

What Can I Say? Disclosure of Student Disability Information in Higher Education

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The Asterisk

These materials are provided for informational purposes only and are not to be construed as legal advice. You should seek independent or house counsel to resolve the individualized legal issues that you are responsible for addressing. Further, any policy or procedure additions or revisions under consideration should be reviewed by your college's legal counsel prior to implementation.

LEARNING OBJECTIVES

- Concepts of FERPA and HIPAA
- Key definitions relating to disclosure of records
- Understand the standards that apply to using or disclosing records.
- Consent requirements for disclosure of records

FERPA vs. HIPAA

1. Family Educational Records Privacy Act	1. Health Insurance Portability and Accountability Act
2. Applies to educational entities who receive DOE funding	2. Applies to protected health information maintained by covered entities.
3. FERPA has one “P”	3. HIPAA has one “P”

What is HIPAA?

- Health Insurance Portability and Accountability Act
- The HIPAA Privacy Rule establishes national standards to protect individuals' medical records and other individually identifiable health information (collectively defined as "protected health information") and applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically.
- The Rule also gives individuals rights over their protected health information, including rights to ... direct a covered entity to transmit to a third party an electronic copy of their protected health information...

Does HIPAA apply to me?

- The Centers for Medicare and Medicaid offer the [Covered Entity Decision Tool](#)
 - Question 1: Does the person, business, or agency furnish, bill, or receive payment for, healthcare in the normal course of business?
 - If you answered “no”, then HIPAA does not apply to you in the context of your work as a disability resource professional (DRP).

Case Study #1

- You are Director of the Disability Resources Office at an institution, and just hired a new staff member who will exclusively be responsible for determining accommodations for neurodiverse students, and building new opportunities for community, with this population. The new staff member has a credentialed Speech-Language Pathologist (CCC-SLP) and you agreed to cover the cost of professional development so your employee can keep their credential current.
- Some accommodations in your office are determined by a committee, but your new staff member is concerned that they should not discuss a student request, because they are covered by HIPAA.

Case Study #1 ?

- Does HIPAA apply to this new staff member discussing a student's accommodation request, with the accommodation committee?
 - A. YES
 - B. NO
 - C. More information is needed.

When Might HIPAA Apply?

- HIPAA may be relevant to students in clinical coursework:
 - A student needs assistive technology to access an electronic medical records system.
 - A student is approved to record clinical interactions as an accommodation.
 - Personally identifiable health information is discussed in a clinical course, that a student otherwise records.
- HIPAA may at times be relevant to our work as disability resource professionals, but these are limited instances, and they should be discussed in the context of the interactive process.

WHAT IS FERPA

- Federal law: Family Educational Rights and Privacy Act. 20 USC §1232g and 34 CFR Part 99.
- Applies to all school receiving DOE funds – e.g. financial aid.
- Limits disclosure of educational records.
- Allows student access to records.
- Provides specific exceptions to use and disclose Educational Records without the students' consent.

Why Comply with FERPA

- Fines
- Dismissal
- Negative Publicity
- Loss of Federal Funding in extreme cases
- Provides Important Service to Student.

FERPA – Student Rights

- Eligible Student = 18 years of age or attending Post-Secondary school at any age.
 - Student must consent to parental access.
- Right to Inspect and review student's educational records maintained by school.
- Right to request an amendment of any record believed to be inaccurate or misleading.
- Right to consent to disclosure personally identifiable information (PII) from students records to third parties.

FERPA- Educational Record Definition

- Broad definition:
 - Records containing information directly related to student who attended the institution.
 - Maintained by institution or party acting for institution.
- Include all format and media: emails, test papers, computer records, video, audio, tracking information for card swipe, records of disciplinary hearings, application files.
- Personally Identifiable information: information which identifies the student.

Non-Educational Records

- Records kept in sole possession of the maker and not shared with anyone (e.g. instructor handwritten notes or observations).
- Student's medical and psychological treatment records.
- Records created and maintained by law enforcement unit, for a law enforcement purpose;
- Records relating to an individual employed by an educational institution.
- Records an institution creates or receives after the student is no longer enrolled and not related to past attendance (e.g. alumni achievements)
- 20 U.S.C. §1232g(a)(4)

Personally Identifiable Information (PII)

- FERPA limits both the use and disclosure of PII.
 - Student written consent required to disclose PII to third parties.
- PII includes:
 - Student's name and address
 - Student's parents' /family's name(s) and address
 - Personal identifiers – SS No. - Student ID No.
 - Indirect identifiers – DOB, place of birth.
 - Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances to identify the student with reasonable certainty.
 - Information requested by a person who the institution reasonably believes know the identity of the student to whom the records relate

Case Study #2

Several students posted videos of classroom discussions on social media in violation of school's code of conduct. The students were dismissed from the university for the remainder of the school year.

The Dean of Academic Affairs wanted to put the kibosh any future consideration by students to engage in such conduct and wanted to release the name, year and majors of all students dismissed to the editor of the student newspaper.

Case Study #2 ?

- May the Dean release this information:

A: Yes: It was widely known and since they are no longer enrolled there is no expectation of privacy.

