



# Deep Dive: HIPAA, FERPA, and Information Sharing

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Camden Webb, Director of Clinical Services, Solano County Office of Education



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# Agenda

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- To have a conversation about critical issues in information sharing and gather information about how we proceed in providing guidance across health-education partners
  
- This is designed to be an interactive 45 minutes together

# Sharing Information: Why It Matters

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→ Start with a Brainstorm ...

- ◆ What information might a health provider want from others to provide better care?
- ◆ What information might others want from a health provider?
- ◆ What are the most common scenarios that present themselves in your work in this area?
- ◆ What questions do you have that they present?



# Sharing Information: Why It Matters

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- We have expectations of privacy for certain information
- Protecting privacy improves access
- Disclosure versus Privacy is the common theme in this work
- All confidentiality laws allow exchange of some information in different ways
- Federal and State Laws Apply to all scenarios



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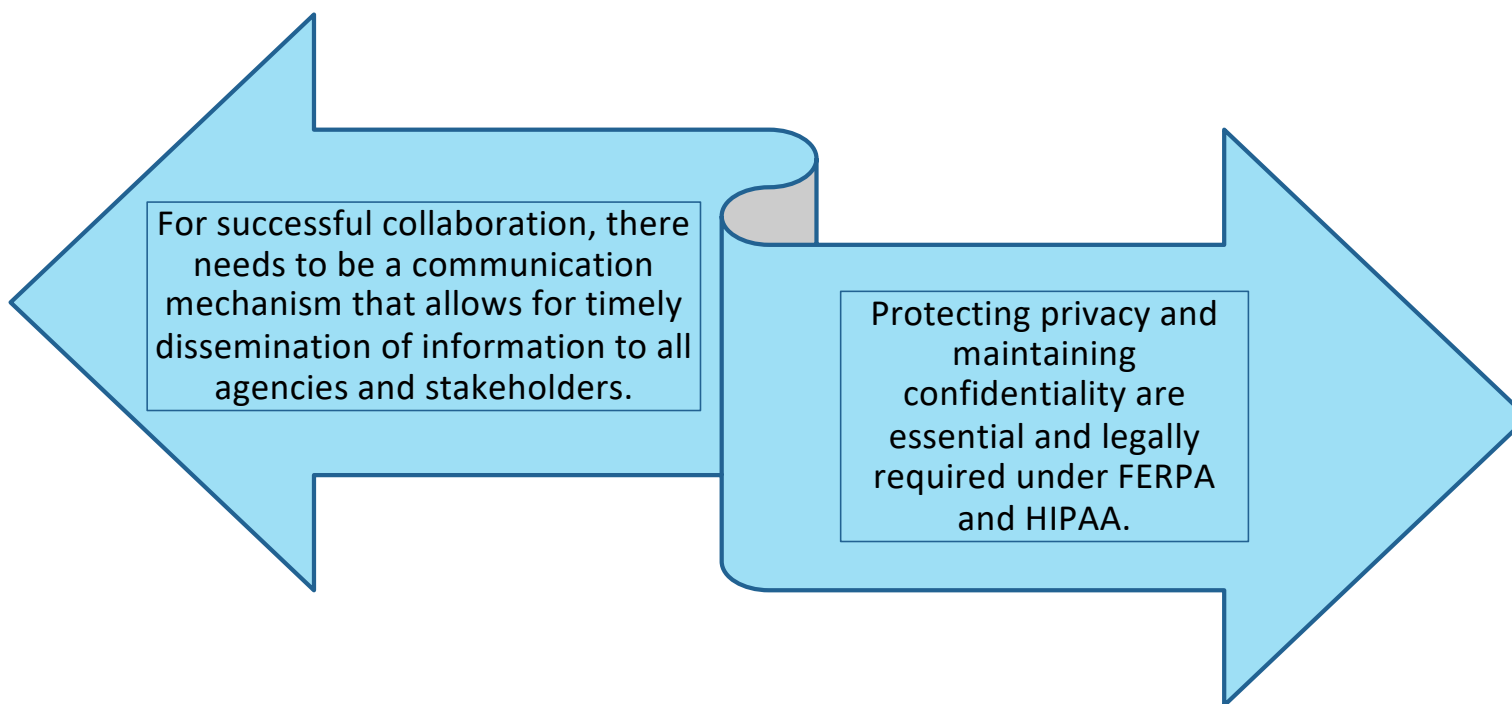
# Resource Guide for Information Sharing

