U.S. Department of Health
and Human Services

U.S. Department of Education

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

December 2019 Update
(First Issued November 2008)

Contents

Which Rule Applies?

What Information Can Be Shared?

I. Introduction

The purpose of this guidance is to explain the relationship between the Family Educational Rights and Privacy Act (FERPA) statute and implementing regulations and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. This document updates and expands on prior guidance to help address potential confusion on the part of school administrators, health care professionals, and others on how FERPA and HIPAA apply to records maintained on students. It also addresses certain disclosures that are allowed without the written consent of the parent or eligible student under FERPA or without authorization under the HIPAA Privacy Rule, especially those related to emergency health or safety situations. While this guidance seeks to answer many questions that school officials, parents, and others may have about the intersection of these Federal laws, ongoing discussions may raise additional questions. Contact information for submitting additional questions or suggestions for purposes of informing future guidance is provided at the end of this document. The U.S. Departments of Education and Health and Human Services are committed to a continuing dialogue on these important matters affecting the safety and security of our nation's schools, students, and communities.

Note: This guidance does not have the force and effect of law and is not meant to bind the public in any way. Instead, it is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

II. Overview of FERPA

FERPA (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of students' "education records." FERPA affords parents certain rights with respect to their children's education records maintained by educational agencies and institutions and their agents to which FERPA applies. These include the right to access their children's education records, the right to seek to have these records amended, and the right to provide consent for the disclosure of personally identifiable information (PII) from these records, unless an exception to consent applies. *See* 34 CFR Part 99, Subparts B, C, and D. These rights transfer to the student when the student reaches the age of 18 years or attends a postsecondary institution at any age, thereby becoming an "eligible student" under FERPA. 20 U.S.C. §1232g(d); 34 CFR §§ 99.3 (definition of "eligible student") and 99.5(a)(1).

FERPA applies to educational agencies and institutions that receive Federal funds under any program administered by the U.S. Department of Education. 20 U.S.C. §§ 1221(c)(1) and 1232g(a)(3); 34 CFR § 99.1(a). If an educational agency or institution receives Federal funds under one or more of these programs, FERPA applies to the recipient as a whole, including each of its components, such as a department within a university. 34 CFR § 99.1(d). The term "educational agency or institution" generally refers to public elementary and secondary schools, school districts, and postsecondary institutions, including medical and other professional schools. Private and religious schools at the elementary and secondary levels generally do not receive funds from the U.S. Department of Education and are, therefore, not subject to FERPA.

An educational agency or institution subject to FERPA may not disclose the education records, or PII from education records, of a student without the prior written consent of a parent or the

student if the student is an "eligible student," unless an exception applies. 20 U.S.C. §§ 1232g (b)(1) and (b)(2); 34 CFR §§ 99.30 and 99.31. FERPA contains several exceptions to the general consent requirement which are set forth in 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j), and 34 CFR § 99.31. For example, educational agencies and institutions can disclose PII from a student's education records, including health and medical information, to teachers and other school officials within the school, without prior written consent, if these school officials have been determined to have "legitimate educational interests" in the education records, pursuant to criteria set forth in the school's annual notification of FERPA rights. 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A). Educational agencies and institutions can also disclose PII from a student's education records, without prior written consent, to appropriate parties in connection with an emergency, if these parties' knowledge of the information is necessary to protect the health or safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

The term "education records" is defined to mean, with certain exceptions, 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. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 (definition of "education records"). For instance, a student's health records, including immunization records, maintained by an educational agency or institution (such as by an elementary or secondary school nurse) would generally constitute education records subject to FERPA.

Records that educational agencies and institutions maintain on children with disabilities, including records of children referred under the Individuals with Disabilities Education Act (IDEA), are also covered as education records under both FERPA and IDEA. IDEA includes confidentiality provisions that are similar to, but broader than, FERPA to protect the privacy of PII in the early intervention or education records of children referred to the IDEA. *See* 20 U.S.C. §1417(c) and for children ages 3 through 21 the IDEA Part B regulations at 34 CFR §§ 300.610-300.626 and for children with disabilities under the age of three the IDEA Part C regulations at 34 CFR §§ 303.400 – 303.416. The IDEA Part B and C confidentiality provisions contain informed parent consent and notice provisions that are separate from FERPA and permit disclosure of PII without parent consent to officials of participating agencies (as defined separately within the IDEA Part B and C regulations). The IDEA regulations contain additional exceptions and generally incorporate the FERPA exceptions to the prior consent requirements. For a comparison of the FERPA and IDEA confidentiality provisions, please refer to Department technical assistance guidance entitled, "IDEA and FERPA Confidentiality Provisions" available at: https://studentprivacy.ed.gov/resources/ferpaidea-cross-walk.

Under FERPA, "treatment records," as they are commonly called, are excluded from the definition of "education records." Treatment records are:

> records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the

> student, and are not available to anyone 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.

20 U.S.C. § 1232g(a)(4)(B)(iv); 34 CFR § 99.3 (definition of "education records"). Assuming certain conditions are satisfied, treatment records may include, for instance, a student's health or medical records that a college's psychologist maintains solely in connection with providing treatment to the student. An educational agency or institution may only disclose an eligible student's treatment records to individuals who are providing treatment to the student (including health care professionals who are not part of, nor acting on behalf of, the educational agency or institution (e.g., third-party health care providers)), and a physician or other appropriate professional of the student's choice. *Id.* For all other disclosures of an eligible student's treatment records, an educational agency or institution must obtain the student's prior written consent or satisfy one of the exceptions to FERPA's general written consent requirement, as the records would no longer qualify as "treatment records" (and thereby be excluded from the definition of "education records") and, instead, become subject to all other FERPA requirements. FERPA's implementing regulations and other helpful information about FERPA can be found at: https://studentprivacy.ed.gov/resources/family-educational-rights-and-privacy-act-regulations-ferpa.

III. Overview of HIPAA

Congress enacted HIPAA in 1996 to, among other things, improve the efficiency and effectiveness of the health care system through the establishment of national standards and requirements for electronic health care transactions and to protect the privacy and security of individually identifiable health information. Collectively, these are known as the HIPAA Administrative Simplification provisions, and the U.S. Department of Health and Human Services has issued a suite of rules, including the Privacy Rule, to implement these provisions. Entities subject to the HIPAA Administrative Simplification Rules (known as the HIPAA Rules) (*see* 45 CFR Parts 160, 162, and 164), called "covered entities," are health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with covered transactions. *See* 45 CFR § 160.103. "Health care providers" include institutional providers of health or medical services, such as hospitals, as well as non-institutional providers, such as physicians, dentists, and other practitioners, along with any other person or organization that furnishes, bills, or is paid for health care in the normal course of business. Covered transactions are those for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan. *See* 45 CFR § 160.103 (definitions of "health care provider" and "transaction") and 45 CFR Part 162, Subparts K–R. Once a health care provider becomes a covered entity, the HIPAA Privacy Rule applies to the individually identifiable health information held by, or on behalf of, the health care provider as a health care provider.

