

Data Privacy in School Nursing: Navigating the Complex Minefield of Privacy Laws

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2

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Criteria for participants to claim contact hours:

- ✓ Participants must be present for the majority of the presentation.
- ✓ Participants must score a 75 or higher on the post-test knowledge questions.
- ✓ Participants must complete and submit an evaluation of the presentation.

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Learning Outcomes

1. Obtain a working knowledge of health information privacy requirements under HIPAA and FERPA.
2. Articulate when and how each federal law may govern health information privacy and sharing in schools.
3. Understand how state privacy laws might affect student health information privacy, including the real and perceived implications of recent state legislative trends.
4. Apply learned information to school nursing scenarios.



Source: Star Tribune

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Carrie Waggoner, JD
Co-Director, Network for Public Health Law – Mid-States Region

Carrie Waggoner, J.D., serves as Co-Director, Mid-States Region. Prior to this role, Carrie served as the Mid-States Office's deputy director. Carrie's legal interests include the use of data to advance health equity, public health authority issues, and law and policies supporting employees and families. Carrie has legal expertise in HIPAA, public health data sharing and privacy, public records, and public health legal authority.

Prior to joining the Network in 2020, Carrie served as the Director of the Public Health Legal Division at the Michigan Department of Health and Human Services. Carrie also serves on the board of directors of the Greater Lansing Food Bank. Carrie is a graduate of Michigan State University College of Law and is licensed to practice law in Michigan.

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Kerri Lowrey is Deputy Director and Director for Grants & Research for the Network for Public Health Law, Eastern Region, based at the University of Maryland Francis King Carey School of Law. Kerri has more than 20 years of experience as a public health lawyer. Her areas of focus have included injury prevention law; laws affecting return to school after traumatic brain injury; novice driver licensing laws and practices; health data privacy and sharing in the school setting; education as a social determinant of health; and housing instability.

She received her J.D. from the University of Maryland School of Law, an M.P.H. from the Johns Hopkins University Bloomberg School of Public Health, and A.B. in public policy and American institutions from Brown University. She is licensed to practice law in Maryland.

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The legal information and assistance provided in this presentation does not constitute legal advice or legal representation. For legal advice, please consult legal counsel in your state.

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Roadmap

- Federal laws that govern health information privacy in the school setting
 - ✓ FERPA
 - ✓ HIPAA
 - ✓ Which applies and when? (For our purposes, K-12...)
- Impact of state law and legislative trends
- Explore specific scenarios
- Questions



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About the Network

- » **The Network provides visionary leadership in the use of law to promote, protect, and improve health equity**
 - ✓ Free non-partisan legal technical assistance and resources
 - ✓ Collaborate with broad set of partners across sectors to expand and enhance use of practical legal and policy solutions
- » **One National Office**
- » **Three Regional Offices**
 - Western, Mid-States, Eastern
- » **Subject-Matter Teams**
 - Climate, Health Equity, Harm Reduction
- » **Significant support from Robert Wood Johnson Foundation since 2010**

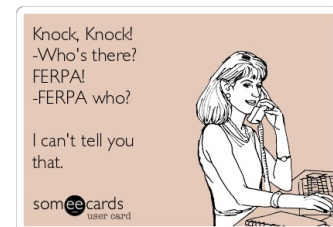


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FERPA

- Family Educational Rights and Privacy Act of 1974—enacted to protect students’ education records.
- Applies to *all* schools that accept funds from the U.S. DOE, whether directly or indirectly (e.g., federal grants, loans). Private schools that do not accept federal funds are not subject to FERPA but usually are still subject to state privacy laws.
- FERPA (1974) applies in *most* school nursing situations, because HIPAA (1996) expressly states that HIPAA does *not* apply when FERPA does. (45 CFR § 160.103)

✓ However, a school that is *not* subject to FERPA (e.g., private/religious school not receiving funding from the U.S. DOE) and qualifies as a HIPAA-covered entity must comply with HIPAA.