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- HIPPA or FERPA? A Primer on Sharing School Health Information in California
  - ◆ National Center for Youth Law publication, in conjunction with Elizabeth Estes, Esq., AALRR
- SBHA Online Tool for School Health Information Sharing

# The Tension

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# Resolution?

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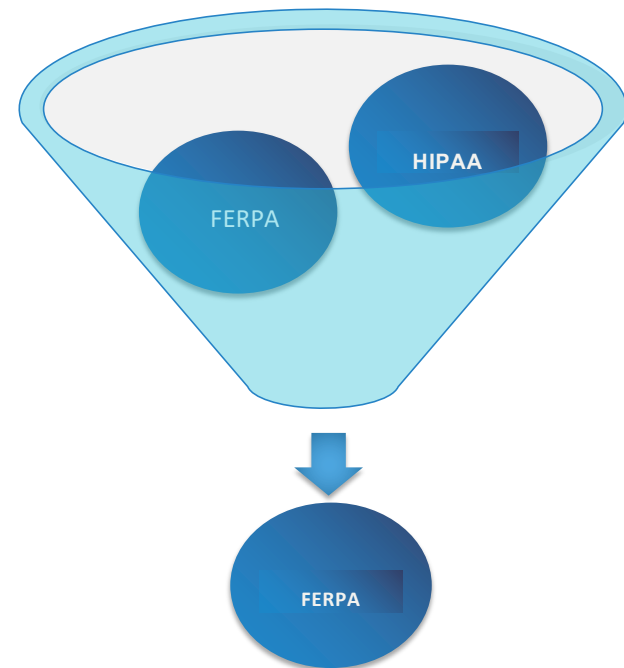
- This is a challenge that can be navigated through careful planning and engagement of families, staff, and providers across agencies committed to a common goal.
- The signed consent of a parent or legal guardian (and in some situations, the minor) to obtain and release information is essential to comply with privacy laws.



# Laws Affecting School-Based Mental Health Services: HIPAA vs. FERPA



→ Is a school-based service record covered under HIPAA or FERPA? This is an intentional analysis that must be completed.



# Laws Affecting School-Based Mental Health Services: **HIPAA**

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- Limits disclosures of health information maintained by most health care providers
- “Health care providers” is a broad term and can mean physicians, clinical social workers, medical/mental health practitioners, hospitals, clinics, etc.
  - ◆ It applies to those health care providers that:
    - Provide, bill for, or are paid for health care; or
    - For individuals, if they transmit health information in electronic form.
- Purpose is to limit disclosing “protection health information” (PHI)

# Laws Affecting School-Based Mental Health Services: **HIPAA**

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- PHI – individually identifiable health information in any form, including oral communications as well as written or electronically transmitted information
- Health care providers cannot disclose information protected by HIPAA without signed authorization.
- **Exception:** Health care providers may share some protected health and mental health information with other health care providers for treatment and referral purposes without need of a signed release.

# Laws Affecting School-Based Mental Health Services: **HIPAA**

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- REMEMBER!
  - You can always share information if there is a valid written authorization to release.
  - Otherwise, you may share if there is an exception that allows or requires disclosure.
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# Laws Affecting School-Based Mental Health Services: **FERPA**

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- Limits disclosures of personally identifiable information in education records maintained by school districts
- Provides parental access to education records
- Education records – records, files, documents, or materials recorded in any other format containing information directly related to a student and are maintained by an educational agency or person acting for such agency

# Laws Affecting School-Based Health Services: FERPA Exceptions

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- School Officials may share PII with other school officials in the same school with legitimate educational interests in the information.
- “Legitimate educational interest” can be defined to mean that the “Official needs to review the education record in order to fulfill his or her professional responsibility.”
- Let’s discuss what that means...



