

# Making Sense of Health Privacy Laws: HIPAA and FERPA for School-Based Health Professionals



September 19, 2024



**MHTTC**

Mental Health Technology Transfer Center Network  
Funded by Substance Abuse and Mental Health Services Administration

**FoCUS:PHI**

The Center of Excellence for Protected Health Information

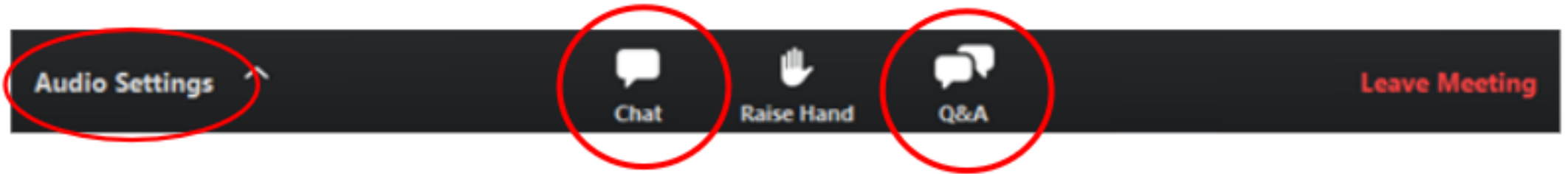


**CAI**

A photograph of three students walking through a school hallway. On the left is a young man with glasses, wearing a white t-shirt and dark pants, carrying a green backpack. In the center is a young woman with her hair in a bun, wearing a yellow t-shirt and blue jeans, carrying a colorful patterned bag. On the right is a young man wearing a white polo shirt and dark pants, carrying a tan backpack. The hallway features blue lockers on the left and a blue wall on the right. The word "Welcome!" is overlaid in white text in the center of the image.

**Welcome!**

# Zoom Webinar Logistics



- This learning session is being recorded.
- The session recording and slide deck will be sent to you within a week.
- You may share these materials with your colleagues as needed.
- Certificates of attendance will be made available to attendees who attend at least half of the session.



# Center of Excellence for Protected Health Information (CoE-PHI)

The CoE-PHI develops and disseminates resources, training, and TA for state and municipal agencies, healthcare providers, school administrators and individuals and families to improve understanding and application of health privacy laws and regulations, including 42 CFR part 2 (part 2), the Health Insurance Portability and Accountability Act (HIPAA), and the Family Educational Rights and Privacy Act (FERPA), when providing or receiving treatment for substance use and mental health conditions.

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

# Mental Health Technology Transfer Center (MHTTC) Network



MHTTC

Mental Health Technology Transfer Center Network

Funded by Substance Abuse and Mental Health Services Administration

Funded by SAMHSA, the Mental Health Technology Transfer Center (MHTTC) Network includes 10 Regional Centers 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.**

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

# Disclaimer

***SAMHSA***

Substance Abuse and Mental Health  
Services Administration

*The CoE-PHI and MHTTC Network projects are funded by SAMHSA of the U.S. Department of Health and Human Services (HHS). The opinions expressed today are the views of the presenters and do not reflect the official position of the HHS or SAMHSA.*

# 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
- Discuss common scenarios involving student mental health 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

# Our Presenters



**Abigail English, JD**  
Legal Subject Matter  
Expert



**Steve North, MD, MPH**  
Clinical Subject Matter  
Expert



**Katy Stinchfield, MS, LPC**  
Clinical Subject Matter Expert



**Why is this important?**

# Word Cloud Activity

What is keeping you up at night in relation to child and adolescent health privacy?

Join by Web

**[PollEv.com/mhttc](https://PollEv.com/mhttc)**

Join by QR code

Scan with your camera app



## What is keeping you up at night in relation to child and adolescent health privacy?

Nobody has responded yet.

Hang tight! Responses are coming in.