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FERPA

- Rights of parents and “eligible students” under FERPA
 - ✓ Privacy of personally identifiable information (PII)
 - ✓ Inspect, review, and request amendments to education records
 - ✓ Annual notice of privacy rights and how school/school district defines the terms *school official* and *legitimate educational interest*
 - ✓ Opt out of directory information disclosures
- What is PII?
 - ✓ Any information (that, *alone or in combination with other information*, could be used to identify a specific student)
 - ✓ Recorded in any medium (handwritten, print, email, video, audio, photos, etc.)
 - ✓ Names of student, parent, or other family members, personal identifiers (date of birth, address, SSN, student id, etc.)

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FERPA

What is PII?

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What is an education record?

- ✓ Records directly related to a student maintained by an ed. agency or an entity acting on its behalf (e.g., an IT contractor)
- ✓ Student health records at K-12 level (e.g., immunization records, physical exam, health screening results)
- ✓ Nurses' notes in official student file
- ✓ Records related to special education or health plans

PUBLIC HEALTH DIVISION
Immunization Program

IMMUNIZATION PRIMARY REVIEW SUMMARY - SECTIONS B, C and D
Initial Statistical Report
(For use by public, charter, alternative and private schools, preschools, head start and certified child care programs)

Demographic Information: This is information about your school or program. We use this information to contact you if we have questions. Please be neat and accurate.

Name of School or Program: **Imaginary Academy** Date of Report: **12/20/2014**
Name of Person Completing Report: **Ms. Ima Ginary** Phone: **503-000-0000**

B. FOR SCHOOL AND CHILDREN'S FACILITY USE			C. FOR HEALTH DEPARTMENT USE ONLY			D. FOR SCHOOL AND CHILDREN'S FACILITY USE		
Child's name (Last, first, middle initials)	Grade	Parent's name	Exclusion (order number)	Date	Vaccines	Date entry recorded	Excluded? Y/N	
Chovie, Ann	Baby	Lily Che	1234 Pizzaz					
Gator, Ali	PK	Mrs. Gal	123 NE Cedar					
Berry, Mary	Kinder	Mr. Berry	2 NW Strawberry					
Ramy, Julie	Kinder	Mr. Ramy	191 Dusty Trail, Port					

Permanent Record - Intermediate Grades

Student Name: **Bat'tista** **Irene**
(Family Name) (Given Name) (Middle Name)
Date of Birth (mm/dd/yyyy): **06/09/1990** Male: ☐ Female: ☒

Funding Year	Grade 4	Grade 5	Grade 6	Grade 7
English as Second Language				
Special Education				
Aboriginal Education		2003	2004	

Academic Record	Grade 4	Grade 5	Grade 6	Grade 7
Language Arts	A	B+	A-	B+
Mathematics	A+	B+	B+	B+
Science	B	B+	A-	B+
Social Studies	B	B+	A-	B
Music	B	B+	B	B+
Art	B	B+	B+	A-

Intermediate achievement:
A = Excellent; B = Above Average; C = Average; D = Below Average; U = Unsatisfactory

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FERPA

- Exceptions (When FERPA allows disclosure of PII *without* prior consent, 34 CFR § 99.31)

- ✓ School officials with a "legitimate educational interest"
- ✓ Other schools to which student is transferring
- ✓ To comply with judicial order or valid subpoena
- ✓ To appropriate officials in health and safety emergencies
- ✓ A contractor, consultant, or volunteer, to whom an agency or institution has outsourced institutional services or functions

Directory information

- ✓ May include: student's name, address, phone #, e-mail, photograph, date and place of birth, grade level, enrollment status, dates of attendance, participation in officially recognized activities and sports, weight and height of members of athletic teams, honors and awards received, most recent school attended, etc.



