

HIPAA, FERPA, and School Health

Confidentiality & Information Sharing in School-Based Health Care

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Disclosure

Abigail English has no financial conflicts of interest to disclose.

Disclaimer

The information provided in this presentation does not constitute legal advice. The information presented provides highlights of the most relevant laws but does not provide comprehensive information about all laws that might be pertinent in a specific situation. For legal advice, an attorney who is familiar with all applicable state and federal laws should be consulted.

National Center for Youth Law

We believe in the incredible power, agency, and wisdom of youth.

For more than 50 years, the National Center for Youth Law has worked to center the voices and experiences of youth in educational, health, and social well-being opportunities, particularly youth of color, youth who identify as LGBTQ, who are disabled, are immigrants, and youth in child welfare and juvenile justice systems.

Overview

- Confidentiality and information sharing
- Overview of HIPAA Privacy Rule
- Overview of FERPA
- HIPAA, FERPA, and other laws
 - ▣ Federal laws
 - ▣ State laws
- Common questions in school-based health
- Best practices

Additional Resources

- Infographic

- “HIPAA & FERPA”

- 2-page overview

- Guide

- “Information Sharing and Confidentiality Protection in School-Based Health Centers: A Resource Guide to HIPAA and FERPA”

- Joint project of NCYL and SBHA

Confidentiality & Privacy

Interests of Parents & Adolescents

- First principles
 - ▣ Comprehensive services
 - ▣ Positive family involvement
 - ▣ Lack of supportive families
 - ▣ Laws & access to care
- Key interests
 - ▣ Parents & adolescents
 - ▣ Apparent conflict, ultimate harmony