The HIPAA Privacy Rule requires covered entities to protect individuals' health records and other personal health information the entities maintain or transmit, known as protected health information (PHI), by requiring appropriate safeguards to protect privacy, and setting limits and conditions on the uses and disclosures that may be made of such information without patient

authorization. The rule also gives patients certain rights with respect to their health information, including rights to examine and obtain a copy of their health records, and to request corrections (amendments).

HIPAA Disclosures that are Relevant in Emergency Situations

Where the HIPAA Privacy Rule applies, it permits covered entities to disclose PHI without patient authorization in certain circumstances, including emergency or other situations. Examples of such permitted disclosures include:

- **Disclosures for Treatment:** Covered entities may disclose, without a patient's authorization, PHI about the patient as necessary to treat the patient or to treat another person (who might be, for example, affected by the same emergency situation). Treatment includes the coordination or management of health care and related services by one or more health care providers and others, consultation between providers, and the referral of patients for treatment. *See* 45 CFR §§ 164.502(a)(1)(ii), 164.506(c), and the definition of "treatment" at § 164.501.

- **Disclosures to Family, Friends, and Others Involved in an Individual's Care and for Notification:** Covered entities are permitted to share PHI with family members (or other caregivers) that is directly relevant to the involvement of a family member in the patient's health care or payment for care if, when given the opportunity, the patient does not object to the disclosure. A covered entity also may share this information with such a family member when the patient is not present—or when it is impracticable, because of emergency circumstances or the patient's incapacity, for the covered entity to ask the patient about sharing information with a family member—if it determines, in the exercise of professional judgment, that doing so would be in the best interest of the patient. *See* 45 CFR § 164.510(b).

  A covered entity also may share information about a patient as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the patient's care, of the patient's location, general condition, or death. This may include situations where it is necessary to notify family members and others, the police, the press, or the public at large. *See* 45 CFR § 164.510(b).

- **Disclosures to Prevent a Serious and Imminent Threat:** Health care providers may share PHI with anyone as necessary to prevent or lessen a serious and imminent threat to the health or safety of the individual, another person, or the public – consistent with applicable law (such as State statutes, regulations, or case law) and the provider's standards of ethical conduct. This permission includes the sharing of psychotherapy notes, which otherwise receive special protection under the Privacy Rule. *See* 45 CFR § 164.508(a)(2). Thus, without a patient's authorization or agreement, health care providers may disclose a patient's health information to anyone who is in a position to prevent or lessen the threatened harm, including family, friends, caregivers, and law enforcement. The HIPAA Privacy Rule expressly presumes the good faith of health care providers in

their determination of the nature and severity of the threat to health or safety and the need to disclose information. *See* 45 CFR § 164.512(j).

Additional information about how HIPAA permits uses and disclosures for emergency preparedness, planning, and response, is available on OCR's website at https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html.

IV. Where FERPA and HIPAA May Intersect

In a few limited circumstances, an educational agency or institution subject to FERPA can also be subject to HIPAA. For instance, a school that provides health care to students in the normal course of business, such as through its health clinic, is also a "health care provider" under HIPAA. If a school that is a "health care provider" transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, it is then a covered entity under HIPAA. As a covered entity, the school's health care transactions must comply with the HIPAA Transactions and Code Sets Rule (or Transactions Rule).

However, many schools that meet the definition of a HIPAA covered entity do not have to comply with the requirements of the HIPAA Rules because the school's only health records are considered "education records" or "treatment records" under FERPA. *See* 45 CFR § 160.103 (definition of "protected health information" ¶¶ (2)(i), (ii)). The HIPAA Privacy Rule specifically excludes from its coverage those records that are protected by FERPA by excluding such records from the definition of "protected health information."

V. Frequently Asked Questions and Answers

Which Rule Applies?

1. Does the HIPAA Privacy Rule apply to an elementary or secondary school?

Generally, no. In most cases, the HIPAA Privacy Rule does not apply to an elementary or secondary school because the school either: (1) is not a HIPAA covered entity or (2) is a HIPAA covered entity but maintains health information only on students in records that are "education records" under FERPA and, therefore, not PHI covered by the HIPAA Privacy Rule. In some circumstances a private school would be required to comply with the HIPAA Privacy Rule when it is a HIPAA covered entity and not subject to FERPA because it does not receive funds from the U.S. Department of Education. Elementary or secondary schools would fall into one of the following categories:

- *The school is not a HIPAA covered entity.* The HIPAA Privacy Rule only applies to health plans, health care clearinghouses, and those health care providers that transmit health information electronically in connection with certain administrative and financial transactions ("covered transactions"). *See* 45 CFR § 160.102. Covered transactions are those for which the U.S. Department of Health and Human Services has adopted a standard, such as health care claims submitted to a health plan. *See* the definition of

"transaction" at 45 CFR § 160.103 and 45 CFR Part 162, Subparts K–R. Thus, even though a school employs school nurses, physicians, psychologists, or other health care providers, the school is not generally a HIPAA covered entity because the providers do not engage in any of the covered transactions, such as billing a health plan electronically for their services. It is expected that most elementary and secondary schools fall into this category.

- *The school is a HIPAA covered entity but does not have PHI.* Even if a school is a covered entity and must comply with the HIPAA Transactions and Code Sets Rules, the school would not be required to comply with the HIPAA Privacy Rule if it only maintains health information in FERPA "education records." For example, a public high school might employ a health care provider that bills Medicaid electronically for services provided to a student under the IDEA. The school is a HIPAA covered entity because it engages in one of the covered transactions electronically, and therefore, would be subject to the HIPAA transaction standard requirements. However, if the school provider maintains health information only in "education records" under FERPA, the school is not required to comply with the HIPAA Privacy Rule because the Privacy Rule explicitly excludes FERPA "education records." *See* 45 CFR § 160.103 (definition of "protected health information," ¶¶ (2)(i), (ii)). Importantly, although the HIPAA Privacy Rule does not apply, FERPA's and IDEA's privacy requirements do apply, including the requirement to obtain prior written parent or eligible student consent (under 20 U.S.C. §§ 1232g(b)(1) and (b)(2) and 34 CFR §§ 99.30, 300.9 and 300.622) to disclose to Medicaid billing information about a service provided to a student.

- *The school is a HIPAA covered entity and is not subject to FERPA.* Schools that are covered entities and are not subject to FERPA must comply with both the HIPAA transaction requirements and the HIPAA Privacy, Security, Breach Notification, and Enforcement Rules regarding any individually identifiable health information the school has about students and others to whom it provides health care. For example, if a private elementary or secondary school not subject to FERPA employs a physician who bills a health plan electronically for the care provided to students (making the school a HIPAA covered entity), the school must comply with the HIPAA Rules regarding the individually identifiable health information of its patients.

