

HIPAA AND FERPA COMPARISON TOOL



| Guiding Question or Key Aspect | HIPAA | FERPA |
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| What is it? What are the general requirements? | The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule is a federal law that protects the privacy of patient health information. ¹ | The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of students' personal records. ² |
| Who is subject to the law? | "Covered entities" and at times those who contract with covered entities. ³ | "Educational agencies or institutions" and at times those who act as an agent of an educational agency. ⁴ |
| What information is covered? | "Protected health information" (PHI) - individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information. ⁵ | "Education records" - records, files, documents, or other materials that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution. ⁶ This includes health information in an education record. |
| What information is not subject to this law? | <p>Examples include:</p> <ul style="list-style-type: none"> • De-identified health information.⁷ • Health information held in an "education record" subject to FERPA.⁸ | <p>Examples include:</p> <ul style="list-style-type: none"> • Communications that are not recorded in any form, such as the contents of a conversation between a teacher and student in a hallway.⁹ • Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.¹⁰ • Treatment records of a student 18 and older when used only in connection with treatment.¹¹ |
| Does the law usually require a signed release to disclose protected information? | Yes. ¹² | Yes. ¹³ |
| Who signs an authorization to release a minor's information? | A parent, guardian or other person with authority under the law to make health decisions for an unemancipated minor signs in most cases. ¹⁴ | In most cases, a parent ¹⁵ must sign that release. FERPA defines "parent" to include "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian." |
| May a youth under age 18 sign a release? | Yes, in some cases a minor must sign the release. ¹⁶ | No. |
| Does it prescribe what the release must include to be legally valid? | Yes, but note state laws. ¹⁷ | Yes. ¹⁸ |

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| May an agency ever limit or withhold information from parents? | Yes. For example, if state law restricts parent access or in situations of endangerment. ¹⁹ See endnote. | Only if there is a court order or other legal document specifically revoking the right. ²⁰ |
| Does the law allow disclosures without need of a signed release? | Yes. Exceptions in HIPAA allow and sometimes require disclosures without a release. ²¹ Some examples include: <ul style="list-style-type: none"> • For treatment purposes.²² • For payment purposes.²³ • For research purposes.²⁴ • To comply with mandated child abuse and public health reporting requirements.²⁵ • Additional exceptions also exist.²⁶ | Yes. Exceptions allow disclosures. ²⁷ Some examples include: <ul style="list-style-type: none"> • Sharing de-identified information.²⁸ • Sharing “directory information.”²⁹ • Sharing with “school officials”³⁰ in the same educational agency who have a “legitimate educational interest” in the information³¹ • Additional exceptions also exist.³² |
| Does the law allow disclosures in order to prevent danger or harm? | Yes, to lessen a serious and imminent threat based on criteria in HIPAA. ³³ See endnote. | Yes, in a health or safety emergency based on criteria in FERPA. ³⁴ See endnote. |
| Does the law allow disclosures of health information in a file to teachers or principals without a signed release? | Not usually. There is no exception in HIPAA that generally allows health care providers to share information with school officials; however, there may be specific scenarios in which such release would be allowed under another exception, such as the “imminent threat” exception described in endnote 34. | Yes, sometimes. ³⁵ There are several exceptions that might apply to allow such release in a given scenario, such as the “legitimate educational interest” exception described in endnote 32. |
| Does the law allow disclosures of health information to other health providers? | HIPAA permits health care providers to disclose protected health information to other health care providers for “treatment” purposes. HIPAA defines “treatment” broadly in this context to include coordination or management of health care, consultation and referral as well as direct treatment. ³⁶ | No exception generally allows release of health information in an education record to health care providers; however, there may be specific scenarios in which such release would be allowed under another exception, such as the health or safety emergency exception described in endnote 35. |
| Effect or interaction with State law | States may have their own confidentiality laws. Covered entities must attempt to comply with both federal and state law. When state law provides greater confidentiality protection than HIPAA, providers usually must follow the state law. ³⁷ | States may have their own confidentiality laws. Educational agencies must attempt to comply with both. To the extent that provisions of FERPA conflict with state law or regulation, FERPA usually preempts state law. ³⁸ |

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| What to look for in state law | <ul style="list-style-type: none"> • Who has health consent rights, which in turn impacts who may sign HIPAA authorizations to release information. • Laws that describe what information parents may or may not access in their minor child’s records. • Additional requirements for authorization to release forms. • Limits and clarification on exceptions. | <ul style="list-style-type: none"> • Local district and agency policies. • Definitions in state law or local policy that add further clarification. For example, district policy may include definitions of “school official” and “directory information” that impact application of FERPA. • Implementation policies. |
| Are there administrative requirements? | <p>Yes, including but not limited to:</p> <ul style="list-style-type: none"> • Notice of Privacy Practice. • Document retention requirements. • Documenting access to records. • Required forms. • Security requirements. | <p>Yes, including but not limited to:</p> <ul style="list-style-type: none"> • Annual notices of rights. • Required local policies. • Record retention rules. • Documenting access to record. • Required forms. |

¹ 45 C.F.R. § 160.103.

² 20 U.S.C. § 1232g.

³ HIPAA defines “covered entity” as health plans, health care clearinghouses, and health care providers who transmit health information in electronic form related to certain types of transactions. 45 C.F.R. § 160.103.

