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HIPAA and FERPA: The Ethics of School Counseling in a Virtual World

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FERPA
Family Educational Rights and
Privacy Act

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What is Family Educational Rights and Privacy Act ([FERPA](#))?

- Federal privacy law that applies to educational agencies and institutions and applicable programs funded by the U.S. Department of Education.
 - Provides parents and eligible students the right:
 - To access education records and seek amendment of education records
 - To provide consent to disclosure of personally identifiable information (PII) from student education records unless a FERPA exception applies
 - To file a complaint under FERPA.
- What is an “education record” under FERPA?
 - “Education records” are, with certain exceptions, those records that are –
 - Directly related to a student
 - Maintained by an educational agency or institution or by a party acting on behalf of the educational agency or institution.
- [Governed by the Family Policy Compliance Office](#)
- [Slide Deck from FERPA regarding the COVID-19 crisis](#)
- [FAQ Doc from FERPA regarding the COVID-19 crisis](#)



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What is the Health Insurance Portability and Accountability Act of 1996 ([HIPAA](#))?

HIPAA is intended to:

- protect the privacy of a medical patient's identifiable health records including electronic health care transactions.
- give patients the right to inspect their own medical records and request amendments to medical records.
- restricts release of confidential communication with the patient or the patient's medical records.









To be in compliance with HIPAA, students' health information must be protected.

The application of HIPAA is directed to psychotherapy notes, with respect to mental health and counseling. The Privacy Rule (45 C.F.R. § 164.502(b)) those with access to medical records to "make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of disclosure."

HIPAA covers different aspects of educational records than FERPA covers. Thus, the notes kept by the school counselor don't necessarily apply to HIPAA regulations unless the release of a student's health records from outside the school setting are somehow involved.



What are the differences between FERPA and HIPAA?

		Who must comply?	Protected information	Permitted disclosures ¹
FERPA	<p>The Family Educational Rights and Privacy Act (FERPA) is a federal law enacted in 1974 that protects the privacy of student education records.</p> <p>The Act serves two primary purposes:</p> <ol style="list-style-type: none"> 1. Gives parents or eligible students more control of their educational records 2. Prohibits educational institutions from disclosing "personally identifiable information in education records" without written consent 	 <ul style="list-style-type: none"> • Any public or private school: <ul style="list-style-type: none"> – Elementary – Secondary – Post-secondary • Any state or local education agency <p>Any of the above must receive funds under an applicable program of the US Department of Education</p>	 <p>Student Education Record: Records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution</p>	 <ul style="list-style-type: none"> • School officials • Schools to which a student is transferring • Specified officials for audit or evaluation purposes • Appropriate parties in connection with financial aid to a student • Organizations conducting certain studies for or on behalf of the school • Accrediting organizations • Appropriate officials in cases of health and safety emergencies • State and local authorities, within a juvenile justice system, pursuant to specific state law • To comply with a judicial order or lawfully issued subpoena
HIPAA	<p>The Health Insurance Portability and Accountability Act (HIPAA) is a national standard that protects sensitive patient health information from being disclosed without the patient's consent or knowledge. Via the Privacy Rule, the main goal is to</p> <ul style="list-style-type: none"> • Ensure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well-being. 	 <ul style="list-style-type: none"> • Every healthcare provider who electronically transmits health information in connection with certain transactions • Health plans • Healthcare clearinghouses • Business associates that act on behalf of a covered entity, including claims processing, data analysis, utilization review, and billing 	 <p>Protected Health Information²: Individually identifiable health information that is transmitted or maintained in any form or medium (electronic, oral, or paper) by a covered entity or its business associates, excluding certain educational and employment records</p>	 <ul style="list-style-type: none"> • To the individual • Treatment, payment, and healthcare operations • Uses and disclosures with opportunity to agree or object by asking the individual or giving opportunity to agree or object • Incident to an otherwise permitted use and disclosure • Public interest and benefit activities (e.g., public health activities, victims of abuse or neglect, decedents, research, law enforcement purposes, serious threat to health and safety) • Limited dataset for the purposes of research, public health, or healthcare operations

1. Permitted disclosures mean the information can be, but is not required to be, shared without individual authorization.

2. Protected health information or individually identifiable health information includes demographic information collected from an individual and 1) is created or received by a healthcare provider, health plan, employer, or healthcare clearinghouse and 2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for the provision of healthcare to an individual; and

- (i) That identifies the individual, or
- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

For more information, please visit the Department of Health and Human Services' [HIPAA website](#) and the Department of Education's [FERPA website](#).

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HIPAA & FERPA: The School Counselor Trainee

- [ASCA Ethical Standards for School Counselors](#)
- [ACA Code of Ethics](#)
- [The School Counselor and Virtual School Counseling Position Statement](#)
- State Licensing Boards
- Local Education Agency

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What applies to me in the school setting?

- Almost always will we follow FERPA as educators
 - Even if you are a Mental Health Provider in a school setting, you still fall under FERPA



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California-Specific Information

[Key points about HIPAA
and FERPA in California](#)





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Scenarios

- Student who is suicidal
 - Stay “with” them. Have them walk to the caregiver if caregiver is home. If caregiver is not home, contact caregiver immediately (stay with student). If caregiver is not available, contact police department for a wellness check
 - What if the student discloses suicidal ideation on social media?
- Small Groups
 - Confidentiality
 - Parent Permission
- A student is diagnosed with COVID-19
 - Follow school protocol





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Scenarios

- Visitor in the virtual classroom
 - As a best practice, educational agencies and institutions should discourage non-students from observing virtual classrooms in the event that information from a student's education record is, in fact, disclosed in such virtual classrooms.
 - Does your school have a policy regarding visitors in the virtual classroom?
- Recording virtual lessons and sharing for later viewing
 - Consider what is in the video, where it will be posted for later viewing, and who has access to the platform.
- Working from home
 - Managing records/student documents



School Counseling Best Practices in a Virtual Space

- First and foremost-- follow school and district protocols
- Stay within your competence area
- Collaboration and communication with Administrators
- Advocate for ethical practices
- Triage as needed
 - How can this semester look different than March/April?
 - More intentional
- Privacy does look different
 - Headphones (both student and counselor)
 - Text, Audio, Video options



School Counseling Best Practices in a Virtual Space

- Synchronous (real-time) versus Asynchronous (not in real time) Counseling Services
- Office hours
 - Links and phone numbers to supports/resources beyond school hours
- Crisis protocol
- Use school equipment if at all possible
 - If you have to use your personal device, try to use school platforms (Zoom, School Email, Google Voice)
- Over-communicate
- When in doubt, ask questions

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School Counseling Best Practices in a Virtual Space

- [ASCA Ethical Standards for School Counselors](#)
 - We are expected to adhere to the same guidelines whether we are virtual or face-to-face
 - New challenges--
 - Parent/Guardian Permission
 - Confidentiality
 - Informed Consent
 - Platforms to Utilize



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Insurance for Virtual School Counseling

Membership with ASCA includes insurance coverage. This coverage covers virtual school counseling as long as you are completing your typical duties as a school counselor. This insurance would not cover any work that is beyond the scope of your school counseling duties.



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