- *Certain private school placements.* Where a student is placed in a private school for the provision of Individualized Education Program (IEP) services on behalf of a school or school district subject to FERPA, the education records of the privately placed student maintained by the private school are subject both to FERPA and to the confidentiality requirements under the IDEA, which incorporate the provisions of FERPA, and not the HIPAA Privacy Rule. The U.S. Department of Education is in the process of preparing a Notice of Proposed Rulemaking to amend the FERPA regulations to add this provision and will provide an opportunity for the public to comment on this proposed amendment.

2. Does FERPA or HIPAA apply to student health records maintained by a health care provider acting for a FERPA-covered elementary or secondary school that is not employed by the school?

Health records that directly relate to students and are maintained by a health care provider, such as a third party contractor, acting for a FERPA-covered elementary or secondary school, would qualify as education records subject to FERPA regardless of whether the health care provider is employed by the school.

Conversely, student health records that are maintained by a health care provider that provides services directly to students and that is not acting for a FERPA-covered educational agency or institution do not constitute FERPA-protected education records. For example, the records created and maintained by a public health nurse who provides immunizations to students on a FERPA-covered elementary or secondary school's grounds, but who is not acting for the school, would not qualify as "education records" under FERPA. (Note: If the school wishes to disclose PII from student education records that it maintains to the public health nurse, the school would have to comply with FERPA and obtain prior written parent or eligible student consent or satisfy an exception to FERPA's general consent requirement.)

HIPAA would apply to student records maintained by a health care provider that are not subject to FERPA only if the provider transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, e.g., health care claims, and the records contain PHI.

3. Does FERPA or HIPAA apply to records on students at health clinics or other health care facilities run by postsecondary institutions?

FERPA applies to most public and private postsecondary institutions and, thus, to the records on students maintained by the campus health clinics and other health care facilities operated by such institutions. These records will be either education records or treatment records under FERPA, both of which are excluded from coverage under the HIPAA Rules, even if the school is a HIPAA covered entity. *See* 45 CFR § 160.103 (definition of "protected health information," ¶¶ (2)(i), (ii)).

While the health records of students maintained by postsecondary institutions may be subject to FERPA, if the institution is a HIPAA covered entity and provides health care to nonstudents, the individually identifiable health information of the nonstudent patients is subject to the HIPAA Rules. Thus, for example, postsecondary institutions that are subject to both HIPAA and FERPA and that operate clinics or other health care facilities open to staff, the public, or both (including family members of students) are required to comply with FERPA with respect to the health records (i.e., "education records" or "treatment records") of their student patients, and with the HIPAA Rules with respect to the health records (i.e., PHI) of their nonstudent patients.

4. Does FERPA or HIPAA apply to records on students who are patients at a university hospital?

Patient records maintained by a hospital affiliated with a university that is subject to FERPA are not typically "education records" or "treatment records" under FERPA because university

hospitals generally do not provide health care services to students for the university. Rather, these university hospitals generally provide such services without regard to the person's status as a student and not on behalf of a university. Assuming the hospital is a HIPAA covered entity, these records are subject to all of the HIPAA Rules, including the HIPAA Privacy Rule. However, in a situation where a hospital does run the student health clinic on behalf of a university, records that the clinic maintains on students would be subject to FERPA, either as "education records" or "treatment records," and not subject to the HIPAA Rules.

5. Does FERPA or HIPAA apply to the health records of an individual who is both a student and an employee of a university at which the person receives health care?

Health records that directly relate to an individual who is both a student and an employee of a university and that are maintained by the university at which the individual receives health care would be considered "education records" or "treatment records" protected under FERPA; thus, such records would be excluded from coverage under the HIPAA Rules. FERPA defines "education records" as, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 (definition of "education records"). One of the exceptions to this definition of education records excludes certain records relating to employees of the educational agency or institution. To fall within this exclusion, such records must, among other things, relate exclusively to the individual in his or her capacity as an employee. *See* 20 U.S.C. § 1232g(a)(4)(B)(iii); 34 CFR § 99.3 (definition of "education records"). (Of note, this exclusion also does not apply to records relating to individuals in attendance at the educational agency or institution who are employed as a result of their status as students. 20 U.S.C. § 1232g(a)(4)(B)(iii); 34 CFR § 99.3 (definition of "education records," ¶ (b)(3)(ii)).) The health records that are maintained by a university as part of its provision of health care to a student who is also an employee of a university would not constitute employment records because the health records would not relate exclusively to the individual in his or her capacity as an employee but also would relate to the individual in his or her capacity as a student. Thus, such records would be covered as education records by FERPA and thus would not be covered by the HIPAA Rules.

6. Are all student records maintained by a health clinic within a postsecondary institution considered "treatment records" under FERPA?

No. Not all records on eligible students that are maintained by a college- or university-run health clinic are treatment records under FERPA because, among other things, many such records are not made, maintained, or used only in connection with the treatment of the students. For example, billing records that a college- or university-run health clinic maintains on a student are not solely made, maintained, and used in connection with the treatment of the student and, therefore, would constitute "education records," not "treatment records," under FERPA, the disclosure of which would require prior written consent from the eligible student unless an exception applies. In addition, records relating to the treatment of a student that the college- or university-run health clinic maintains and discloses to persons other than those providing

treatment to the student, or physicians or other appropriate professionals of the student's choice, are "education records," not "treatment records," under FERPA.

7. Can a postsecondary institution be a "hybrid entity" under the HIPAA Privacy Rule?

Yes. A postsecondary institution that is a HIPAA covered entity may have health information to which the Privacy Rule may apply not only in the health records of nonstudents in the health clinic, but also in records maintained by other components of the institution, such as a law enforcement unit or research department, where such records are not education records or treatment records under FERPA. In such cases, the institution, as a HIPAA covered entity, has the option of becoming a "hybrid entity" and, thus, have the HIPAA Privacy Rule apply only to its health care unit. The school can achieve hybrid entity status by designating the health unit as its "health care component." As a hybrid entity, any individually identifiable health information maintained by other components of the university (i.e., outside of the health care component), such as a law enforcement unit, or a research department, would not be subject to the HIPAA Privacy Rule, notwithstanding that these components of the institution might maintain records that are not "education records" or "treatment records" under FERPA.