Source: cdc.gov/healthyschools

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Health Ins. Portability & Accountability Act - HIPAA

- Protects the privacy and security of protected health information ("PHI")
 - ✓ Requires appropriate safeguards to protect privacy and security of PHI
 - ✓ Sets limits and conditions on use and disclosure of PHI without written patient authorization (privacy)
 - ✓ Gives individuals rights over their PHI (privacy)
 - ✓ Requires appropriate administrative, physical, and technical safeguards to ensure confidentiality, integrity, and security of ePHI (security)
- Includes provisions regarding compliance, breach investigations, and imposition of civil monetary penalties for non-compliance
 - ✓ [Office for Civil Rights](#) (link)– U.S. Department of Health and Human Services

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Health Ins. Portability & Accountability Act - HIPAA

- To whom does HIPAA apply?
 - ✓ "Covered entities": health plans, (most) health care providers, health care clearinghouses
 - ✓ "Business Associates" of covered entity
- If not a covered entity or business associate, then HIPAA does not apply
 - ✓ State privacy laws might!
- Covered entities may choose to designate themselves as a hybrid entity
- Schools could be covered entities if it engages in covered transactions (e.g., billing Medicaid for Medicaid-covered services in the school setting)
- Health care collaborators (student's physician) likely must comply with HIPAA

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Health Ins. Portability & Accountability Act - HIPAA

- If CE, must comply with HIPAA when using or disclosing PHI
- PHI = individually identifiable health information, including demographics
 - ✓ In any form – written, electronic, or oral
 - ✓ Relating to past, present, or future conditions, provision of care, or payment for care
 - ✓ That identifies an individual or for which there is a reasonable basis to believe can be used to identify
- PHI ≠ individually identifiable information
 - ✓ In education records subject to FERPA
 - ✓ In employment records held by covered entity in its role as employer
 - ✓ Regarding person who has been deceased for more than 50 years

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Health Ins. Portability & Accountability Act - HIPAA

- Common exceptions to HIPAA's written authorization requirement
 - ✓ For treatment, payment, or health care operations activities
 - ✓ As required by law
 - ✓ Use or disclosure to a public health authority for public health purposes
 - ✓ Health oversight activities
 - ✓ Judicial and administrative proceedings
 - ✓ *See 45 CFR 164 subpart E*
- Generally must follow minimum necessary rule

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What is Preemption?

- Higher level of government can preempt actions of lower level
 - ✓ Congress can reserve power to the federal government
 - ✓ State government can override local municipalities
- Law may assign a particular function or regulatory program to a specific entity
- Preemption is a continuum
 - ✓ Floor preemption = higher level of government established minimum requirements; expressly allows lower levels to enforce more stringent requirements
 - ✓ Ceiling preemption = prohibits lower levels of government from requiring more than or different from what the higher-level law requires

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Does HIPAA preempt state law?

- HIPAA sets the floor for protecting PHI
 - ✓ If state law goes further than HIPAA to protect the privacy of PHI, then CE follows state law
 - ✓ If state law requires a greater right of access to PHI than HIPAA, then CE follows state law
- In practice, this means likely dealing with state law requirements AND with HIPAA

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Does FERPA preempt state law?

- **FERPA generally preempts conflicting state laws.** *Rim of the World Unified Sch. Dist. V. Superior Court of County of San Bernardino*, 129 Cal. Rptr. 2d 11 (App. Ct. 2002)
 - ✓ Most state laws reinforce/mirror FERPA. According to U.S. Dpt. of Ed., “state laws can supplement FERPA, but compliance with FERPA is necessary if schools are to continue to be eligible to receive Federal education funds.”
 - ✓ One reason for this is that FERPA specifically states when state law may play a part in permissible disclosures of PII (*i.e.*, allows disclosures of PII to state and local juvenile justice authorities pursuant to applicable state law). Such “carve outs” usually imply intent to otherwise “preempt the field.”
- In practice, this means likely dealing with state law requirements AND with FERPA.

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Communicating with Students’ Providers: How HIPAA and FERPA Intersect

- Health care providers may share health information with the school nurse under HIPAA for “treatment purposes” without authorization of patient or patient’s parent.
 - ✓ So, a physician may discuss the student’s treatment record with the student’s school nurse, and the school nurse may call the physician to *discuss* or *clarify* the physician’s recommendations.
 - ✓ But once that information is entered into the student’s school record, FERPA applies in determining permissible disclosures.
 - ✓ **Note:** There is no treatment or provider-to-provider exception in FERPA
 - ✓ **You can always share PII with consent!** A signed consent form that allows schools to share health information with other health care providers is a good idea.



