

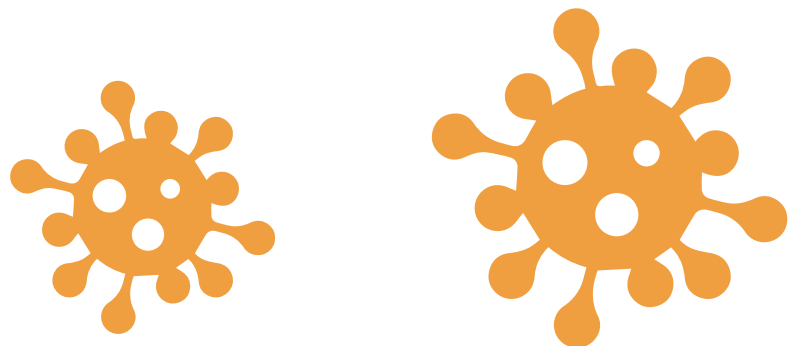
How FERPA and HIPAA Apply to Student Records in General

Most student health records held by public schools are subject to FERPA because “the HIPAA privacy rule *expressly excludes* information considered ‘education records’ under FERPA from HIPAA’s requirements. In short, when FERPA applies, HIPAA does not.”² A few exceptions exist, however, and we discuss these below.

FERPA protects personally identifiable information (PII)³ in students’ education records⁴ maintained by an educational agency or institution.⁵ Students’ health records maintained by a school—regardless of whether health care is provided to students on-campus or off-site—are considered part of students’ education records and therefore are subject to FERPA. Schools can disclose FERPA-protected information only after obtaining consent from either a parent or the eligible student⁶ *unless* an exception to FERPA’s general consent rule applies. In the case of COVID-19, the most applicable exception to consent is FERPA’s health or safety emergency exception.

According to FERPA’s health or safety emergency exception,⁷ if a school determines that there is an articulable and significant threat to the health or safety of a student or other individuals *and* that someone needs PII from education records to protect the student’s or other individuals’ health or safety, the school may disclose that information to the people who need to know it without first gaining the student’s or parent’s consent. The school is responsible for determining whether to disclose PII on a case-by-case basis by considering all of the circumstances related to the threat. Before disclosing PII, administrators should ask whether that disclosure is necessary and, if so, should disclose the minimum amount of information required to address the issue at hand. We discuss FERPA’s health or safety emergency provision in the context of COVID-19 further below.

In most cases, student health records maintained by a public school are education records subject to FERPA’s consent requirement. However, USED has stated that if a school’s health services are “funded, administered and operated by or on behalf of public or private health, social services, or other non-educational agency or individual,” then that school’s health records are protected by HIPAA, not FERPA.⁸ HIPAA prohibits the disclosure of protected health information (PHI) without consent and requires entities subject to the law to establish appropriate privacy protections to protect PHI from unauthorized disclosure. For example, USED has clarified that if a school’s “health care provider . . . delivers health services and engages in covered transactions, such as billing Medicaid for Medicaid-covered services in the school setting,” the resulting records are protected by HIPAA, not FERPA.⁹ Like FERPA, HIPAA has an emergency provision allowing the disclosure of protected health information in certain cases. See the FAQs below for further details.




How FERPA and HIPAA Apply to Student Records During the COVID-19 Pandemic

To illustrate how schools can share information about students while protecting their privacy during a public health emergency, we offer the following FAQs with examples that expand on USED's recent guidance.¹⁰



1. If a student has COVID-19, what information from education records can the school share with the community?

FERPA does not apply when schools disclose that a student may have COVID-19 as long as the school does not directly or indirectly identify that student. Most of the time, in order to receive sufficient notification of risks to their children, parents do not need to know which student was or may be infected, even if they would like to know. For example, let's assume that Tina, the only sixth-grade student on the varsity basketball team, is diagnosed with COVID-19. Administrators should ensure that any messages to the community do not identify Tina directly or indirectly:



Share that a sixth-grade student on the varsity basketball team tested positive for COVID-19 because it is common knowledge that Tina is the only sixth-grade varsity basketball player.