To become a hybrid entity, the covered entity must designate and include in its health care component(s) all components that would meet the definition of a covered entity (or business associate) if they were separate legal entities. However, the hybrid entity is not permitted to include in its health care component other types of components that do not perform the covered functions of the covered entity or components that do not perform support activities for the components performing covered functions. That is, components that do not perform health plan, health care provider, or health care clearinghouse functions, and components that do not perform activities in support of these functions (as would a business associate of a separate legal entity) may not be included in a health care component(s). Within the hybrid entity, most of the HIPAA Privacy Rule requirements apply only to the health care component(s), although the hybrid entity retains certain oversight, compliance, and enforcement obligations. *See* 45 CFR § 164.105 of the Privacy Rule for more information. *See* also https://www.hhs.gov/hipaa/for-professionals/faq/522/can-a-postsecondary-institution-be-a-hybrid-entity-under-hipaa/index.html for additional information about hybrid entities under the HIPAA Privacy Rule.

What information can be shared?

8. Where HIPAA applies, when an individual reaches the age of majority or becomes emancipated, who controls the PHI concerning health care services rendered while the individual was an unemancipated minor?

The individual who is the subject of the PHI can exercise, with limited exceptions, all rights granted by the HIPAA Privacy Rule with respect to all PHI about him or her, including information obtained while the individual was an unemancipated minor, consistent with State or other law. Generally, State laws provide that parents are the personal representatives of minor children until such time as the child reaches the age of majority or becomes emancipated. Parents of adult children or emancipated minors generally are not treated as personal representatives and, therefore, cannot exercise the rights of their children under HIPAA. Of

course, any individual can designate a personal representative – which may include a parent – who can exercise rights on his or her behalf.

For example, if parents wanted to provide a specialist with an adult child's medical records from the family doctor, HIPAA would govern whether the parent could obtain said records from the family doctor. Under the HIPAA Privacy Rule, the parent could provide the doctor with a HIPAA authorization signed by the adult child, or have the adult child exercise the HIPAA right of access to direct the family doctor to send the records to the parent.

9. Where HIPAA applies, when can a health care provider share an adult child's PHI with a parent if the adult child has not signed an authorization or asked the provider to send a copy of their records to the parent?

HIPAA allows health care professionals to disclose some health information without a patient's authorization or agreement under certain circumstances, as described below.

- **Caregivers**. When the patient hasn't objected, and the provider shares health information with a caregiver that is directly related to the caregiver's involvement in the patient's health care or payment of care. 45 CFR § 164.510(b).

  For example, an adult child's family physician conducts a depression screening and believes the adult child shows positive markers for depression. The family physician, adult child, and parent have discussed the potential diagnosis in the past, and the patient did not object to the parent's presence or participation. The family physician may take into account the parents' history of involvement in determining that it is in the adult child's best interests to contact the parents with whom the adult child lives to discuss medical strategies at home.

- **Personal representatives**. A parent who serves as the personal representative of the adult child, or who holds a health care power of attorney or other legal appointment granting control of medical information for the adult child, generally has the right to access the child's records. 45 CFR § 164.502(g), 45 CFR § 164.524. An exception applies where the covered health care provider has a reasonable belief, based on professional judgment, that the adult child is subject to domestic violence, abuse or neglect by the personal representative, or doing so would otherwise endanger the child. 45 CFR § 164.502(g)(5). The covered health care provider must verify the personal representative's authority to act on behalf of the adult child before disclosing information. 45 CFR § 164.514(h)(1).

  For example, a parent holds a health care power of attorney for an adult child with serious mental illness. The parent can exercise the HIPAA right of access to obtain the adult child's records, so long as the health care provider first verifies the parent's authority (e.g., by viewing a copy of the health care power of attorney documentation).

- **Facility Directories.** Sharing facility directory information about an adult child (i.e., name, location in the facility, and general condition) with a parent or other person who

identifies the adult child by name, if the provider determines that doing so is in the best interests of a patient who is incapacitated or there is an emergency treatment circumstance, provided that the disclosure is consistent with a prior expressed preference of the individual, if any, that is known to the covered health care provider. 45 CFR § 164.510(a).

For example, a parent calls the local hospital looking for an adult child who is missing. Hospital staff may inform the parent that the adult child is in serious condition in the intensive care unit if the staff are not aware of any objection the child may have to this disclosure. The level of the parent's involvement in the adult child's care does not affect the hospital staff's ability to disclose this information.

- **Health or Safety Threats.** Informing parents or others in a position to prevent or lessen a serious and imminent threat to the health or safety of the individual, another person, or public, consistent with applicable law and the provider's standards of ethical conduct. 45 CFR § 164.512(j).

  For example, a young man who has reached the age of majority storms out of his therapist's office stating, "I know where my parents keep their guns." The therapist believes that the young man is on his way home and may try to use a weapon kept by the parents at home. The therapist may contact the parents, police, or others in a position to help, to warn them that the young man is on the way home and may take a weapon.

10. Where FERPA applies, when can a school disclose an eligible student's PII from education records to his or her parent if the eligible student has not provided written consent?

Although FERPA provides that the parents' rights afforded by FERPA transfer to the "eligible student," FERPA permits an educational agency or institution to share, without applicable prior written consent, PII from the eligible student's education records with his or her parents under certain circumstances. For example:

- Schools may release PII from an eligible student's education records to his or her parents, without the consent of the eligible student, if the student is claimed as a dependent for tax purposes under section 152 of the Internal Revenue Code. 20 U.S.C. § 1232g(b)(1)(H); 34 CFR § 99.31(a)(8).

- FERPA permits schools to disclose PII from an eligible student's education records to his or her parents, without the consent of the eligible student, in connection with a health or safety emergency if the parents' knowledge of the records is necessary to protect the health or safety of the student or other persons. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

- FERPA permits a college or university to inform parents of students under the age of 21 (at the time of disclosure)that the student has violated any law or policy concerning the use or possession of alcohol or a controlled substance if the institution determines that the

student committed a disciplinary violation with respect to that use or possession. 20 U.S.C. § 1232g(i); 34 CFR § 99.31(a)(15).

- Nothing in FERPA prohibits a school official from sharing information with parents that is based on that official's personal knowledge or observation and that is not based on information contained in an education record. Therefore, FERPA would not prohibit a teacher or other school official from letting a parent know of their concern about the parent's child that is based on their personal knowledge or observation.

11. Does HIPAA allow a health care provider to disclose PHI about a minor child with a mental health condition and/or substance use disorder to the parents of the minor?

The HIPAA Privacy Rule generally allows a covered entity to disclose PHI about a minor child to the child's parent, as the minor child's personal representative, when the disclosure is not inconsistent with State or other law.[1]

In some cases, such as when a minor may receive treatment without a parent's consent under applicable law, the parents are not treated as the minor's personal representative. *See* 45 CFR § 164.502(g)(3). In such cases where the parent is not the personal representative of the minor, other HIPAA Privacy Rule provisions may allow the disclosure of PHI about the minor to the parent.