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FERPA Consent Form

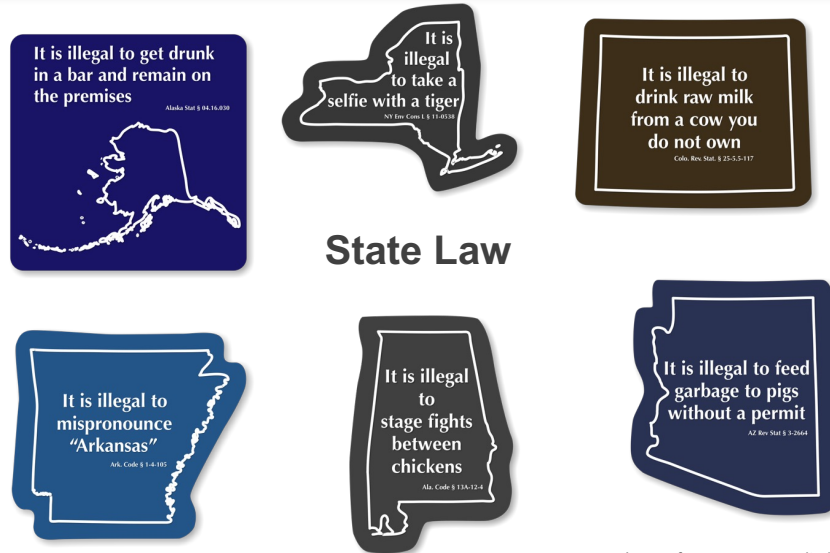
- There is no required format for a consent form for disclosure of education records, but FERPA requires that the consent form:

- ✓ Be signed and dated;
 - ✓ Specify the records that may be disclosed;
 - ✓ State the purpose of the disclosure; and
 - ✓ Identify the party or class of parties to whom the disclosure may be made.
- ✓ An oral agreement for disclosure of information would not be sufficient under FERPA (34 CFR § 99.30).

TEA Texas Education Agency		Division of Compliance and Investigations FERPA Release Form	
<p>CONSENT FOR RELEASE OF PERSONALLY IDENTIFIABLE INFORMATION FROM EDUCATION RECORDS PURSUANT TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. § 99.30</p>			
<p>TO: Texas Education Agency Complaints Management 1701 North Congress Avenue Austin, Texas 78701 complaintsmanagement@tea.texas.gov</p>	<p>FROM: Parent* or Eligible Student** Name Address City State Zip Code Telephone E-Mail Address</p>		
<p>I authorize TEA to disclose personally identifiable information from the education records of:</p>			
<p>PRINT Student Full Name While Enrolled in Texas Public Schools (First Name, Middle Name (if applicable), Last Name)</p>		<p>Date of Birth</p>	
<p>Release To:</p>		<p>Phone Number (if applicable) Fax Number (if applicable) E-Mail Address (if applicable)</p>	
<p>Name Organization/Company Name (if applicable) Address City State Zip Code</p>			
<p>Purpose for this disclosure (REQUIRED):</p>			
<p>Signature of Parent* or Eligible Student**</p>		<p>Date</p>	
<p><small>* With my parent signature I attest that my parental rights to educational records have not been affected by a court order. ** Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.</small></p>			
<p>SUBSCRIBED AND SWORN TO BEFORE ME A NOTARY PUBLIC IN AND FOR _____ COUNTY, _____ (STATE) THIS _____ DAY OF _____ 20 ____</p>			

Source: <https://tea.texas.gov>

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Images from: www.mysecuritysign.com

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State Legislative Trends

- ✓ Recent increase in state educational “parental rights” laws grounded in the idea that parents have been left out of school decisions and that schools are trying to indoctrinate kids and undermine parental authority
- ✓ In 2023, 63 bills introduced in 24 states considered related legislation—parental notification, access to information, authority re: instruction (sexuality/gender), etc.
 - Passed in AZ, IA, and NC
 - FutureEd legis. tracker: <https://www.future-ed.org/legislative-tracker-2023-parent-rights-bills-in-the-states/>
- ✓ Florida...