# In 2023, according to the CDC's *Youth Risk Behavior Survey* of high school students:

**4 in 10**

Experienced *persistent feelings* of sadness or hopelessness

**2 in 10**

Seriously considered *attempting suicide*

**1 in 10**

*Attempted Suicide*

# School Mental Health Statistics

48%

Percent of schools who feel they can **effectively provide mental health services to all students** who need them

43%

Percent of school leaders who say they are *“moderately”* or *“extremely”* concerned about their **students’ mental health.**

41%

Percent of school leaders say they are *“moderately”* or *“extremely”* concerned about their **staff’s mental health.**

27%

Percent of school leaders who say are *“moderately”* or *“extremely”* concerned about their **own mental health.**



# In schools that provide mental health services who provides these services?

**75%**

School Counselors

**67%**

School- or district-employed licensed mental health professionals

**57%**

Outside Practices or Programs

**17%**

School Nurses

**What do the laws say?**

# Overview



Importance of confidentiality and information sharing



Which laws protect privacy and provide for information sharing?

- HIPAA, FERPA, and other federal laws
- State laws



What information is protected by privacy laws?

- Is behavioral health information treated differently?



How can protected information be shared?

# Advance Questions

- Hundreds of excellent questions submitted in advance by webinar registrants
- Some general... others very specific...
- Some would depend on state law ...
- All helped shape the content of this webinar
- Many will be used to inform future resources developed by COE-PHI

# Confidentiality & Information Sharing



# Importance of Confidentiality

- Avoid negative health outcomes
  - Protect health of adolescents
  - Protect public health
- Encourage adolescents to seek needed care
- Supported by research findings
  - Privacy concerns influence . . . .
    - Whether adolescents seek care
    - Where they seek care
    - When they seek care
    - How candid they are with health care providers

# Consent, Confidentiality & Disclosure

- “Consent & confidentiality”
  - Linkage
    - Clinical practice
    - Ethical guidelines
    - Professional policies
    - State & federal laws
- Confidentiality & disclosure
  - Minor consent laws
  - Medical privacy & records laws
  - Funding program requirements
  - Insurance laws
- **Consent to treat vs. consent to release information**

# Confidentiality Not Absolute

- Disclosures may be required
- Exceptions to confidentiality
  - Child abuse reporting
    - Physical, sexual, & emotional abuse
  - Patient threat of harm to self or others
  - Other disclosures required by law

# Confidentiality & Disclosure Questions

- Important questions to ask:

What **may not**  
be disclosed?

What **may** be  
disclosed?

What **must** be  
disclosed?

# Importance of Information Sharing

- Support individual adolescent's health
  - Referrals
  - Treatment
- Billing and insurance claims
- Population health
  - Research
  - Targeted interventions
  - Program evaluation





# Privacy Laws Don't Prevent Sharing!

- Power of a release
  - Most information can be shared...
    - ... with a legally compliant release
- Importance of understanding
  - **HIPAA, FERPA**, other federal laws, **state laws**
  - Policies, protocols, contracts
  - Ethical standards
  - Sensitivity of the information

# HIPAA & FERPA

# HIPAA & FERPA - The Basic Rule

- HIPAA protects patients' information that falls within the definition of "protected health information" (PHI)
- HIPAA Privacy Rule definition of PHI **excludes information that is part of a student's education record**
  - Is an adolescent's health information part of their education record?
    - If so, it is covered by FERPA
  - If not, does it fall within the HIPAA Privacy Rule definition of PHI?
    - If so, does it meet other criteria for HIPAA Privacy Rule protection?
    - If not, is it protected by other **state** or **federal** confidentiality laws?

