

Focus:PHI

The Center of Excellence for Protected Health Information



Federal Health Privacy Laws: Basics for School Professionals

(2 Part Series)



Session 1

March 14, 2023: 1:00-2:00 PM EST

Funded by Substance Abuse and Mental Health Services Administration



Zoom Features & Logistics

All attendees are muted and cannot share video.

Closed captioning is available! Click the 'CC' icon for options.

Have a question for the presenters? Use the Q&A Pod!

Have an audio or tech issue? Relevant resources to share with other participants? Use the Chat Box!

You will receive an email within a week from today's session with access to the session recording, slide deck, and certificate of attendance.



Important Information



This Zoom Meeting will be audio-recorded.



By joining this session, you automatically consent to the recording and note-taking.



This is a safe space- questions and poll responses are anonymous, so please feel free to openly share your opinions. We want to hear from everyone!



Center of Excellence for Protected Health Information

Funded by SAMHSA, the CoE-PHI develops and disseminates resources, training, and TA for states, healthcare providers, school administrators and individuals and families to improve understanding and application of federal privacy laws and regulations, **including FERPA, HIPAA, and 42 CFR Part 2**, when providing and receiving treatment for SUD and mental illness.

Resources, training, technical assistance, and any other information provided through the CoE-PHI do not constitute legal advice.

The MHTTC Network

Funded by SAMHSA, the Mental Health Technology Transfer Center (MHTTC) Network includes 10 Regional Centers, a National American Indian and Alaska Native Center, a National Hispanic and Latino Center, and a Network Coordinating Office.

Our collaborative network supports resource development and dissemination, training and technical assistance, and workforce development for the mental health field.

Through our MHTTC School Mental Health Initiative, we bring awareness, disseminate information and provide technical assistance and training on the implementation of mental health services in schools and school systems.

Visit the MHTTC website to learn more at <https://mhttcnetwork.org/>



Learning Objectives

Describe how federal health privacy laws (e.g., HIPAA and FERPA) apply to student mental health information

Explain how student mental health information can be protected and shared in compliance with federal health privacy laws

Learning Objectives (continued)

Discuss common scenarios involving student MH information that arise in school settings through case study discussions led by clinical and legal experts

Demonstrate how relevant resources and technical assistance can be accessed through the MHTTC Network and the CoE-PHI

Presenters



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Privacy regulations protect your students and help you to understand the boundaries in protecting and sharing information about students and families.

Introduction to Student Privacy Protections

WHY THIS IS IMPORTANT



A Clinician's Perspective

- Our first priority is the safety and wellbeing of our students
- First potential student interface with the mental health system
- We want to create a relationship that is based on trust and support, with a long-term view
- Critical to be able to discuss the realities around our communications with students, the schools, and caregivers

Poll Question #1

Have students using your services expressed concern about their information being disclosed to their parents?

- Yes
- No
- Not sure

Poll Question #2

Have students using your services expressed concern about their information being disclosed to other individuals in the school setting?

- Yes
- No
- Not sure



Rationale for Confidentiality Protection

- Avoid negative health outcomes
 - Protect health of adolescents
 - Protect public health
- Encourage adolescents to seek needed care
- Supported by research findings



Privacy Concerns

- Many adolescents have privacy concerns
- Adolescents are primarily concerned about disclosure of information to their parents related to:
 - sexual behaviors
 - substance use
 - mental health



Effect of Privacy Concerns on Behavior

- Privacy concerns can influence:
 - Whether adolescents seek care
 - When adolescents seek care
 - Where adolescents seek care
 - How openly adolescents talk with health care provider



Student Mental Health Information

OVERVIEW OF FEDERAL

PRIVACY LAWS

FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)



Purpose of FERPA

- Federal Family Educational Rights and Privacy Act
 - Protect the privacy of educational records
- Assure access to records
 - Parents
 - Eligible students



What Does FERPA Protect?