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# School Mental Health Provider Records

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- What if the school district hires an outside mental health provider?
- Potentially yes, if the mental health provider is acting as a school employee.
  - ◆ Mental health provider would either be hired as a school official; or
  - ◆ A contractor of the school district discharging District services for District's students with District funds.



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# School Mental Health Provider Records

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## → Contractors and Consultants:

- ◆ Local Board Policy must define “school official” to include contractors and consultants and be clear the records may be shared with contractors acting on behalf of agency with a “legitimate educational interest”
- ◆ Local Board Policy should also define “legitimate educational interest”
- ◆ Contractor must be under control of school in terms of use of records and comply via contract with FERPA related to use and disclosure of PII



# Laws Affecting School-Based Mental Health Services: **FERPA**

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- Outside of legitimate educational interest, school districts need written permission for the release:
  - ◆ Parent signature on the release; or
  - ◆ If student is 18 years-old or older, student's signature.
- Parent includes “natural parent, guardian, or an individual acting as a parent in the absence of a parent or a guardian”

# Laws Affecting School-Based Mental Health Services: **FERPA**

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- Education Records do not include:
  - ◆ Oral communications, personal impressions
  - ◆ “Sole Possession Records”

# Laws Affecting School-Based Health Services: **FERPA**

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→ **Question:** How are “sole possession” records defined?

◆ **Law:** Records kept in the sole possession of the maker, used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker of the record are NOT considered pupil/FERPA records.

[20 U.S.C. §1232g(a)(4)(b)(i); 34 C.F.R. 99.3; Cal. Ed. Code §49061(b).]

# Laws Affecting School-Based Mental Health Services: **FERPA**

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- In sum, as it relates to personal notes exception to pupil records under FERPA, courts have held:
  - ◆ Notes must not be shown to anyone else
  - ◆ Notes must not be maintained as a pupil record in the pupil file
  - ◆ Notes must be solely used as a memory aid
  
- Overarching exception to production of records must also be understood; any records may be subpoenaed and ordered disclosed by a court of competent jurisdiction.

# HIPAA vs. FERPA TOGETHER

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- Private Health Information (PHI) under HIPAA does not include information subject to FERPA
- HIPAA explicitly states that health information held in an education record subject to FERPA is not PHI
  - ◆ If FERPA applies to a particular document, HIPAA does not simultaneously apply.
- FERPA and HIPAA do not apply to the same information at the same time.
- BUT records can transfer coverage from one to the other.

# Application of HIPAA or FERPA

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→ A school mental health program's information is **subject to HIPAA** if the program is funded, administered, and operated by or on behalf of a public or private health, social services, or other non-educational agency or individual.

→ A school's mental health program's records are **subject to FERPA** if the program is funded, administered and operated by or on behalf of a school or educational institution.



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# School Mental Health Provider Records

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- These decisions require intentional discussion and should be made when you are developing your partnership and processes depending on your particular program!!

# Critical to All Sharing is Informed Consent to Disclosure

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- The purpose of disclosure and party or class of parties to whom the disclosure may be made.
- The name and contact information of the agency requesting the information.
- The name and contact information of the agency releasing the information.
- The guardian name and contact information for youth under 18 years of age.
- The name and contact information for young persons 18 years of age or older.
- The types of records or other information to be received (e.g., education, substance abuse, medical, or mental health records).
- The process by which information will be released (e.g., U.S. mail, fax, electronic mail).
- The signature of the guardian or young person if legally applicable.
- The contact information for individual(s) providing consent.
- The date the consent will expire, after which a new consent would be needed.



## Note: Minor Consent Services

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- Children 12 and older have the right to behavioral health services in California without parent consent in certain circumstances.
- However, under FERPA, parents hold an absolute right to access educational records.
- There is no exception under FERPA that limits a parent's inspection rights simply because the information in the records pertains to health care services or to "minor consent" services.
- Districts should have a protocol for release of confidential health records to parents upon request, including minor consent records, and all records requests should follow that procedure in order to ensure protection of both parent and student rights.

# Question & Answer Session