# HIPAA Privacy Rule

# HIPAA Privacy Rule - Who Must Comply?

- “Covered entities”
  - Health plans
  - Health care clearinghouses
  - **Health care providers** who conduct certain transactions electronically
- “Business associates” of covered entities
  - Subcontractors of business associates
- Most health care professionals and sites caring for adolescents
  - Not necessarily all health professionals working in schools

# HIPAA Privacy Rule - Information Affected

- “Protected health information” – PHI
  - Health information
  - Individually identifiable
  - Created or received by a covered entity
  - Includes written and oral communications
- “Education records” covered by FERPA - not HIPAA
  - **Excluded** from definition of “protected health information” in the HIPAA Privacy Rule

# HIPAA - Mental Health Information

- Is mental health information treated differently under HIPAA?
  - Generally no, but...
- Special protections for “psychotherapy notes”
  - With few exceptions, the Privacy Rule requires patient authorization prior to a disclosure of psychotherapy notes for any reason

# HIPAA - What is a Psychotherapy Note?

- “[N]otes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.”
- “Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.”



# HIPAA - Confidentiality & Release of PHI

- Health care providers must protect the confidentiality of protected health information
- Providers must have a signed “authorization” in order to share protected health information
  - Authorization sometimes referred to as “release” or “ROI”
- Some exceptions in HIPAA allow or require disclosure of PHI absent signed release

# HIPAA - Disclosure Without Authorization

- Disclosure **allowed**, but not required, without authorization
  - Treatment, payment, health care operations
  - To avert serious and imminent threat
  - Research
- Disclosure **required**, even without authorization
  - Child abuse reporting
  - Court order
- Request of patient or patient's representative (e.g., parent or guardian)



# HIPAA - Authorization to Disclose PHI

- To comply with HIPAA, an authorization to release information must include specific elements, including but not limited to:
  - Expiration Date or Event
  - Generally, no compound document
  - Describes info to be disclosed in meaningful way
  - Description of purpose for release
  - Signature
  - Required notices, including right to revoke and no conditioning of care
- Who signs the authorization to release?

**Always ask: Does state law require additional elements or notices?**

# HIPAA - Who Signs a Release?

- Adults and emancipated minors sign for self unless they are under guardianship or conservatorship limiting their rights
- Unemancipated minor must sign if considered the “individual” under HIPAA
- Parent, legal guardian, or patient’s personal representative signs if minor is not authorized to sign on their own behalf

# HIPAA Privacy Rule - When is Minor an “Individual”

- 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
- 
- **IMPORTANT ALERT: State law matters!**

# HIPAA Privacy Rule - Disclosure to Parents

- Parent usually authorized representative of minor child & has access
- When minor is individual
  - Parent not necessarily authorized representative of minor
  - Parent access determined by 4-part test
    - 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
  - **Deference to other applicable law** – state or federal
    - State minor consent & confidentiality laws
    - Title X, Part 2 SUD, & other federal confidentiality laws

# HIPAA Privacy Rule - Denial of Access to PHI

- Provider discretion granted by the rule
  - Parent not “personal representative” if minor subject to domestic violence, abuse, neglect, or endangerment and other criteria are met
  - Parent’s access to minor’s health information may be denied if health care professional determines it would cause substantial harm to minor or another individual

**FERPA**



# What is FERPA?

- Federal Family Educational Rights and Privacy Act
  - Protects the privacy of “education records” that contain “personally identifiable information” (PII)
  - Assures access to records by
    - Parents/guardians
    - “Eligible students” who are age 18 years or older



# FERPA - Who Must Comply?

- Who is required to comply with FERPA?
  - Educational institutions and agencies receiving federal education funds
    - if the agency receives federal funds from the Secretary of Education and provides educational services or instruction to students, or the agency is authorized to direct and control schools.
  - School officials
    - Some consultants, contractors, volunteers
    - Organizations that contract with or consult with an educational agency or a person acting for such agency when they can be called a “school official”

# FERPA - What Does It 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
  - Not oral communications
- Education records include:
  - **Records maintained by a school nurse**
  - IEP and other special education records maintained by the school
  - Immunization records in school file

# FERPA - What is Not Covered?

- Education records do not include:
  - Oral communications, personal impressions
  - Records of instructional, supervisory, and administrative personnel in the sole possession of the maker and which are not accessible to any other person except a substitute—aka “sole possession” records
  - Records on students age 18 years or older made by a physician, psychologist or other recognized professional and used only in connection with the provision of medical treatment