- “Education Records”
- Records, files, other documents, which:
 - Contain information directly related to a student; and
 - Are maintained by an educational agency or institution or by a person acting for such agency or institution



"Education Records" & Health Info

- **Education records may include certain health information:**
 - Records maintained by a school nurse
 - IEP and other special education records maintained by the school although these are subject to specific IDEA confidentiality rules
 - Immunization records in school file
- **Education records do not include:**
 - "Treatment records"
 - Students age 18 or older
 - Maintained by specified health care professionals (*e.g., physician, psychiatrist, psychologist, or other paraprofessional*) and available only to persons providing treatment

FERPA Access Rules

- Who has access to education records?
 - With rare exceptions, parents must be allowed to review and inspect records on request
 - Access to records by anyone other than a parent is restricted without the consent of a parent or eligible student, except in a few circumstances
 - “Eligible student” – age 18 or older or enrolled in postsecondary educational institution – has access and control of their own records

Exceptions to FERPA Access Rules

- Education records may be released without parent or eligible student consent:
 - To other school employees ...
 - “Directory information”
 - Health or safety emergency
 - Child abuse reporting

Poll Question #3

Protected Records

True or False?

FERPA only protects written records and does not apply to information received verbally or mental recollections.

Poll Question #3

Protected Records

Answer

- **True:** FERPA only applies to written records. Information received verbally may be protected by other applicable privacy laws or a provider's professional ethical duty of confidentiality.

HIPAA PRIVACY RULE



Information Affected by HIPAA Privacy Rule

- “Protected health information”
 - Health information
 - Individually identifiable
 - Created or received by a covered entity
- “Education records” covered by FERPA
 - Excluded from definition of “protected health information” in the HIPAA Privacy Rule

To Whom Does HIPAA Privacy Rule Apply?

- “Covered entities”
 - Health plans
 - Health care clearinghouses
 - Health care providers
- Many/most health care/mental health professionals and sites caring for adolescents
 - Not necessarily those providing services in schools



HIPAA Privacy Rule in School Settings

- Are School Health/MH Professionals and SBHCs Covered Entities under HIPAA?
 - Do they furnish, bill, or receive payment for health care in the normal course of business?
 - Do they conduct covered transactions?
 - Are any of the covered transactions transmitted in electronic form?
 - A CMS [decision tool](#) can help determine whether a person, business, or agency is a covered entity

HIPAA Privacy Rule Rights re: PHI

- Rights of individual
 - Access to information/PHI
 - Some control over disclosure of PHI
 - Request privacy protection
- Rights of parents
 - Parents are generally personal representative of minor child
 - Personal representative has access to PHI

HIPAA Privacy Rule: Disclosure to Others

- Disclosure without authorization
 - Treatment
 - Payment
 - Health care operations
 - Other exceptions:
 - Child abuse reporting
 - Prevention of serious or imminent threat to individual, another person, or the public

- Disclosure with authorization
 - To anyone else
 - Authorization of parent?
 - Authorization of minor?

HIPAA PRIVACY RULE AND MINORS AS INDIVIDUALS

Minors as "Individuals" Under HIPAA

- Minors are treated as "individuals" under HIPAA Privacy Rule in 3 circumstances:
 - Minor has the right to consent and has consented; or
 - Minor may obtain care without parental consent and the minor, a court, or someone else has consented; or
 - Parents accede to confidentiality agreement between minor and health care provider
- Minor acting as "the individual" can exercise rights re "protected health information"

HIPAA Privacy Rule re: Disclosure to Parents

- When minor is “the individual”
 - Deference to state or other laws (e.g., state minor consent laws)
 - If state or other law requires it, provider must disclose
 - If state or other law prohibits it, provider may not disclose
 - If state or other law permits it, provider has discretion to disclose
 - If state or other law is silent or unclear, provider has discretion to grant or withhold access