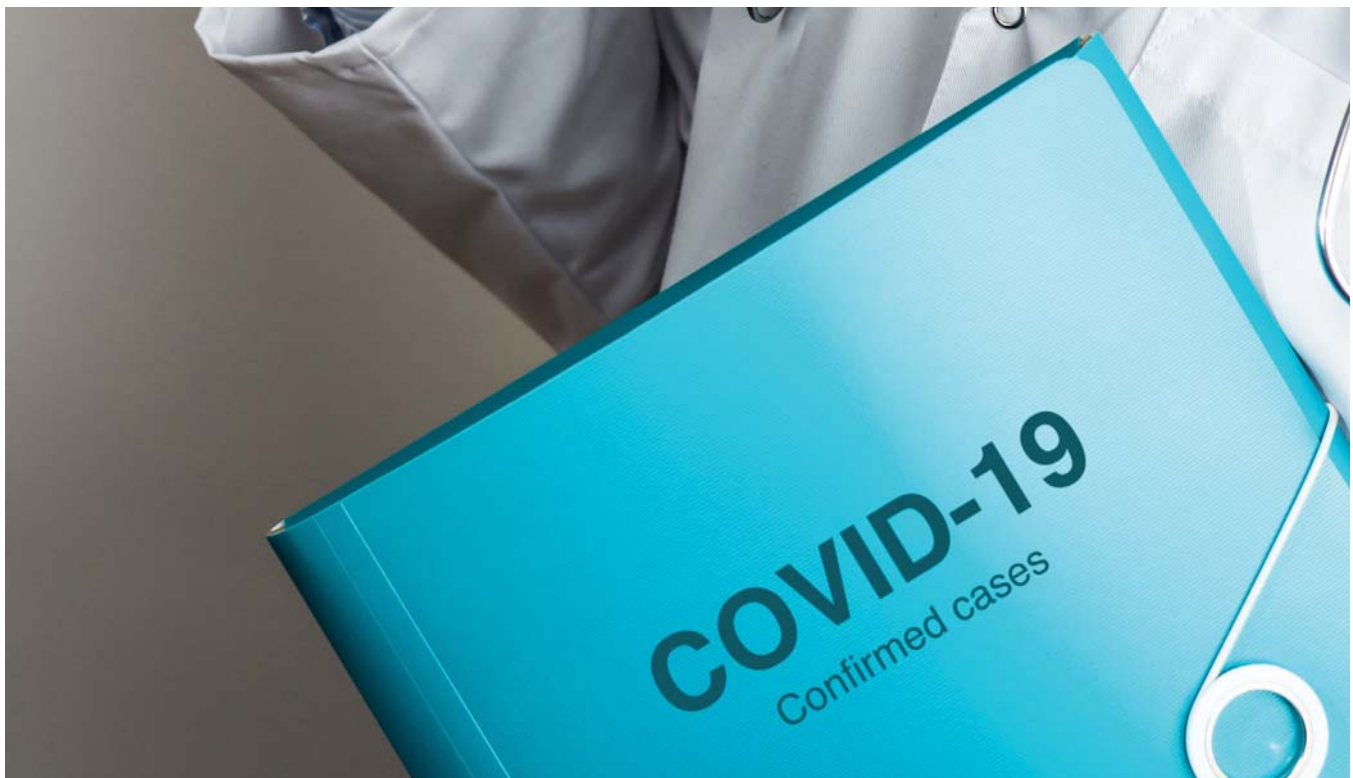
Feel free to share that a student on the basketball team or a student who attended the most recent basketball game tested positive for COVID-19.

However, the school may determine that certain students who had close contact with Tina when she was potentially contagious should be notified so they can choose to self-quarantine. The school could either obtain Tina's parents' consent to release that information or rely on FERPA's health or safety emergency exception¹¹ to make a more specific disclosure to at-risk individuals. The health or safety emergency exception applies if the school determines that an articulable and significant threat to the health or safety of a student or other individuals exists *and* that someone needs PII from education records to protect the student's or other individuals' health or safety. Consider these criteria and the actions the school might take in Tina's case:

- **Articulable and significant threat of a health or safety emergency:** "Articulable and significant threat" means that the school should be "able to explain, based on all the information available at the time, what the threat is and why it is significant."¹² USED generally defers to schools on whether something is an articulable and significant threat of an emergency. In the FERPA and COVID-19 guidance, USED states that "[i]f local public health authorities determine that a public health emergency, such as COVID-19, is a significant threat to students or other individuals in the community, an educational agency or institution in that community may determine that an emergency exists as well."¹³ The 2009 FERPA and H1N1 guidance from USED also noted that an emergency could include "sharing information when necessary during the early stages of a pandemic," and that the "emergency" can last "so long as there is a *current outbreak* of H1N1 in the particular school or district."¹⁴

- **The disclosure is necessary to protect the health or safety of the student or other individuals:** This language allows the school to decide, as noted above, that Tina’s teacher, classmates and their parents, or students with whom Tina spent significant time need to know that Tina has COVID-19 in order to protect their health.
- **Only disclose the minimum amount of information required to address the issue at hand:** However, the school should consider carefully how much information it should disclose; would it be sufficient, for example, to just say that someone in Tina’s class has COVID-19, without identifying Tina as the infected student to her classmates? As noted above, as long as the notification does not directly or indirectly identify Tina, FERPA would not apply. If the school does believe they need to identify Tina, they should make sure they provide the minimum information necessary—that she has COVID-19 and perhaps a window of time when she may have been infectious, if known—and not additional information such as her health history.
- **School officials should be sure to document when they release PII under this exception:** The health or safety emergency exception requires the school to list the following information in Tina’s record: the articulable and significant threat that formed the basis for the disclosure and the parties who received the information.¹⁵

