



DATA PRIVACY IN SCHOOL NURSING Fact Sheet

Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws (Part II)


School nurses collect and are responsible for a vast amount of personal information related to students and their health. This document is designed to help school nurses understand what information they can share, when, and with whom in accordance with federal privacy laws. The primary federal law that governs confidentiality and information sharing by schools is the Family Educational Rights and Privacy Act (FERPA), while the main federal law that controls data privacy and sharing by health care professionals is the Health Insurance Portability and Accountability Act (HIPAA). This document is a follow-up to [Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws \(Part I\)](#), and will continue where that document left off by addressing additional specific questions from members of the National Association of School Nurses (NASN) related to data privacy and data sharing in school nursing. Please see *Part I* for a brief overview of HIPAA and FERPA as they relate to the practice of school nursing, as well as guidance on how to navigate the intersection of the two laws.

Also, recall that each state also has its own data privacy laws that may affect data privacy and data sharing, therefore school districts should always refer to the most updated version of state law when deciding how a particular record should be handled. Contact the Network for Public Health Law for assistance on individual state laws.

The following questions are based on actual inquiries from members of NASN.

Are K-12 student health records always subject to FERPA? That is, does HIPAA ever apply to a school nurse?

While many schools that provide health care services may technically qualify as “covered entities” under HIPAA definitions, school nurses are generally subject to FERPA (and not HIPAA) because the HIPAA Privacy Rule **expressly excludes** information considered “education records” under FERPA from HIPAA’s requirements. In short, when FERPA applies, HIPAA does not. HHS reasoned that subjecting educational institutions to both FERPA and HIPAA would be unduly burdensome. Therefore, student health records that are maintained by an education agency—including immunization records and records maintained regarding students receiving special education services under the Individuals with Disabilities Act (IDEA)—are considered “education records” and are therefore subject to FERPA, not HIPAA. Parental consent must be secured under FERPA before the records are disclosed.¹



School nurses that engage in “HIPAA transactions” may be subject to HIPAA in instances when FERPA *does not* apply—that is, where the nurse engaging in HIPAA transactions works in a school that does not receive funds from any program administered by the U.S. Department of Education. The Privacy Rule defines HIPAA transactions as “the transmission of information between two parties to carry out financial or administrative activities related to health care,”² including submitting claims.

School-based health centers that are sponsored by HIPAA-covered entities, such as hospitals or health departments, may present a scenario in which the same student health information is covered by both HIPAA and FERPA. Student health information collected or maintained by the school district would be treated as FERPA-covered education records, while the hospital or health department would have to comply with HIPAA regarding its retention of that same student information.

If a school nurse is not paid by the school district (e.g., funded by a grant by a health department) must he or she comply with HIPAA or FERPA?

Students’ health records that are maintained by a school district or school generally are considered “education records” subject to FERPA. If the school nurse is hired as a school official or contractor, notwithstanding the source of the funding for the nurse’s salary, the records maintained by the nurse or clinic are “education records” subject to FERPA.³

If a school nurse program is staffed by a health department or hospital, such that student health records are maintained on health department or hospital servers (and not school servers), are those student health records still considered a “educational records” under FERPA?

The law is not clear on this point. The Department of Education has broadly interpreted FERPA’s definition of “education records” to mean “those records that are: (1) directly related to a student, and (2) *maintained* by an educational agency or institution or *by a party acting for the agency or institution*” (emphasis added).⁴ The answer to this question really depends on the level of control (“maintenance”) that the school or school district maintains over the student health records and whether the school nursing program is acting as an agent for the school. Where nurses are providing health services only for students in the school setting (including a school-based health clinic), the safest interpretation is that the nurse is acting as an agent of the school and, therefore, the health information collected is part of the student’s educational record. As such, parental consent would be required for disclosure unless a FERPA exception applies.

Some states have laws that allow minors to consent to reproductive or other sensitive health care services without parental consent (“minor consent laws”). Many of these laws also allow providers to withhold such information from parents and guardians. In states with minor consent laws, could a school nurse refuse to allow a parent or guardian access to information about sensitive health care services, even though FERPA requires that parents have access to inspect educational records?

No. FERPA requires that parents have a right to inspect and review their children’s education records, which are defined as records that are directly related to a student and maintained by an educational agency or institution.⁵ Information about any health care services provided to specific students by school nurses becomes part of the educational record, and FERPA would require a school nurse in this situation to allow a parent to inspect or review such health information. This is true even in states that allow health care providers to withhold such information from parents, because where state law conflicts with FERPA—meaning that it would be impossible for one to comply with both laws—FERPA prevails.⁶ (Note that HIPAA, *unlike FERPA*, defers to state minor consent laws.⁷)



Does privacy law require that a school nurse provide physical privacy to students when in the health clinic (i.e., visual and conversational privacy)?

No, because FERPA relates to education records, and not to an individual's personal visual or conversational privacy. While school nurses are generally subject to FERPA and not HIPAA, the HIPAA guidance on this issue is instructive: others being able to see a student/patient in a health clinic (and therefore knowing they are receiving medical care) would constitute permissible "incidental disclosure" on the part of the provider under HIPAA.⁸ Incidental use or disclosure is permissible under HIPAA mainly because requiring physical privacy for each patient is not practicable. (For example, every patient would need their own private waiting room, curtains separating care areas in emergency departments would be insufficient, etc.) Nonetheless, professional ethics dictate that school nurses keep patient care confidential to the extent possible.