For example, if a provider believes a minor presents a serious danger to self or others, the HIPAA Privacy Rule permits a covered entity to disclose PHI to a parent or other person(s) if the covered entity has a good faith belief that: (1) the disclosure is necessary to prevent or lessen the serious and imminent threat and (2) the parent or other person(s) is reasonably able to prevent or lessen the threat. The disclosure also must be consistent with applicable law and standards of ethical conduct. *See* 45 CFR § 164.512(j)(1)(i); *see also* provisions related to 42 CFR Part 2 regulating the disclosure and re-disclosure of substance-use disorder information by Part 2 programs.

For example, a minor makes statements to his physician that he plans to harm himself or others. The HIPAA Privacy Rule permits the physician, including a mental health provider, to contact a parent (or anyone) who the health care provider has a reasonable belief is in a position to lessen or prevent the harm.

12. Does FERPA permit a school to disclose PII from the education records of a student, who is under the age of 18 years and is not attending a postsecondary institution, with a mental health condition and/or substance use disorder to the parents of the student?

Yes. FERPA permits schools to disclose PII from education records to the parent of a student

[1] For more detailed information, *see* 45 CFR § 164.502(g) and the fact sheets regarding personal representatives at:

- http://www.hhs.gov/ocr/hipaa/guidelines/personalrepresentatives.pdf
- https://www.hhs.gov/sites/default/files/when-your-child.pdf
- https://www.hhs.gov/sites/default/files/am-i-my-childs.pdf

who is not an eligible student. *See* 34 CFR § 99.31(a)(12). Further, under FERPA, a school must generally provide a parent of a student who is not an eligible student with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request. 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10(b). While required to provide a parent of a student who is not an eligible student with access to their child's education records, a school is not generally required by FERPA to provide copies of education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 CFR § 99.10. One of the exceptions in which a school may be required to provide a copy of the education records requested is in the context of a request for access to education records from a parent or student who is not an eligible student where the circumstances would effectively prevent the parent from exercising his or her right to inspect and review education records; in this context, the school would be required to either provide the parent with a copy of the education records requested or make other arrangements that would allow for the parent to inspect and view the requested records. 34 CFR § 99.10 (d). An example of circumstances effectively preventing a parent from inspecting or reviewing education records is where the parent does not live within commuting distance of the school.

13. What options do family members of an adult patient with mental illness have under HIPAA if they are concerned about the patient's mental health and the patient refuses to agree to let a health care provider subject to HIPAA share information with the family?

The HIPAA Privacy Rule permits a health care provider to disclose information to the family members of an adult patient who has decision-making capacity, and indicates that he or she does not want the disclosure made, only to the extent that the provider perceives a serious and imminent threat to the health or safety of the patient or others and the family members are in a position to lessen the threat. *See* 45 CFR § 164.512(j). Otherwise, under HIPAA, the provider must respect the wishes of the adult patient who objects to the disclosure.

HIPAA in no way prevents health care providers from listening to family members or other caregivers who may have concerns about the health and well-being of the patient. A provider can factor that information into the patient's care, and should the patient later request access to the health record, any such information disclosed under a promise of confidentiality (such as that shared by a concerned family member with the provider), may be withheld from the patient if the disclosure would be reasonably likely to reveal the source of the information. *See* 45 CFR § 164.524(a)(2)(v). This exception to the patient's right to access their PHI allows loved ones to disclose relevant health or safety information with providers without fear of disrupting their relationship with the patient.

14. What options do the parents of an eligible student with mental illness have under FERPA if they are concerned about the student's mental health and the eligible student refuses to provide consent to permit a school subject to FERPA to share PII from education records with the family?

Under FERPA, an eligible student's education records and treatment records (which constitute education records if made, maintained, or used for any purpose other than the eligible student's treatment) may be disclosed, without appropriate consent, if the disclosure meets one of the

exceptions to FERPA's general consent rule. *See* 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR § 99.31. For example, a university physician treating an eligible student might determine that the student's treatment records should be disclosed to the student's parents. This disclosure may be made, without consent of the eligible student, if the eligible student is claimed as a dependent under section 152 of the Internal Revenue Code of 1986. 20 U.S.C. § 1232g(b)(1)(H); 34 CFR § 99.31(a)(8). If the eligible student is not claimed as a dependent, the disclosure may be made to the parents if the conditions of any other exception to FERPA's general requirement of consent are met, such as if the disclosure is in connection with a health or safety emergency and the parents' knowledge of the records is necessary to protect the health or safety of the eligible student or other persons. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

If the exceptions to FERPA's general consent requirement do not apply and the eligible student refuses to provide written consent for the disclosure, then FERPA would prohibit the school from making the disclosure. However, FERPA would not prevent school officials from listening to the concerns of family members or other care givers, nor preclude a school official from sharing personal observations of the student not based on information contained in the student's education record.

15. Does HIPAA allow a health care provider to disclose PHI about a student to a school nurse or physician?

Yes. The HIPAA Privacy Rule allows covered health care providers to disclose PHI about students to school nurses, physicians, or other health care providers for several purposes, without the authorization of the student or student's parent.

HIPAA permits covered entities to disclose PHI for treatment purposes, without the authorization of the student or student's parent. For example, a student's primary care physician may discuss the student's medication and other health care needs with a school nurse who will administer the student's medication and provide care to the student while the student is at school.

The HIPAA Privacy Rule also permits a covered entity to disclose PHI to a person(s) if the covered entity has a good faith belief that: (1) the disclosure is necessary to prevent or lessen a serious and imminent threat and (2) the parent or other person(s) is reasonably able to prevent or lessen the threat. The disclosure also must be consistent with applicable law and standards of ethical conduct. *See* 45 CFR § 164.512(j)(1)(i).

For example, a parent tells their child's therapist they are worried because the child threatened to kill a teacher and has access to a weapon. HIPAA permits the therapist to contact school officials if, based on a credible representation by the parent, the therapist believes the disclosure to school officials is necessary to prevent or lessen a serious and imminent threat to the teacher.

16. Does FERPA allow a school official to disclose PII from a non-eligible student's education records to a third-party health care provider without the written consent of the parent?

In a couple of cases, yes. First, under FERPA, a school nurse or other school official may disclose PII from a non-eligible student's education records to the student's family physician, without the written consent of the parent, where a health or safety emergency exists and the physician's knowledge of the records is necessary to protect the health or safety of the student or other persons. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36. Additionally, FERPA would permit a school official to verify information that is contained in a record created by a third party with that third party, such as verifying a physician's note excusing a student's absence with that physician, as long as other PII from the student's education records is not disclosed without written consent. *See* 34 CFR § 99.3 (definition of "disclosure"). This is because the definition of "disclosure" permits a targeted release of information back to the stated source for verification purposes. *See id.*

17. Does HIPAA allow a parent to access the medical records of his or her deceased child?

HIPAA defers to applicable State laws regarding who qualifies as an individual's personal representative, and thus who can obtain and make decisions about sharing the individual's health information upon the individual's death, when the individual dies without designating a legal personal representative. *See* 45 CFR § 164.502(g)(4). The parent of a deceased minor child generally is the child's personal representative.