Source: edweek.org

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State Legislative Trends: Florida

HB 241, Parents' Bill of Rights (signed by Gov. DeSantis June 2021)

- ✓ Parents have a fundamental right to “direct the upbringing, education, health care, and mental health” of their children.

HB 1557, Parental Rights in Education (signed by Gov. DeSantis March 2022)

- ✓ Expands on the previous legislation by giving families the right to “withhold consent or decline any specific service” offered (including health care offered by a school nurse).

SB 662, The Student Online Personal Information Protection Act (SOPIPA) (signed by Gov. DeSantis May 2023)

- ✓ Limits student data collection, use, and disclosure by operators of educational websites, services, and apps and imposes data security and deletion requirements.



Source: edweek.org

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State Legislative Trends: Florida

- ✓ To comply with Parental Rights in Education (PRE), each school district must notify parents of services offered at the beginning of each school year and give opportunity to decline.
 - Palm Beach County School District now requires consent form on file or health care not rendered unless serious injury or illness.
 - Similar policies adopted in Escambia County School District, Alachua County Public Schools, and Hillsborough County Public Schools



Source: edweek.org

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THE SCHOOL DISTRICT OF PALM BEACH COUNTY
EQUITY AND WELLNESS

Parent/Guardian Consent for School Health Services

This is to be completed by the parent/guardian and returned to the school to consent for the student identified below to receive any of the school health services listed below. All items must be completed.

Student #	Student First Name	M.I.	Last Name	Gender	Birth Date
Parent/Guardian First Name		Last Name		Phone Number	Relationship to Student

As required by F.S. 1014.06(1), parent or legal guardian must authorize healthcare services to be provided for their student by a healthcare practitioner or their delegate, as defined in F.S. 456.001 and 1006.062, should the need arise for such treatment, while their student is under the supervision of the school.

When necessary, emergency health services such as first aid, cardiopulmonary resuscitation (CPR) or use of an automated external defibrillator (AED) will be performed until emergency medical services arrive on campus.

For each service choose Yes or No:

Health care services including care and treatment for illness and injury: ☐ Yes ☐ No

Yes - response will authorize such treatments including, but not limited to, major or minor injury or illness reported or observed while the student is at school. Failure to respond will result in an indication of "no" for healthcare treatment.

No - response will result in calls to the parent or guardian for the student to be picked up for all medical concerns. This will be for all instances where students are feeling ill, have a headache or injuries such as cuts, scrapes, bumps, or bruises. EMS will be called for any situation deemed serious.

Students will receive non-invasive health screenings for vision, hearing, scoliosis, and height/weight (BMI) pursuant to Florida Statute 3.81.0056(6)(e), unless the parent or guardian opts out in writing by checking "no" below:

Hearing screening: ☐ No

Scoliosis screening: ☐ No

Growth and development screening (body mass index): ☐ No

Vision screening: ☐ No

Note: This form, in addition to a physician's authorization, will be required for the school clinic staff or school staff to administer daily or as-needed prescribed or over-the-counter medications, conduct medical procedures or provide medical treatment.

I understand that this consent will remain in effect until the above named student transfers to another school district, graduates or I indicate in writing that I wish to rescind this consent for school health services.

Parent/Guardian Signature

Parent/Guardian Printed Name

Date

Health care services including care and treatment for illness and injury:

Yes - response will authorize such treatments including, but not limited to, major or minor injury or illness reported or observed while the student is at school. Failure to respond will result in an indication of "no" for healthcare treatment.

No - response will result in calls to the parent or guardian for the student to be picked up for all medical concerns. This will be for all instances where students are feeling ill, have a headache or injuries such as cuts, scrapes, bumps, or bruises. EMS will be called for any situation deemed serious.