Exception in cases of abuse, neglect, and endangerment

- Provider may elect not to treat a minor's parent as their personal representative if:
 - **(1)** Provider has a reasonable belief that
 - The minor has been or may be subject to domestic violence, abuse, or neglect by the parent, *or*
 - Treating the parent as the personal representative could endanger the minor
 - **(2)** And, in the provider's professional judgment, it is not in the best interest to treat the parent as the minor's personal representative
 - **(3)** No state law or any other requirement to the contrary

State Minor Consent Laws

- Every state has some laws that allow minors to consent for their own care in specific circumstances
- Laws are based on either
 - Status of minor (e.g., emancipated, homeless, parenting)
 - Specific health service (e.g., STI/HIV, outpatient mental health, substance use)
- Some minor consent laws also contain confidentiality or disclosure provisions

Poll Question #4

HIPAA

True or False?

Parents always have access to their adolescent child's health information under HIPAA

Poll Question #4

HIPAA

Answer

- **False:** HIPAA defers to state and other laws that determine parents' access when an adolescent minor is allowed to consent for their own care. HIPAA also may limit parents' access to a child's PHI in situations involving abuse or endangerment.

HIPAA OR FERPA

Student MH Records HIPAA or FERPA?

- Who is providing the service?
- Is the information PHI?
- Is the information part of an “education record”?
- Is the information part of a “treatment record”?

SBHC Records HIPAA or FERPA?

- SBHCs/sponsoring agencies
 - Usually “covered entities” under HIPAA
 - If SBHCs are “covered entities” they must follow the HIPAA Privacy Rule with respect to students’ “protected health information”
- Education records are excluded from definition of “protected health information” in HIPAA Privacy Rule
 - If SBHC records fall within the definition of “education records” under FERPA
 - SBHC must follow FERPA rather than HIPAA access and disclosure rules

When Are Records Subject to FERPA?

- [Joint Guidance](#) from federal Office of Civil Rights in the Department of Health and Human Services and federal Department of Education
- Whether the information or records are subject to HIPAA or FERPA depends on the relationship between the school-based provider and the educational agency
 - Case by case assessment
 - Relevant factors include:
 - Funding
 - Operational and administrative control
 - Services and functions provided

HIPAA and FERPA

- Similarities:
 - Generally restrict access to records
 - Require written authorization/consent for release
 - Some exceptions that allow disclosure without need of written authorization/consent
- Differences:
 - Parent access rules
 - Who must sign an authorization/consent for release
 - Opportunities for information exchange exist under both laws; however, who may exchange information with whom, without a written authorization, is different



Poll Question #5

HIPAA & FERPA

True or False?

If a healthcare provider's records fall under FERPA, they cannot also fall under HIPAA.

Poll Question #5

HIPAA & FERPA

Answer

- **True:** The HIPAA definition of "protected health information" specifically excludes any education records protected by FERPA.

42 CFR PART 2 (PART 2)



What is Part 2?

- Federal substance use disorder (SUD) privacy law and regulations
 - 42 USC 290dd-2 and 42 CFR Part 2
- Protects SUD treatment records provided by school and community-based SUD treatment providers, *if* records originate at a "Part 2 program"
- Part 2 protections generally follow the information even after it leaves a Part 2 program



What is a Part 2 program?

- A substance use disorder treatment provider that is both "federally assisted" and a "program," as defined in the regulations
- Examples:
 - Opioid treatment program that dispenses methadone
 - Outpatient SUD wing of a general hospital that is a certified Medicaid provider
 - Identified SUD unit of a non-profit community mental health center (CMHC)
 - Identified SUD counselor in school clinic whose primary function is providing SUD services and has DEA registration

What information does Part 2 protect?

- Anything that identifies someone as seeking or receiving treatment from a Part 2 program
 - Examples: name, address, date of birth, social security number, photograph, fingerprints, status in program, diagnosis, treatment, medications, test results, etc.
- Includes information in any form – written, verbal, or electronic



How does Part 2 protect patient privacy?