When a child has reached the age of majority (under State law) before death and has designated a personal representative who is not a parent, a covered entity must obtain authorization from the personal representative before disclosing records to the parent.

18. Does FERPA allow a parent to access the education records of his or her deceased child?

Consistent with common law principles, the U.S. Department of Education interprets the FERPA rights of eligible students to lapse or expire upon the death of the eligible student. Therefore, FERPA would not protect the education records of a deceased eligible student, and an educational agency or institution may disclose such records at its discretion or consistent with State law. However, at the elementary and secondary level, FERPA rights do not lapse or expire upon the death of a non-eligible student because FERPA provides specifically that the rights it affords rest with the parents of students until that student reaches 18 years of age or attends a postsecondary institution. Once the parents are deceased, the records are no longer protected by FERPA.

19. Under FERPA, may an eligible student's treatment records be shared with parties other than treating professionals?

Under FERPA, treatment records, by definition, are only available to professionals and paraprofessionals providing treatment to the student, or to physicians or other appropriate professionals of the student's choice. If an educational agency or institution that maintains a student's treatment records uses or discloses these records for other purposes or to other parties, they are no longer "treatment records," and become subject to the FERPA requirements concerning "education records." (As previously explained, any disclosure of "education records"

requires prior written consent of a parent or eligible student or must satisfy one of the exceptions to FERPA's general consent requirement. *See* 20 U.S.C. §§1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j); 34 CFR §§ 99.30 and 99.31.)

For example, in order for a physician at a university-operated health clinic treating an eligible student to disclose the student's treatment records to the student's parents, the physician would need to either obtain the eligible student's prior written consent or satisfy one of the exceptions to FERPA's general consent requirement. Under one such exception, the physician could non-consensually disclose the records to the parents if the eligible student qualified as the parents' dependent, under section 152 of the Internal Revenue Code of 1986, for Federal income tax purposes. *See* 20 U.S.C. § 1232g(b)(1)(H); 34 CFR § 99.31(a)(8). The disclosure could also be made, without prior written consent, to parents, as well as other appropriate parties, in connection with a health or safety emergency if the parents', or other parties', respective, knowledge of the records was necessary to protect the health or safety of the student or other persons. *See* 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

20. When does FERPA permit an eligible student's treatment records to be disclosed to a third-party health care provider for treatment?

An eligible student's treatment records may be disclosed to individuals who are providing treatment to the student, including health care professionals who are not part of nor acting on behalf of an educational institution (i.e., third-party health care provider), as long as the information is being disclosed only for the purpose of providing treatment to the student. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 CFR § 99.3 (definition of "education records," ¶ (b)(4)(iii)). In addition, an eligible student's treatment records may be disclosed to a third-party physician or other appropriate professional of the student's choice. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv). In either of these situations, if the treatment records are disclosed to a third-party health care provider that is a HIPAA covered entity, the records would become subject to the HIPAA Privacy Rule. The treatment records maintained by the educational institution would continue to be treatment records under FERPA, so long as the records remain unavailable to anyone other than persons providing the eligible student with treatment, or a physician or other appropriate professional of the student's choice.

If the disclosure is for purposes other than treatment, an eligible student's treatment record only may be disclosed to a third party as an "education record," that is, with the prior written consent of the eligible student or if one of the exceptions to FERPA's general consent requirement is met. For example, if a university is served with a court order requiring the disclosure of the mental health records of a student maintained as treatment records at the campus clinic, FERPA would permit the university to disclose the records to comply with the court order in accordance with the provisions of 20 U.S.C. §§ 1232g(b)(2), and (j) and 34 CFR § 99.31(a)(9). Although FERPA would generally require the university to make a reasonable effort to notify the eligible student in advance of compliance with such a court order so that the eligible student may seek protective action, the university may also wish to take additional measures to protect the privacy of student mental health records, such as obtaining a protective order or filing the records under seal. The university also should determine if the disclosure would comply with all other applicable laws, including any applicable State laws protecting the confidentiality of the mental

health records. Thereafter, these mental health records that the university disclosed for non-treatment purposes would no longer be excluded from the definition of "education records" and, instead, become subject to all other FERPA requirements as "education records" under FERPA.

21. Under HIPAA, when can information be shared about someone who presents a serious danger to self or others?

The HIPAA Privacy Rule permits a covered entity to disclose PHI, including psychotherapy notes, when the covered entity has a good faith belief that the disclosure: (1) is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or others and (2) is to a person(s) reasonably able to prevent or lessen the threat. This may include, depending on the circumstances, disclosure to law enforcement, family members, the target of the threat, or others whom the covered entity has a good faith belief can mitigate the threat. The disclosure also must be consistent with applicable law and standards of ethical conduct. *See* 45 CFR § 164.512(j)(1)(i).

For example, consistent with other laws and ethical standards, a mental health provider whose teenage patient has made a credible threat to inflict serious and imminent bodily harm on one or more fellow students may alert law enforcement, a parent or other family member, school administrators or campus police, or others the provider believes may be able to prevent or lessen the chance of harm. In such cases, the covered entity is presumed to have acted in good faith where its belief is based upon the covered entity's actual knowledge (i.e., based on the covered entity's own interaction with the patient) or in reliance on a credible representation by a person with apparent knowledge or authority (i.e., based on a credible report from a family member or other person). *See* 45 CFR § 164.512(j)(4).

For threats or concerns that do not rise to the level of "serious and imminent," other HIPAA Privacy Rule provisions may apply to permit the disclosure of PHI. For example, covered entities generally may disclose PHI about a minor child to the minor's personal representative (e.g., a parent or legal guardian), consistent with State or other laws. *See* 45 CFR § 164.502(b).

22. Under FERPA, when can PII from a student's education records be shared, without prior written consent, about someone who presents a serious danger to self or others?

FERPA provides that PII from a student's education records, including student health records, may be disclosed by educational agencies and institutions to appropriate parties in connection with a health or safety emergency, without the consent of the parent or eligible student, if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

For example, if an eligible student storms out of a teacher's office stating that, "I know where my parents keep their guns, and someone is going to pay" and the teacher believes that the student is on his way home to and may try to use the weapons, FERPA's health or safety exception would permit the teacher to contact the parents, police, or others in a position to help, to warn them that the student is on the way home and threatened to use a weapon against others.