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

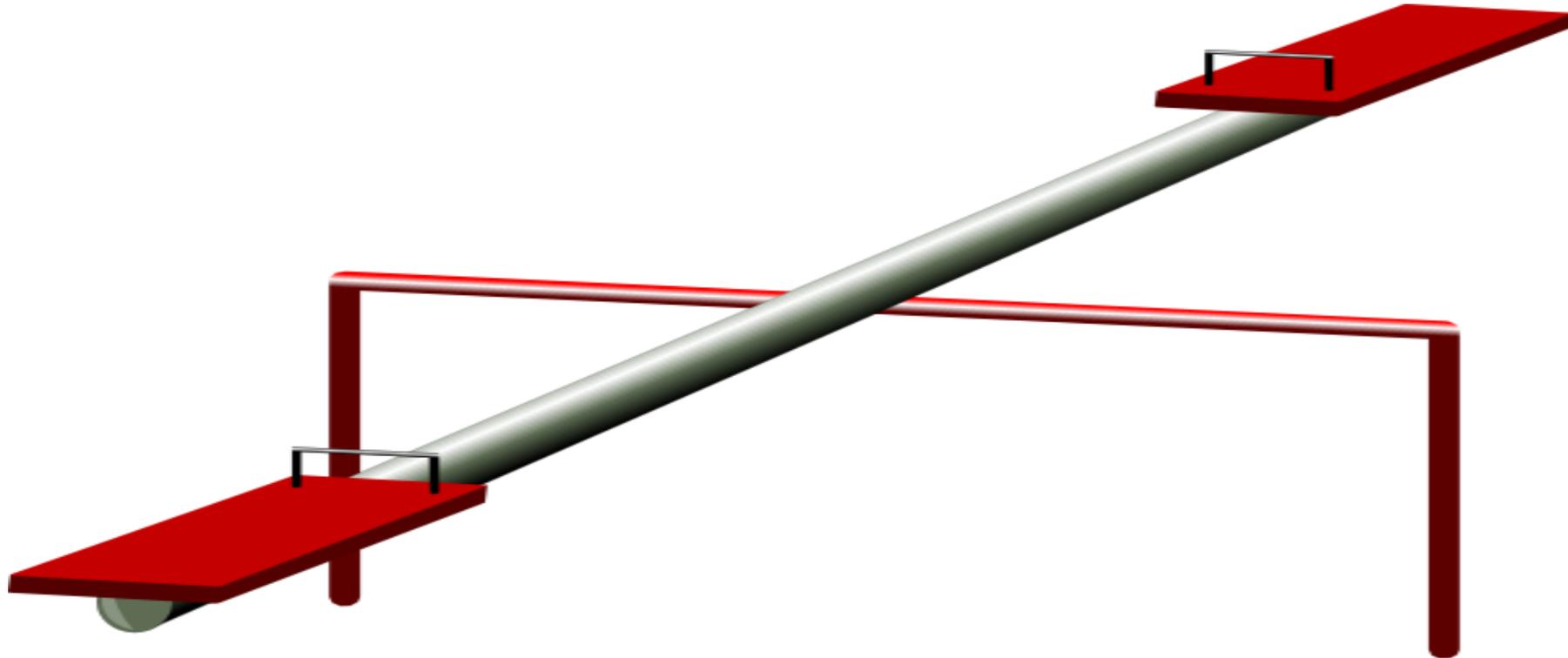
Confidentiality Not Absolute

- Disclosures may be required
- Exceptions to confidentiality
 - ▣ Child abuse reporting
 - Physical, sexual, & emotional abuse
 - Human trafficking?
 - Voluntary sexual activity of adolescents??
 - ▣ Patient threat of harm to self or others
 - ▣ Other disclosures required by law

Confidentiality Challenges & Questions

- What is a **critical challenge**?
 - ▣ finding the right balance ...
 - ▣ ...between confidentiality and disclosure
- Questions to ask . . .
 - ▣ What **may not** be disclosed?
 - ▣ What **may** be disclosed?
 - ▣ What **must** be disclosed?

A Balancing Act



Information Sharing

Important Role 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 – Covered Entities

- “Covered entities”
 - ▣ Health plans
 - ▣ Health care clearinghouses
 - ▣ Health care providers
- Most health care professionals and sites caring for adolescents

SBHCs - Covered Entities Under HIPAA

- Does the SBHC furnish, bill, or receive payment for health care in the normal course of business?
- Does the SBHC conduct covered transactions?
- Are any of the covered transactions transmitted in electronic form?
- Covered Entity Decision Tool
 - ▣ <https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/Downloads/CoveredEntitiesChart20160617.pdf>

HIPAA Privacy Rule – Information Affected

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

HIPAA Privacy Rule – Rights of Individuals

- Rights of individuals
 - ▣ Control disclosure
 - Authorize disclosure of PHI
 - Disclosure without authorization
 - ▣ Access records
 - Individual or authorized representative
 - ▣ Request special confidentiality protections
 - Restrictions on disclosure
 - Confidential communications

HIPAA Privacy Rule – Disclosure of PHI

- Disclosure without authorization
 - ▣ Treatment
 - ▣ Payment
 - ▣ Health care operations
 - ▣ Other exceptions (e.g., emergencies, child abuse reporting)
- Disclosure with authorization
 - ▣ Authorization of parent?
 - ▣ Authorization of minor?

HIPAA Privacy Rule – When Minor Is 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

HIPAA Privacy Rule – Rights of Minor as Individual

- Minor acting as “the individual” can exercise rights re “protected health information”
- Right of the individual
 - ▣ Access to information
 - ▣ Control over disclosure
 - ▣ Request privacy protection

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

Questions???

FERPA

FERPA – Who Must Comply?

- Federal Family Educational Rights and Privacy Act
 - ▣ Protect the privacy of educational records
 - ▣ Assure parental access to records
- Who is required to comply?
 - ▣ Educational institutions
 - ▣ School officials
 - Some consultants, contractors, volunteers

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
- 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 – Access Rules

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

FERPA – Release Without Consent

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

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’ 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

SBHC Records – When Subject to FERPA?

- **Joint Guidance** from federal Department of Health and Human Services and federal Department of Education – 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

▣ 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

Questions???

HIPAA, FERPA, and Other Laws

Important Federal Laws

- HIPAA
- FERPA
- Part 2 Substance Use Disorder
- Title X Family Planning
- FQHC
- Ryan White
- 21st 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

Best Practices

Best Practice Principles

□ Autonomy

- Obtain consent for disclosures whenever possible, even if authorization is not necessary under the applicable law. HIPAA, FERPA, and most confidentiality laws allow sharing when a release form is in place.

□ Transparency

- Inform students and parents about confidentiality and its limits
- Explain purpose for disclosure

□ Trust

- Tailor disclosures narrowly
- Share fact of disclosure as soon as possible

Conclusion

- Review the comprehensive guide
- If you still have questions, consult your own legal counsel
- Build trust
 - ▣ Protect confidential information
 - ▣ Follow the laws and best practices when sharing information

- **THANK YOU!**