- Generally requires written patient consent before disclosure
 - Limited exceptions apply: mandated reports of child abuse/neglect, medical emergencies, crime on program premises or against program personnel, etc.

How does Part 2 treat minor patients?

- Defers to state law definitions of "minor"
 - State law also dictates whether minor can consent to their own SUD care
- **Generally, Part 2 requires minor patient's signature even for disclosure to parents**
 - One exception when minor is *applying* to services and program director determines that there is a substantial threat to life or physical well-being, disclosure to parent may reduce threat, and minor lacks capacity due to extreme youth or mental or physical condition preventing rational decision making
- Whether parent's signature also required for disclosures also depends on state law

Poll Question #6

HIPAA & FERPA

True or False?

If a healthcare provider's records fall under FERPA, they cannot also fall under Part 2.

Poll Question #6

HIPAA & FERPA

Answer

- **False:** Some school-based substance use disorder treatment providers will meet the definition of a "Part 2 program," so their records will be protected by Part 2 *as well as* FERPA. Note the difference with HIPAA / FERPA!

21ST CENTURY CURES ACT

21st Century Cures Act - 2016

- Key requirement = develop rules to enhance patient access to and control of their health data
 - Electronic health information blocking (EHI)
 - Interoperability
 - Health IT certification
- Impact on patients, physicians, payers, technology developers, and other health care providers and stakeholders

21st Century Cures Act

ONC Rule - 2020

- Office of the National Coordinator for Health Information Technology (ONC)
 - "21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program" (ONC Rule)
- Patient access to EHI
- Ban on "information blocking"
 - 8 exceptions to information blocking
 - Preventing harm
 - Privacy
 - Infeasibility



Does 21st Century Cures Apply to Student MH Information?

- Information blocking applies to “Actors”
 - Health care providers
 - Health IT developers of certified health IT
 - Health Information Network (HIN) or Health Information Exchange (HIE)
- May apply to some health care providers of mental health services in schools

Information Blocking Rule for Student MH Records

- 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program (ONC Rule) created new prohibitions on "blocking" access to individuals' health information
 - Exceptions include a "privacy" exception, so still need patient consent if stricter privacy law applies (like 42 CFR Part 2)
- Information Blocking Rule may apply to some MH professionals in school settings

INTERSECTION OF HEALTH PRIVACY LAWS



Intersection of Privacy Laws

State and federal privacy laws must be understood in relation to each other

- **HIPAA Privacy Rule**
 - Excludes education records covered by FERPA from PHI
 - Defers to state and other laws on whether parents have access when child is considered the “individual” and has consented to care
- **FERPA**
 - May give parents access to health information in education records that they would not have if HIPAA Privacy Rule applied



Intersection of Privacy Laws

(continued)

State and federal privacy laws must be understood in relation to each other

- Part 2
 - Provides certain protections for minors who are authorized to consent for SUD care under state law
- 21st Century Cures Act
 - Includes exception to ban on information blocking if necessary to comply with federal or state privacy laws

**Confused about the overlap between
privacy regulations for students and families?
You're not alone.**

**Privacy regulations can help protect students and
school staff, and improve
treatment outcomes.**

KEY POINTS TO REMEMBER

Key Points

- Know your state laws around informed consent and confidentiality for minors
- Know how the federal laws affect students' health privacy
- Tell the student who you work for and why it matters in terms of their information
- Let the student know up front what information is confidential and who has access to the visit record
- Know your responsibility as to what information to share with the student's family and/or school and when to share it



Questions?

Please utilize the Q&A pod to ask any questions you may have.



ACCESSING THE MHTTC AND THE CoE-PHI

Accessing the CoE-PHI



Technical Assistance

Technical assistance (TA) provided by the Center of Excellence for Protected Health Information (CoE-PHI) aims to support implementation of relevant federal confidentiality and privacy laws for providing mental health and substance use disorder services to clients in practice.