Educational agencies and institutions are responsible for making the determination as to whether a health or safety emergency exists. *See* 34 CFR § 99.36(c). Pursuant to § 99.36(c) of the FERPA regulations, in determining whether it may rely on FERPA's health or safety emergency exception:

> an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student of other individuals. If the educational agency or institution determines that there is an *articulable and significant threat* to the health or safety of the student or other individuals, it 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. If, based on the information available at the time of the determination, there is a *rational basis for the determination*, the [U.S. Department of Education] will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Emphasis added.) *See also* 73 Fed. Reg. 74,806, 74,837 (Dec. 9, 2008) (explaining that the U.S. Department of Education amended FERPA's health or safety emergency exception to add subsection (c) in order to "provide[ ] greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals.").

The U.S. Department of Education discussed the health or safety emergency exception to FERPA's general consent requirement in some detail in the preamble to the 2008 *Federal Register* notice implementing changes to the FERPA regulations, 73 Fed. Reg. 74,806, 74,836-74,839 (Dec. 9, 2008), and in guidance entitled "Addressing Emergencies on Campus," issued in June 2011. In the preamble, the U.S. Department of Education explained that:

> the phrase "articulable and significant threat" means that if a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of substantial bodily harm, to any person, including the student, the school official may disclose education records to any person whose knowledge of information from those records will assist in protecting a person from that threat.

73 Fed. Reg. at 74,838. The U.S. Department of Education also stated that:

> to be "in connection with an emergency" means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.

Further, in the June 2011 guidance, the U.S. Department of Education explained the following:

> In some situations, a school official may determine that it is necessary to disclose [PII] from a student's education records to appropriate parties in order to address a health or safety emergency . . . This exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of [PII] from a student's education records. Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed under this FERPA exception. Disclosures for health or safety emergency reasons do not include disclosures to address emergencies for which the likelihood of occurrence is unknown, such as would be the case in emergency preparedness activities.

U.S. Department of Education, *Addressing Emergencies on Campus*, p. 3 (June 2011), *available at* https://studentprivacy.ed.gov/resources/addressing-emergencies-campus.

Finally, where an educational agency or institution non-consensually discloses PII from a student's education records pursuant to FERPA's health or safety emergency exception, within a reasonable period of time after the disclosure, the educational agency or institution must record in the student's education records the articulable and significant threat to the health or safety of the student or other individual(s) that formed the basis for the disclosure, and the parties to whom the information was disclosed. 34 CFR § 99.32(a)(5).

23. Under FERPA, can an educational agency or institution disclose, without prior written consent, PII from a student's education records, including health records, to the educational agency's or institution's law enforcement officials?

Yes, if certain conditions are met. By way of background, many schools have their own law enforcement units to monitor safety and security and enforce any local, State, or Federal law or refer such enforcement matters to appropriate authorities. Those schools that do not have specific law enforcement units may designate a particular office or school official to be responsible for monitoring safety and security and referring potential or alleged violations of law to local authorities. Some smaller school districts and colleges employ off-duty police or sheriff's department officers to serve as school security officers.

If a law enforcement official is an employee of an educational agency or institution and meets the criteria specified in the school's annual notification of FERPA rights to parents and eligible students for being a "school official" who has been determined to have a "legitimate educational interest" in the education records, then the law enforcement unit official may be considered a school official to whom PII from students' education records may be disclosed, without prior written consent of a parent or eligible student. *See* 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A). Educational agencies and institutions may also consider law enforcement unit officials, such as off-duty police or sheriffs' department officers and School Resource Officers (SROs) who are not employees of the educational agency or institution, to be

"school officials," to whom PII from student's education records may be disclosed, without appropriate consent, if the law enforcement unit officials:

1. Perform an institutional service or function for which the educational agencies or institutions would otherwise use employees (*for, e.g.*, to ensure school safety and security);
2. Are under the "direct control" of the educational agencies or institutions with respect to the use and maintenance of the education records (*for, e.g.*, through a memorandum of understanding (MOU) that establishes data use restrictions and data protection requirements);
3. Are subject to FERPA's use and re-disclosure requirements in 34 CFR § 99.33, which provides that the PII from education records may be used only for the purposes for which the disclosure was made (*for, e.*g., to promote school safety and the physical security of students), and which limits the re-disclosure of PII from education records; and,
4. Meet the criteria specified in the educational agencies' or institutions' annual notification of FERPA rights for being "school officials" who have been determined to have "legitimate educational interests" in the education records.

See 20 U.S.C. § 1232g(b)(1)(A); 34 CFR §§ 99.7(a)(3)(iii) and 99.31(a)(1)(i)(A) and (B)(1)-(3).

In situations where the law enforcement official is not a school official with a legitimate educational interest, the school may only disclose a student's education records, including health records, to that official with the prior, written consent of the parent or eligible student, unless an exception applies. One such exception that could apply is FERPA's health or safety emergency exception (discussed in greater detail in Question 21 above). Under this FERPA exception, a student's education records, including health records, may be disclosed, without the prior written consent of a parent or eligible student, to appropriate parties in connection with an emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals. *See* 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36.

For more information on this issue, see the following guidance entitled, "School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)," issued by the U.S. Department of Education's Privacy Technical Assistance Center in February 2019 – https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.

24. Does HIPAA permit an educational agency or institution to disclose PHI to a Protection and Advocacy system where the disclosure is required by law?

Yes. Protection and Advocacy (P&A) systems are designated by the governor of each State and territory to protect and advocate for the rights of individuals with disabilities, including by investigating incidents of abuse or neglect. Each P&A system administers multiple P&A programs authorized by Congress through legislation such as the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) (for individuals with developmental disabilities), the

Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act) (for individuals with mental illness), and section 509 of the Rehabilitation Act of 1973 (Rehabilitation Act) (for certain individuals with disabilities who, for example, are not eligible for P&A services under the DD Act or PAIMI Act). These statutes and their implementing regulations require that access to records be provided to P&A systems under certain circumstances. *See* DD Act at 42 U.S.C. § 15043(a)(2)(I) and (J), 45 CFR § 1386.22; PAIMI Act at 42 U.S.C. § 10805(a)(4), 42 CFR § 51.41; and the Rehabilitation Act at 29 U.S.C. § 794e(f)(2), 34 CFR § 381.10(a)(2).

The Privacy Rule permits a covered entity to disclose PHI without an individual's authorization to a P&A system to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law. *See* 45 CFR § 164.512(a). Thus, a covered entity may disclose PHI to the P&A system, as required by the DD Act, PAIMI Act, or section 509 of the Rehabilitation Act, as well as any other Federal statute authorizing a P&A program, when the P&A system requests access to such records in carrying out its protection and advocacy functions under these Acts. Similarly, covered entities may disclose PHI to the P&A system where another Federal, State, or other law mandates such disclosures, consistent with the requirements in such law.