# FERPA - Access Rule

- Who has access to education records?
  - With rare exceptions, parents/guardians must be allowed to review and inspect records on parent/guardian request
  - An “eligible student” age 18 years or older
  - Access to records by anyone other than a parent/guardian or eligible student is restricted, absent consent, except in a few circumstances
  - Access may be granted with consent (or release)

# FERPA - Who Signs a Release?

- Who signs a release to permit access to education records?
  - “Parent” for students under age 18 years
  - “Student” if student is age 18 years or older
- Who is a parent for this purpose?
  - Parent “includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian”
  - Definitions in local education policy also important

# FERPA - Disclosure Without Signed Release

- FERPA allows – or requires – disclosure of a student’s PII without a signed authorization or release by a parent or eligible student in some circumstances
- Examples include:
  - To school officials with legitimate educational interests
  - “Directory information”
  - Health or safety emergency
  - Child abuse reporting
  - Court orders
  - Others

# School-Based Health Centers (SBHCs)



# School Based Health Centers - HIPAA or FERPA?

- SBHCs and their “sponsoring agencies” usually “covered entities” under HIPAA
  - Sponsoring agencies often include Federally Qualified Health Centers (FQHCs), local hospitals, and other health systems/sites
- If SBHCs are “covered entities” they must follow the HIPAA Privacy Rule with respect to students’ PHI
- Education records are excluded from definition of “protected health information” in the 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

# School Based Health Center - When Subject to FERPA

- **Joint Guidance** from federal Department of Health and Human Services and federal Department of Education – issued in 2008 and updated 2019
  - Whether the records of a SBHC 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, FERPA and Other Laws

# HIPAA & FERPA

## Similarities

- Restrictions on access to records
- Written authorization/consent for release
- Exceptions allowing disclosure without written authorization/consent

## Differences

- Parent access rules
- Who must sign an authorization/consent for release
- Opportunities for information exchange exist under both laws
  - Who may exchange information with whom, without a written authorization, is different

# Important Federal Laws

- HIPAA
- FERPA
- Part 2 Substance Use Disorder
- Title X Family Planning
- FQHC
- Ryan White
- 21<sup>st</sup> Century Cures Act and Information Blocking Rule





# Important State Laws

- Minor consent laws
  - Status
  - Services
  - Confidentiality & disclosure
- Medical privacy laws
- Funding programs
- Professional licensing
- Evidentiary privileges



# Which Law Applies?

- Case by case determination!
- If FERPA applies, HIPAA does not
- State law can apply where neither HIPAA nor FERPA apply
- HIPAA and state law can apply at the same time
  - **HIPAA usually defers to more protective state laws**
- FERPA and state law can apply at the same time
  - FERPA generally preempts
  - Where FERPA is permissive
    - **Follow the more protective law**

**What can we learn from some cases?**



# Interactive Case Studies

A photograph of a person with dark, curly hair, seen from the back, wearing a tan sweater over a collared shirt. They are pointing their right hand towards a blue screen. The background is a blurred office setting with other people. A dark blue semi-transparent overlay covers the right side of the image, containing the text 'Interactive Case Studies' in white.

## Case Study #1

You are a therapist employed by a community mental health agency, and your regular work site is the nearby high school. You often work collaboratively with school staff, and are well-known in the school setting. Lately, both the school counselor and the school nurse have been expressing concerns about a 15-year-old sophomore student named Juanita, reporting that she is missing several days of school every week.





## Case Study #1

When she does come to school, she appears to have poor hygiene, seems generally withdrawn, and does not socialize with her usual friend group. The school counselor has tried to discuss these concerns with Juanita's parents, but they work long hours and have been dismissive when they do respond.

The school counselor and school nurse have asked for your help in supporting Juanita. Keep in mind that in your state, minors can consent to outpatient mental health services at the age of 14.