TA is designed to clarify confidentiality regulations and laws, link professionals to helpful resources, and identify strategies to support practical implementation of confidentiality and privacy regulations in practice.

Before requesting Technical Assistance, consider visiting our Resource Library, as answers to many frequently asked questions regarding federal health privacy laws are contained within our resources.

[REQUEST TECHNICAL ASSISTANCE →](#)

Request TA

coephi.org/technical-assistance

Resource Library

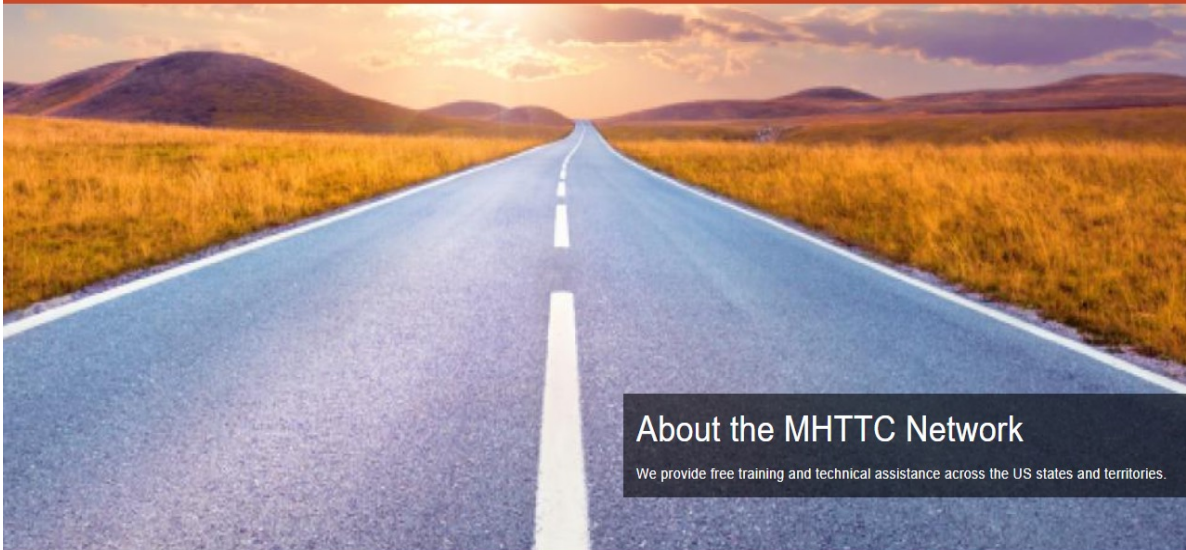
coephi.org/resource-library/

**Confidentiality is a cornerstone of recovery.
Protecting patient privacy opens doors to communication,
understanding, and trust.**

Accessing the MHTTC Network



YOUR MHTTC ▾ TRAINING AND EVENTS ▾ RESOURCES ▾ PROJECTS ▾ COMMUNICATION ▾ ABOUT ▾



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The MHTTC Pathways is a monthly e-pub with information and news relevant to the

GET INFORMED!

Search our Products & Resources Catalog to find tools you can use to improve services!

GET TRAINED!

Search our calendar of upcoming trainings and events to find a training to fit your needs!

Visit our website!

www.MHTTCnetwork.org



@MHTTCNetwork

For questions about the MHTTC School Mental Health Initiative, contact Jessica Gonzalez jegonzalez@Stanford.edu

[Access our Training and Events Calendar](#)

[Access our Products and Resources Catalog](#)

Training Evaluation



Please complete this brief 3-minute survey to provide feedback for today's learning session!

<https://ttc-gpra.org/P?s=113080>



Join us on Thursday for Session 2!

March 16, 2023 @ 1- 2 PM EST

THANK YOU!