As Tina’s example suggests, administrators should be aware that disclosures made under FERPA’s health or safety emergency exception are not all or nothing. They do not require communicating to everyone or no one. If administrators know that a student is exhibiting symptoms of COVID-19 but hasn’t yet been diagnosed, they could choose to tell only immunocompromised or at-risk students and faculty that a student may have the virus, before communicating with the broader school community. Schools can also combine communication approaches; for example, by identifying Tina as necessary to her classmates and their parents, but sharing only de-identified information, such as “a sixth-grade student likely has contracted COVID-19,” with the broader school community.




2. If the school suspects that a student has COVID-19, what information can the school share with its community?

School administrators may wish to proactively warn parents and students that COVID-19 may be in the school community to facilitate prevention efforts and ensure that people have the information necessary to address a potential outbreak. Given COVID-19's high degree of infectiousness, it may be wise for schools to err on the side of caution and notify the entire school when suspected-but-unconfirmed cases exist. However, it may not be necessary to identify the symptomatic individual.



FERPA does not cover “personal observations,” as long as knowledge was “not obtained through the staff member’s official role in making a determination maintained in an education record about the student.”¹⁶ Therefore, it is possible that a teacher who notices that a student looks sick could disclose that information publicly without violating FERPA, but the school nurse who then examines that student and documents observations in that student’s health file could not disclose the observations. School administrators and educators should consider potential

harms that could occur if they identify a student, and should use alternative approaches to effectively advocate precautionary measures.



Disclose via social media that Timmy, a fifth-grade student in Mr. Smith's class, went home with a fever and difficulty breathing yesterday, and he might have COVID-19. While such a statement does not necessarily violate FERPA, it could harm the student (for example, he could be bullied) and simply spreads rumors without providing useful information. Many schools also have social media policies, and posting this type of information could lead to disciplinary action against teachers or staff members.

Consider the effects of notifying parents and students that a student exhibited symptoms of the virus; will it just create fear? The school may want to wait until Timmy is tested for COVID-19 or his doctors rule out the flu, and it may instead be useful to just encourage parents to practice social distancing. If the school decides to tell the community, do not identify the student exhibiting symptoms unless the community needs to know that information (as discussed in question 1), and perhaps share CDC-recommended preventative measures or other resources as part of a message that can help protect parents and students.

It’s also important to note that FERPA does not cover teachers. If a teacher has COVID-19, a school may share that information without violating FERPA; however, state laws regarding employee confidentiality might apply. One employment law expert advised calling the state public health authority and communicating whatever disclosures they advise to the school community.¹⁷

3. If a school suspects that a student may have COVID-19, can school officials contact the student's primary care physician?

If a school cannot reach a student or their parents and suspects that the student might have COVID-19, they may want to reach out to the student's primary care physician to ask if the physician can confirm that the student has COVID-19 so the school can notify the community. This is allowable under FERPA *if* school officials follow the FERPA requirements that would allow them to disclose that the student is suspected of having COVID-19 to the student's physician. The school could obtain the parent's or eligible student's consent to contact the physician; use FERPA's health or safety emergency exception as described in question 1; or contact the physician without needing to comply with FERPA if the suspicion results from a personal observation as defined in question 2.¹⁸



However, HIPAA may not allow the physician to disclose any information back to the school. Health records outside of the education context are protected by HIPAA rather than FERPA. Like FERPA, HIPAA contains an emergency exception that allows health care providers to disclose protected health information without patient authorization "as necessary to prevent or lessen a serious and imminent threat to the health or safety of the individual, another person, or the public."¹⁹ A suspected case of COVID-19

indicates that public health and the health of others may be at risk, but that determination is left to the HIPAA-covered entity, which is the health care provider, not the school administrator. If a provider identifies the risk, they would be permitted to disclose the minimum information necessary to the school. However, if a school suspects a positive case, administrators could recommend that the parent take their child to get tested.

4. If a student has COVID-19 and the school's health records are covered by HIPAA rather than FERPA, what information may the school disclose to its community?

As noted above, the HIPAA privacy rule expressly excludes information covered by FERPA; therefore, it is rare that HIPAA would come into play for schools. However, if the records are covered by HIPAA, that law also includes an emergency exemption allowing covered entities to disclose protected health information without patient authorization. COVID-19 presents a risk to public health and the health of others on campus, indicating a sufficient basis for the disclosure. However, like FERPA, HIPAA requires covered entities to disclose the "minimum information necessary to prevent or control the spread of the disease or otherwise carry out public health interventions or investigations."²⁰



Disclose in an email to the campus community the name, dormitory, room number, and class schedule of the student.