⁴ “Educational agencies or institutions” are defined as institutions that provide direct instruction to students, such as schools; as well as educational agencies that direct or control schools, including school districts and state education departments. 34 C.F.R. § 99.1(a). Almost all public schools and public school districts receive some form of federal education funding and must comply with FERPA. Organizations and individuals that contract with or consult for an educational agency also may be subject to FERPA if certain conditions are met. *See e.g.* 34 C.F.R. § 99.31(a)(1)(i)(B) (“A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party-- (1) Performs an institutional service or function for which the agency or institution would otherwise use employees; (2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and (3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.”).

⁵ See 45 C.F.R. § 160.103 for definition of protected health information.

⁶ 20 U.S.C. § 1232g (a)(4)(A) (“... the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”).

⁷ 45 C.F.R. § 160.103.

⁸ 45 C.F.R. § 164.103 (“*Protected Health Information*...Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. § 1232g;”).

⁹ 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.

¹⁰ 34 C.F.R. § 99.3(b)(1) (“*Education Records*’... (b) The term does not include: (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.”).

¹¹ 34 C.F.R. § 99.3(b)(4) (“(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”).

¹² Generally, health care providers cannot disclose information protected by HIPAA without a signed authorization. 45 C.F.R. §§ 164.502(a), 164.508.

¹³ 34 C.F.R. § 99.30.

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¹⁴ 45 C.F.R. §§ 164.508, 164.502(g)(1)&(3).

¹⁵ 34 C.F.R. § 99.3 (“Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.”)

¹⁶ An unemancipated minor must sign the authorization in any of the following situations: (1) the minor consented to the underlying health care, (2) the minor lawfully may obtain care without the consent of a parent or person acting in loco parentis, and the minor, a court, or another person authorized by law consented for the care, or (3) a parent, guardian or person acting in loco parentis assents to an agreement of confidentiality. 45 C.F.R. § 164.502(g)(i). Thus, who signs will depend in part on what other laws, including state law, say about when other adults may act on behalf of minors in making health decisions and when minors may obtain care on their own.

¹⁷ 45 C.F.R. § 164.508(c). It also is important to check state law as state law may impose additional requirements for a release to be valid.

¹⁸ 34 CFR § 99.30.

¹⁹ When a parent consented for the child’s health services, the parent, as personal representative, generally has a right to access the records unless there is a court order limiting that access. However, even where a parent otherwise has a right of access under HIPAA, there are some exceptions. For example, HIPAA defers to state law if state law limits access and HIPAA gives the health care professional discretion to withhold the child’s health record in some cases, such as when the health provider in their professional judgment believes disclosure may put a patient in danger. See 45 C.F.R. §§ 164.502(g)(3)&(5) for more details. It also is important to check state law.

²⁰ 34 C.F.R. § 99.4.

²¹ 45 C.F.R. §§ 164.506, 164.512.

²² 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506.

²³ 45 C.F.R. §§ 164.502(a)(1)(ii), 164.506.

²⁴ 45 C.F.R. § 164.512(i).

²⁵ 45 C.F.R. § 164.512(b)(1)(i)&(ii).

²⁶ For example, see exceptions in 45 C.F.R. §§ 164.502(a)(1), 164.512.

²⁷ 34 C.F.R. § 99.31.

²⁸ 34 C.F.R. § 99.31(b).

²⁹ Directory information may be shared with the public if the school and district have given public notice to parents and the opportunity to opt out. 34 C.F.R. § 99.37. The U.S. Department of Education provides a Model Notice for Directory Information, available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html>. The scope of the term ‘directory information’ will depend on district policy, but can include the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C. § 1232g(a)(5)(A).

³⁰ The term “school official” includes school staff, such as teachers, counselors, and school nurses. A school or district may define this term more broadly in its School Board Policies so that it also includes outside consultants, contractors or volunteers to whom a school has outsourced a school function if certain conditions are met. See 34 C.F.R. § 99.31(a)(1)(i).

³¹ 20 U.S.C. § 1232g (b)(1); 34 C.F.R. § 99.31(a)(1)(i)(A).

³² See 34 C.F.R § 99.31.

³³ HIPAA says that a provider may disclose information, consistent with applicable law and ethical principles, if the provider in good faith believes the disclosure:

(1) is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

(2) is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.

There is a presumption that a provider acted in good faith in making such a disclosure if the provider’s belief is based on actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority. 45 CFR § 164.512(j)(1), (4). It is important to assess whether any state law applies in these situations as well, and if so, how it intersects with HIPAA.

³⁴ 34 C.F.R §§ 99.31(a)(10), 99.36. FERPA authorizes disclosures to “appropriate parties” in response to a specific situation that poses an imminent danger. The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.” 34 C.F.R. § 99.36; U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>; U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Martha Holloway, Alabama Dept. of Educ.,” Feb. 25, 2004.

³⁵ While FERPA typically requires a signed release, an exception allows school staff to share information with “school officials” in the same educational agency who have a “legitimate educational interest” in the information. The term “school official” includes school staff, such as teachers, counselors, and school nurses. A school or district may define this term more broadly in its school policies so that it also includes outside consultants, contractors or volunteers to whom a school has outsourced a school function if certain conditions are met. The school official must have a “legitimate educational interest” in the information. This has been defined to mean that the school official needs the information to perform his or her official duties. 20 U.S.C. § 1232g (b)(1); 34 C.F.R. § 99.31(a)(1)(i)(A).

³⁶ 45 C.F.R. § 164.501.

³⁷ 45 C.F.R. §§ 160.203, 164.202.

³⁸ If an educational agency believes there is an actual conflict between obligations under state law and its ability to comply with FERPA, the educational agency must notify the U.S. Department of Education’s Family Policy Compliance Office. 34 C.F.R. § 99.61.