Where disclosures are required by law, the Privacy Rule's minimum necessary standard does not apply; instead, the law requiring the disclosure will establish the limits on what should be disclosed. Moreover, with respect to disclosures required by law, a covered entity cannot use the Privacy Rule as a reason not to comply with its other legal obligations.

25. Does FERPA permit an educational agency or institution to disclose PII from a student's education records to a Protection and Advocacy system?

Yes, in certain circumstances. For instance, an educational agency or institution may disclose PII from a student's education records to a P&A system, where a parent of a student under 18 and not in attendance at an institution of postsecondary education, or an eligible student, provides prior written consent to disclose such PII to the P&A system. Additionally, as we previously stated in an *amici curiae* brief jointly filed by the U.S. Departments of Education and Health and Human Services before the U.S. Court of Appeals for the Second Circuit, there are also circumstances in which an educational agency or institution may disclose such PII to the P&A system without obtaining such prior written consent, such as in connection with an emergency under FERPA's health or safety exception (set forth in 20 U.S.C. § 1232g(b)(1)(I) and 34 CFR §§ 99.31(a)(10) and 99.36), if the P&A system's knowledge of the PII is necessary to protect the health or safety of the student or other individuals.[2] We noted that "the facts supporting a P&A's determination that a mentally ill student's health or safety is in serious jeopardy, *see* 42 U.S.C. § 10805(a)(4)(C), for example, might also support a school's determination that an 'emergency' existed in which disclosure of [PII from education records] was 'necessary to protect the health or safety of the student or other persons.' 20 U.S.C. § 1232g(b)(1)(I)." *Id.* at 15-16. However, we also recognized that a P&A system's request for name and contact information might not always satisfy a FERPA exception to the general requirement of consent and that, in those instances where the DD Act, the PAIMI Act, or section 509 of the

Rehabilitation Act conflict with FERPA, "FERPA does not bar a P&A from obtaining access to the name of and contact information for a parent, guardian, or other legal representative of a minor student with a disability or mental illness where the P&A's probable cause determination satisfies the requirements for access to records under the PAIMI Act and the DD Act." *Id*. at 15-16. We concluded that where the statutes are in conflict, "the specific access provisions of the PAIMI Act and the DD Act (and [section 509 of the Rehabilitation Act] by incorporation) are properly understood as a limited override of FERPA's generally applicable non-disclosure requirements." *Id*. at 15. We viewed a P&A system's access to such PII from education records as generally being consistent with Congress' intent relating to student privacy in part because a P&A system "is required to maintain the confidentiality of any student records it receives, see 42 U.S.C. § 10806(a) …," such that we saw little risk of the public disclosure of the information that FERPA is intended to prevent. *Id*. at 19-20.

26. Does HIPAA permit a school-based health care provider to report a student to the National Instant Criminal Background Check System (NICS)?

Most likely no. Although HIPAA allows limited disclosures to the National Instant Criminal Background Check System (NICS) by a designated set of covered entities, this permission most likely would not apply to covered entities that operate in the school context.

NICS is maintained by the Federal Bureau of Investigation (FBI) to conduct background checks on persons who may be disqualified from possessing or receiving firearms based on State law or Federal prohibited categories, including those who have been "involuntarily committed to a mental institution" or "adjudicated as a mental defective" (*e.g*., found incompetent to stand trial). *See* 27 CFR § 478.11.

HIPAA's permission to disclose to NICS applies only to covered entities that are: (1) An entity designated by a State to report, or which collects information for purposes of reporting, on behalf of a State, to the NICS; or (2) A court, board, commission, or other lawful authority that makes a commitment or adjudication that causes an individual to become subject to disqualification as described above. For these covered entities, the Privacy Rule allows disclosure of only the limited demographic and certain other information needed for purposes of reporting to NICS and expressly prohibits the disclosure of diagnostic or clinical information for such purposes. *See* 45 CFR § 164.512(k)(7).

It is unlikely that a school health provider is a HIPAA covered entity designated by a State to report to NICS or given the authority to order a student's involuntary commitment, but if it is, such a provider could make limited disclosures concerning a student to NICS.

More information can be found online at OCR's NICS page.

27. Does FERPA permit an educational agency or institution to disclose, without prior written consent, PII from a student's education records to the NICS?

FERPA permits records of a law enforcement unit of an educational agency or institution, subject to the provisions of 34 CFR § 99.8, to be reported to NICS without obtaining the prior written consent of parents or eligible students because such records are not covered as "education records" under FERPA. Among the exclusions from the definition of "education records" – and

thus from the privacy protections of FERPA – are records of a law enforcement unit of an educational agency or institution. 20 U.S.C. 1232g(a)(4)(B)(ii); 34 CFR § 99.3 (definition of "education records," subsection (b)(2)). These records must be: (1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit. 20 U.S.C. 1232g(a)(4)(B)(ii); 34 CFR § 99.8(b)(1). Law enforcement unit records do not include the following: (1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or (2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution. 34 CFR § 99.8(b)(2). Under FERPA, "law enforcement unit" means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or noncommissioned security guards, that is officially authorized or designated by that agency or institution to (1) enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (2) maintain the physical security and safety of the agency or institution. 34 CFR § 99.8(a)(1). Therefore, subject to State or local law, educational agencies and institutions may disclose records of a law enforcement unit, as set forth in 34 CFR § 99.8, to anyone, including NICS, without consent from parents or eligible students.

V. Conclusion

While the educational agency or institution has the responsibility to make the initial, case-by-case determination of whether a disclosure meets the requirements of FERPA, the U.S. Department of Education's Student Privacy Policy Office is available to offer technical assistance to school officials in making such determinations.

For quick, informal responses to routine questions about FERPA, school officials may e-mail the Department at FERPA@ed.gov. For more formal technical assistance on the information provided in this guidance in particular or FERPA in general, please contact the Student Privacy Policy Office at the following address:

Student Privacy Policy Office
U.S. Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202-8520

You may also find additional information and guidance on the Department's website at: https://studentprivacy.ed.gov.

For more information on the HIPAA Privacy, Security, Breach Notification, and Enforcement Rules, please visit the U.S. Department of Health and Human Services' HIPAA Privacy Rule Web site at: http://www.hhs.gov/ocr/hipaa/. The Web site offers a wide range of helpful information about the HIPAA Privacy Rule, including the full text of the Privacy Rule, a HIPAA Privacy Rule summary, over 400 frequently asked questions, and both consumer and covered

entity fact sheets. Information on the other HIPAA Administrative Simplification Rules is available at: http://www.cms.hhs.gov/HIPAAGenInfo/.

In addition, if you would like to submit additional questions not covered by this guidance document or suggestions for purposes of informing future guidance, please send an e-mail to OCRPrivacy@hhs.gov and FERPA@ed.gov.