## Poll #1

**What would you do in this case?** (*Ignore any applicable privacy laws for the moment.*)

- a)** Stop Juanita in the hallway during the next passing time and ask if she is ok.
- b)** Wait for a day when she is present at school, then call Juanita to your office during her study hall. Talk with her privately to learn more about her and see if she'd like to enroll in mental health services.
- c)** Get Juanita's address from the school office and visit her at home to see if you can figure out what's wrong.
- d)** Call Juanita's parents and yell at them for not taking these concerns seriously.





## Poll #1

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- d) Call Juanita's parents and yell at them for not taking these concerns seriously.



# Considerations

## Clinical Considerations

- How do you best support this student?
- What first steps would you take?
- What additional information do you need?
- How would you communicate with parents?
- How would you communicate with referring school staff?

## Legal Considerations

- Which federal privacy law(s) apply(ies)?
- FERPA? HIPAA? Part 2?
- Which state laws apply?
- Do any of the applicable laws ...
  - ... require you to share the information?
  - ... permit you to share the information?
- Who may access the information in your records without the patient's consent?



## Case Study #2

Oscar is a 14-year-old with anxiety who is being seen at the SBHC for therapy and he is taking an SSRI prescribed by his family physician. He is seeing the therapist weekly and the SBHC keeps his medication so he stops by every morning to receive it.

Oscar has been struggling academically but over the past month has shown some improvement. The school guidance counselor is currently aware of Oscar's academic challenges and that he has been seen at the SBHC but does not know the extent of the care he receives there.

Oscar has not disclosed either being prescribed medication or being in therapy to his parents due to his perception of a stigma toward mental illness and therapy in their extended family and church.





## Case Study #2

At the time of enrollment in the SBHC the parents signed a release that allowed the school and SBHC to discuss health issues however it does not differentiate mental health and physical health. His state Medicaid plan does not send EOBs and Medicaid does not require a copay on the medication.

Oscar has been struggling academically but over the past month has shown some improvement. The school guidance counselor is currently aware of Oscar's academic challenges and that he has been seen at the SBHC but does not know the extent of the care he receives there.

Last week Oscar's parents approached the school guidance counselor with concerns about his academic performance.



### What can the school guidance counselor share with the parents?

- a) All of the health and information in the education record she knows because their relationship is covered by FERPA?
- b) Nothing because Oscar has not given his therapist or his doctor permission to share information about his mental health treatment.
- c) Only information in the education record covered by FERPA.
- d) Only mental health records, excluding physical health records.

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# Considerations

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# Key Points

# Key Points - Clinical

- Privacy regulations protect your students and help you to understand the boundaries in protecting and sharing information about students and families
  - When in doubt:
    - Review clinical considerations from the case studies shared today.
    - Seek clinical supervision and consultation from your supervisor
    - Review Resources such as:
      - [SBHA HIPAA, FERPA and School Health Resource](#)
      - [CoE-PHI Resources](#)
      - [Materials from last year's webinar on Federal Health Privacy Laws for School Professionals](#)



# Key Points - Legal

- Mental health issues are currently of critical and pressing importance in schools for both students and professionals
- HIPAA and FERPA are two federal laws that provide both privacy protection and ways to share students' health information
- Records covered by FERPA are not covered by HIPAA
- Other federal laws such as Part 2 and the 21<sup>st</sup> Century Cures Act are also important for proper handling of students' health information
- State laws are essential to consider when considering privacy protection and information sharing
- Privacy laws do not prevent sharing information if the right steps are followed

# Best Practice Principles



Autonomy



Transparency



Trust

A blurred background of a classroom with students raising their hands. The image is overlaid with a semi-transparent blue filter. The text "Questions & Answers" is centered in white.

# Questions & Answers



# Closing

# 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](https://coephi.org/technical-assistance)

## Resource Library

[coephi.org/resource-library/](https://coephi.org/resource-library/)



## Evaluation

Please complete our evaluation following the training.

Your opinions improve our future trainings and resources.





**Thank you!**