Compliance Office home page:

<http://www.ed.gov/policy/gen/guid/fpco/index.html>

Final FERPA Regulations (Dec 2008):

<http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf>

New FERPA-HIPAA joint guidance document:

<http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hippa-guidance.pdf>

Nuesoft Xpress article "Everything you've always wanted to know about HIPAA and FERPA (but were afraid to ask):

<http://www.nuesoftxpress.com/ferpa>

Informal questions about FERPA: e-mail [FERPA@ed.gov](mailto:FERPA@ed.gov)

Informal questions about HIPAA: e-mail [OCRPrivacy@hhs.gov](mailto:OCRPrivacy@hhs.gov)