B: No: this information may not be disclosed.

C: Maybe: If there the rationale was prevent future academic violations.

Directory Information

- Institutions may disclose without consent a student's PII, if the information is considered "directory information"
- Directory information if disclosed is not considered harmful or an invasion of privacy.
- Directory information includes:
 - Name, address, telephone listing, email address
 - Date and place of birth
 - Field of study
 - Weight and height of athletes
 - Enrollment status
 - Degrees and awards received
 - Dates of attendance
 - Grade level
- Students also have the right to refuse directory information disclosure
- 34 C.F.R. §99.3

Case Study #3

A professor sends the following email to all enrolled students in a course, not using BCC:

“Hello Class!

Just a quick reminder to please show up to Smith Hall 105 at 10am tomorrow in order to take the mid-term. It should just take an hour. If you receive disability accommodations, please report instead to the library testing center at 10am. Happy Studying, Dr. C”

Joe, is a student who receives accommodations, and is concerned that his classmates will know he is receiving disability accommodations since he isn't going to be in the classroom, and is instead headed to the library.

Case Study #3 ?

Has the professor violated FERPA by sending this email?

- A. YES
- B. NO
- C. More information is needed.

FERPA's Non-Consensual Disclosure Exceptions

- University [School] Officials with a legitimate educational interest.
 - 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
- In a health or safety emergency.
- When institution discloses PII under an exception, it must inform recipient that it may not re-disclose, except in limited circumstances.

34 C.F.R. §§99.31, 99.33, 99.35, 99.37

Studies Exception

- Institution not required to have consent from student to disclose PII to organization conducting certain types of studies for institution. Purpose of study must involve:
 - Developing, validating, or administering predictive tests.
 - Administering student aid program; or
 - Improving Instruction.

34 C.F.R. §99.31(a)(6)

FERPA's Non-Consensual Disclosure Exceptions Continued

- To comply with a judicial order or subpoena.
- An institution where the student seeks or intends to enroll.
- Representatives of Federal, State or local education authorities conducting an audit or evaluation.
- For financial aid.
- To a victim of an alleged crime
- The final result of a disciplinary proceeding is if the student was found to be a perpetrator of a crime of violence

Legitimate Educational Interest

- School Official may have a legitimate educational interest, if the official needs to review an educational record in order to fulfill their responsibility. This includes:
 - Performing appropriate tasks that are specific to their job.
 - Performing a task related to a student's education.
 - Providing services for the student such as healthcare, counseling, or financial aid.

Less is more

DOE Guidance:

“Whenever a school chooses to disclose personally identifiable information from a student’s education records without consent, the school should consider the impact of such disclosure and should only disclose the minimum amount of personally identifiable information necessary for the intended purpose.”

Transparency

- Be transparent with students what you mean by “confidential”.
- Example:
 - Information shared with DRS is confidential except when required to be shared with appropriate university officials for health and safety reasons. Approved accommodations are shared with faculty, staff and/or administrators on a need-to-know basis only for purposes of coordination.

Student Concern With Disability Disclosure

- Honor student concern about disability disclosure because discrimination is not uncommon.
 - [Aquino, Alhaddab, and Kim \(2017\)](#) found that 23% of students with disabilities had witnessed discrimination and 22% had experienced offensive verbal comments.
 - Disability discrimination is the most prevalent type of discrimination in employment per the [EEOC](#)

The Role of DRPs in Risk Mitigation

- While some faculty might have very helpful clinical or otherwise relevant training about some disabilities, it is to their benefit to not ever be in the position of treating a student differently on the basis of their disability.

Case Study #4

A professor in the College of Ed, Special Ed Major knows that Pat is a student working with your Disability Resource Office. It's just a couple weeks into the winter term. They observe that Pat has been highly distractible, breaking out in a sweat, jittery, and seemed defensive when the professor privately asked after class is anything wrong.

The professor calls you after class, explains their concern about Pat's well-being, and that they are also falling behind.

The professor asks if you can share more information about Pat's disability so they can teach them better, and hopefully connect.

- How might you handle the professor's request for information?

Case Study #5

A program director for first year students contact disability services and requests data including student's name, disability type, and accommodation information for the purpose of distributing students with disabilities to certain courses.

- What, if any exception applies to non-disclosure?
- Consideration of responses to the program director.

Case Study #6

The new Director for Institutional Research is requesting data including student's ID numbers, disability type, and accommodation information to include in their first state of the university report.

What questions do you have?

Emergencies Exception

- If an institution determines that there is significant threat to health and safety of student or other individuals, it may disclose PII to “appropriate parties”
- Exception applies only to emergencies which are imminent or already occurring. Does not apply to possible or eventual emergency.
- Appropriate parties may include law enforcement, public health and medical personnel.

Case Study #7

You're in your school's behavioral intervention team meeting, and the director of University Residences has just learned that a student is missing, as both their roommate and emergency contact reached out with concerns. The student works with your office, and you have extensive information about the student's mental health history and past self-harm behaviors.

Can you share this information with the BIT team?

- A. Yes
- B. No
- C. I need more information

Questions?