<https://www2.palmbeachschools.org/formssearch/pdf/2667.pdf>

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The Network
for Public Health Law

Data Privacy Scenarios

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Who owns the data that school nurses collect?

Privacy law doesn't seem to place much stock in data *ownership*, but rather on who collects and maintains it.

- ✓ State and federal law grants permissions and impose restrictions on school districts or private schools regarding the maintenance, disclosure, and destruction of school records, (which includes data collected by school nurses). For example, FERPA gives parents and students certain rights to access students' educational data and allows schools may charge a fee for copies of the records.
- ✓ This suggests that the question of data *ownership* is less important than the *rights and responsibilities* the law imposes on the possession and disclosure of such data.

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A school nurse provides contraception and related counseling to high school students. A parent calls and demands to know whether his child was given contraception. Is the nurse required to tell him?

Yes, if such information is recorded, it is part of the student's educational record, and FERPA gives parents the right to access their dependent child's (under age 18) education record, including any health information maintained.

- ✓ This is true even if a state allows minors to consent to contraceptive care without parental notification or consent.
- ✓ A possible exception is if a school nurse's notations on contraception counseling were "personal notes."
- ✓ Data collected for practice or program evaluation should be aggregate and de-identified.

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If a school nurse maintains personal notes, are they part of the educational record and thus subject to FERPA?

Yes, unless certain conditions are met.

- ✓ A school nurse's personal notes are not part of the educational record *only if all* of the following criteria are met:
 - ✓ The notes are used only as a memory aid;
 - ✓ They remain in the sole possession of the writer; and
 - ✓ They are shared with no one except a temporary substitute RN.

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Can a list of students' health issues be distributed to teachers or other staff?

A global transmittal of student health issues is not permissible under privacy laws and does not constitute best practice.

- ✓ Disclosure *is* permitted to certain teachers and other staff in limited circumstance where there is a "legitimate educational interest."
- ✓ Aggregate, de-identified health data may also be shared.

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If I am concerned that a student might hurt themselves or someone else, to whom can I report this information?

You may disclose to any person who *needs* to know to protect health or safety.

- ✓ If a school nurse evaluates the information available at the time and feels that there is an "articulable and significant threat to the health or safety of a student or other individuals, [he or she] may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals."

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May a school nurse, without consent, disclose health records or other educational records maintained by a school to the public health department?

Yes, under certain exceptions to the general prohibition on disclosure (34 CFR § 99.31):

- ✓ Abuse or neglect
- ✓ Certain reportable diseases
- ✓ An emergency if knowledge is necessary to protect health & safety of the student or others
- ✓ De-identified data



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If a school nurse is asked to attend a multi-disciplinary meeting about a student where community persons (e.g., mental health therapist), school-based health center staff, and/or school staff are present, what can that school nurse share about a child's health?

The school nurse can share information with school staff if there is a legitimate educational interest, and with non-school staff only if there is consent, unless an exception applies (34 CFR § 99.31)



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If a community group conducts a health screening that the school arranges, may a school nurse share information about a student's health with a volunteer from the organization?

It depends on the relationship between the school and the volunteer organization.

- ✓ If the community group is employed by, under contract with, or otherwise acting on behalf of the school, the screening becomes part of the educational record and thus subject to FERPA. If not, then these records are not education records and thus not subject to FERPA.
- ✓ Without written consent, a school nurse cannot share a student's health information with a volunteer (unless there is a data sharing agreement between volunteer and school that binds the volunteer to FERPA and HIPAA requirements).

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What are the consequences of violating FERPA? Are there potential consequences to a nurse's licensing?

Consequences can include:

- ✓ Schools losing federal funding
- ✓ Possible sanctions by state nurse licensing entity
- ✓ Liability under state privacy or tort laws
- ✓ No private right of action under FERPA but people who believe their rights have been violated may file a complaint with the Education Department's Family Policy Compliance Office (FPCO)

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For more information...

Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records

<https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf> (link)

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Contact Us

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