Family Educational Rights and Privacy Act (FERPA) and the Disclosure of Student Education Records

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A common assumption is that the Health Insurance Portability and Accountability Act (HIPAA) protects the confidentiality of all records. However, under HIPAA’s regulations, student education records are not “protected health information” if they are covered by the Family Educational Rights and Privacy Act (FERPA). FERPA is a federal law that protects the confidentiality of education records. It applies to educational institutions that receive federal funds under any program administered by the Secretary of Education, including the Individuals with Disabilities Education Act (IDEA). It is important that social workers who work with students in educational institutions be familiar with FERPA. This Legal Issue of the Month provides a brief overview of FERPA and how it relates to the disclosure of education records.

How HIPAA interacts with FERPA

Both HIPAA and FERPA provide important privacy protections but confusion can arise as to which privacy regulation is applicable to student health records. In 2008, the Joint Guidance on the Application of the Family Educational Rights and Privacy Act was created to clarify any confusion regarding how and when HIPAA and FERPA interact. It can be found at [http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaaguidance.pdf](http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaaguidance.pdf). The Joint Guidance provides an explanation of the relationship between FERPA and HIPAA and how these two laws apply to records maintained on students.

FERPA – Who Is Protected

FERPA applies to student records in K-12 schools and most public and private postsecondary institutions. Private and religious elementary secondary schools are not subject to FERPA because they generally do not receive federal funding. FERPA gives parents and eligible students the following basic rights:

- The right to inspect and review a student's educational records maintained by the school within 45 days of the request;
- The right to request that a school amend the student’s education records;
- The right to consent in writing to the disclosure of personally identifiable information from the student's education record, except under certain permitted situations; and
- The right to file a complaint with the Family Policy Compliance Office (FPCO) regarding an alleged violation under FERPA.

An “eligible student” protected under FERPA is a student who is at least 18 years of age or who attends a postsecondary institution. When a student turns 18 years old or enters a postsecondary institution at any age (even if student is still a minor), the rights under FERPA transfer from the parents to the eligible student. Despite this, however, institutions can still disclose information to parents under a variety of circumstances, including: if the
parent claims the student as a federal tax dependent; if the student is under 21 and has violated school alcohol or drug policies; or if the institution believes there to be a health or safety emergency involving the student.

**Education v. Treatment Records**

Medical records, which include counseling records, are generally considered to be education records under FERPA, unless they fall under a narrow exception. The term “education records” is defined under FERPA to mean those records, files, documents, and other materials that:

- 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.”

Examples of education records include records maintained by a school nurse, IEP and other special education records maintained by the school, and immunization records in school file.

If a person or entity is employed by or acts on behalf of the school by providing health services (whether at the school or off-site) under contract or otherwise under the “direct control” of a school and maintains student health records, then these records are considered education records under FERPA as if the school were maintaining the records directly. However, it is important to note that if a person or entity provides health services directly to students and is not employed by, under contract to, or otherwise acting on behalf of a school, then the resulting health records are not deemed to be part of the education record covered by FERPA, even if the services are provided at the school site.

FERPA excludes “treatment records” from its definition of “education records.” Under a narrow exception in FERPA, a student’s record is considered a "treatment record" if it meets three criteria. It must be:

- Directly related to a student who is eighteen years of age or older, or is attending an institution of postsecondary education;
- Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional capacity, or assisting in a paraprofessional capacity; and
- Made, maintained, or used only in connection with the provision of treatment to the student, and not available to anyone (including the student) other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.

FERPA does not apply to treatment records as long as the school only discloses the records to persons providing treatment. FERPA permits treatment records to be used for purposes other than treatment. However, if treatment records will be used for other (non-treatment) purposes, such as giving them to the student or to notify someone of a potential threat, then they convert to education records and would no longer fall under the treatment record exception. Once treatment records have been converted back to education records, they can be disclosed consistent with FERPA regulations.

**Disclosure of Records**

An educational institution subject to FERPA may not disclose the education records of students without a parent or eligible student’s signed and written consent, unless a FERPA consent exception applies. The exceptions to this general consent requirement that allow the disclosure of education records without consent include:
• To school officials with a legitimate educational interests; 
• To comply with a judicial order or lawfully issued subpoena; 
• In a health or safety emergency in order to protect the student or others; 
• To parents in cases of drugs or alcohol violation when the student is under the age of 21; 
• To the provider or creator of a record to verify the validity of that record (i.e. suspected fraud); 
• To organizations conducting research on behalf of the university if there is a written agreement between the university and the research organization; and 
• To officials at an institution in which the student intends to enroll.

Although the definition of treatment records and their conversion to education records can be a bit confusing, the important point for social workers to remember is that FERPA allows the disclosure of information -- whether the information is from a treatment record or education record -- without the student’s or parent’s consent in specific situations.

Conclusion

The Family Educational Rights and Privacy Act (FERPA) is a federal law that generally prohibits the improper disclosure of a student’s education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. It is important that social workers who work with students in educational institutions are familiar with FERPA to understand when, how, and what student records can be shared with others.

Resources and References

Family Educational Rights and Privacy Act (FERPA)

Family Educational Rights and Privacy Act Regulations (FERPA), 34 CFR Part 99

Family Educational Rights and Privacy Act (FERPA) - General Guidance for Students


U.S. Dept. of Health and Human Services (DHHS). Health Information Portability and Accountability Act (HIPAA) Standards for Privacy of Individually Identifiable Health Information. 45 CFR Parts 160, 164

145 CFR § 160, 164.

2The FERPA statute is found at 20 U.S.C. § 1232g and the FERPA regulations are found at 34 CFR Part 99.

If the records are not covered under FERPA or HIPAA, state or local privacy laws that protect the confidentiality of medical and counseling records may still apply.

FERPA prevents the disclosure of a student’s education record or personally identifiable information (PII) in a student’s education record without consent unless an exception applies. Personally identifiable information includes name, address, personal identifiers like social security number, date of birth, or other information that could be used alone or in combination to identify a student.

Private and religious elementary and secondary schools that are not covered under FERPA may be subject to HIPAA if they transmit health information electronically.


An “eligible student” is one who is at least 18 years of age or attends a postsecondary institution. 34 CFR § 99.3.


20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3.

20 U.S.C. § 1232g; 34 CFR § 99.3


34 CFR § 99.30.

34 CFR § 99.31.

FERPA’s exception to consent for disclosure to school officials permits an educational institution to disclose, without a court order, treatment records to in-house counsel in the context of litigation with the student provided the institution has determined that counsel has a legitimate educational interest in the records. The institution does not need the student’s consent before accessing and sharing a student’s education records if the records help the institution defend itself against a lawsuit by the student. The regulation states, “If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student’s education records that are relevant for the educational agency or institution to defend itself.” 34 CFR § 99.31(a)(9)(iii)(B).

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