May a school nurse text a parent or guardian with health information regarding their student?

School nurses should not use personal devices to transmit or receive student health information, because the confidentiality of that information cannot be ensured once the transmittal is made. For example, a school nurse should not use their personal cell phone to text a parent or school staff member with a student's blood glucose readings.⁹ If permitted by state law, school nurses may use an encrypted device or app provided by the school or educational agency for this purpose.¹⁰

Schools often use parent volunteers to assist with health-related activities, such as vision and hearing testing, medical filing, mobile dentist chaperoning, etc.). What are the rules for volunteers?

Parent volunteers can be considered school officials with a legitimate educational interest in student personally identifiable information (PII) under a FERPA exemption for contractors or volunteers that are carrying out outsourced services or functions on behalf of the school.¹¹ As such, parent volunteers' access to and use of student PII is subject to FERPA requirements. As a best practice, schools should ensure that volunteers are aware of their responsibilities regarding student privacy and may wish to require related training before allowing volunteer access to student PII.¹² Confidentiality agreements can also help to ensure that volunteers understand their responsibilities with regard to student PII.

School nurses are often asked to share student data for continuity of care, research, and other legitimate reasons. Is there any guidance for school nurses on whether and how to share student health data with third parties?

The Network for Public Health Law has developed Data Sharing Guidance for School Nurses, which is available on the Network's [Website](#). The guidance document sets forth requirements imposed by federal law regarding use and disclosure of student education record data and shares strategies for devising agreements that allow legal and efficient data sharing in compliance with federal law. It presents use cases to illustrate specific data sharing situations that school nurses may encounter and how these agreements can facilitate communication and collaboration among providers and other entities in compliance with state and federal law.



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SUPPORTERS

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¹ 34 CFR § 99.30

² 45 CFR § 160.103 – DEFINITIONS, Transactions.

³ U.S. DEP'T OF HEALTH AND HUMAN SERVS. & U.S. DEP'T OF EDUC., 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 RECORDS (Dec. 2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-hipaa-guidance.pdf at page 9.

⁴ Id. at p. 4, interpreting 34 CFR § 99.3.

⁵ 20 U.S.C. § 1232g(a)(1)(A); 34 CFR Part 99, Subpart B, and § 99.3 ("Education records").

⁶ Rooker, LeRoy S. U.S. Department of Education Family Policy Compliance Office, Letter to School and College Legal Services of California re: Parental Access to Records of Confidential Medical Services for K-12 Students (March 14, 2005). (<https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/ca031405.html>)

⁷ English A and Kenney KE, State Minor Consent Laws: A Summary, second ed., Chapel Hill, NC: Center for Adolescent Health & the Law, 2003; and Boonstra H and Nash E, Minors and the right to consent to health care, Gutmacher Report on Public Policy, 2000, 3(4):4-8 (explaining the relationship between state minor consent laws and HIPAA). "If a state or other law explicitly *requires* information to be disclosed to a parent, the rule allows a health care provider to comply with that law and to disclose the information. If a state or other law explicitly permits, *but does not require*, information to be disclosed to a parent, the rule allows a provider to exercise *discretion* to disclose or not. If a state or other law *prohibits* disclosure of information or records to a parent without the minor's consent, the rule *does not allow* a provider to disclose without the minor's permission. If state or other law is silent on the question of parents' access, a provider or health plan has discretion to determine whether to grant access to a parent who requests it." (emphases added)

⁸ See OCR HIPAA Privacy, Incidental Uses and Disclosures [45 CFR 164.502(a)(1)(iii)], December 3, 2002. Retrieved from <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/coveridentities/incidentalu%26d.pdf>.

⁹ National Association of School Nurses. (2019). *Wearable medical technology in schools – The role of the school nurse* (Position Brief). Silver Spring, MD, online at <https://www.nasn.org/advocacy/professional-practice-documents/positionbriefs/pb-wearable>, citing National Forum on Education Statistics. (2016). Forum guide to education data privacy. (NFES 2016-096). U.S. Department of Education. Washington, DC: National Center for Education Statistics. Retrieved from <https://nces.ed.gov/pubs2016/NFES2016096.pdf>.

¹⁰ Czuprynski, C. N., & Smith, R., (2017). Data security for schools: A legal and policy guide for school boards. Alexandria, VA: National School Boards Association. Retrieved from https://cdn-files.nsba.org/s3fs-public/reports/Data_Security_Guide_5_Jan2017.pdf?G4UaLHlwi3zo6iSq94F.K.vSAaCmzb.v. See also, Ventola C. L. (2014). Mobile devices and apps for health care professionals: uses and benefits. *P & T: a peer-reviewed journal for formulary management*, 39(5), 356–364.

¹¹ 34 CFR §99.31(a)(1)(i)(B)

¹² The U.S. Department of Education Privacy Technical Assistance Center (PTAC) has developed a brochure for volunteers with access to students' PII, which includes a place for the volunteer to sign and acknowledge their understanding of FERPA privacy requirements. The brochure is available online at <https://studentprivacy.ed.gov/resources/school-volunteer-brochure>. PTAC has also developed a training video for school volunteers, which is available at <https://www.youtube.com/watch?v=HAU-aMqzXE>.