Disclose in an email to the campus community that a student has tested positive for COVID-19, and consider including which dorm that student was living in or other pertinent locations where the student might have been (but be careful about including too much information, since only one student may have a particular class schedule). Consider whether to identify the infected student to their roommate or housemates.

5. What if a school receives a voluntary request from a local, state, or federal agency for student records to assist the agency in responding to the COVID-19 outbreak?



FERPA does not prohibit disclosure of aggregated or properly de-identified information, so administrators may freely share that type of information to help agencies respond to the pandemic. However, FERPA has a specific de-identification standard: schools must assess whether a “reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, [could] identify the student with reasonable certainty” based on both the information the school discloses at that time and other information that community members could combine with the information disclosed.²¹

For example, if an agency requests information about student visits to the school nurse due to students’ coughing or fevers (symptoms of the virus) during the months of January and February, follow these guidelines:



Share information that could allow a student to be re-identified. For example, If Tommy is the only Latino student in the eighth grade who visited the nurse’s office in January, breaking down information by class year and ethnicity would allow a classmate or other member of the school community to infer that Tommy is the student who may have COVID-19.

Share an aggregated percentage of symptomatic students who visited the nurse’s office, as long as that information would not reasonably allow a person in the school community to identify particular students.

Likewise, schools can share information without consent about school absentee rates as long as they provide this information in aggregated or de-identified form.



Disclose that a ninth-grade student has been absent from class two weeks in a row.
Disclose the absentee rate per grade.

For more information about de-identification, see USED’s guidance on data de-identification²² and disclosure avoidance.²³

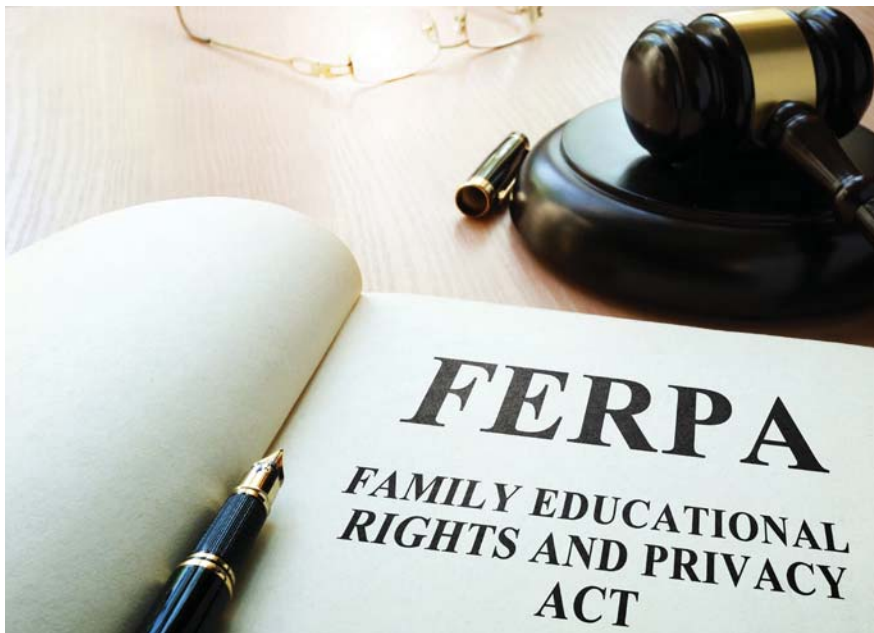
A school could elect to share PII from student records with a public health agency if the school decides that a health or safety emergency exists and the disclosure is necessary to protect students' health or safety. As discussed in question 1, any disclosure made to an appropriate party under this exception must be limited to the duration of the identified emergency and be documented in the student's education record. Moreover, before administrators share any information—because FERPA's health or safety emergency exception requires school administrators to determine whether an emergency exists and whether circumstances warrant sharing students' information—they should first carefully consider which information is necessary for the request, even if an exception to FERPA's consent requirement applies to the circumstances.

Share the student's entire education or health record to the requesting party.

Share pertinent information, such as recent nurse's visits, with the requesting party. Ensure that the party retains that information only for the duration of the health emergency. As required by FERPA, document which data was shared and why it was shared in the student's education record.

6. What should a school do if it receives a request under a mandatory reporting law to share student health records with a public health agency?

Some states have mandatory reporting laws that require schools to report communicable diseases to public health agencies. Depending on the disease, the information that must be reported could be either PII or de-identified or aggregated data. As a reminder, de-identified or aggregated reporting is not covered by FERPA, and can therefore be shared at any time.



USED previously provided FERPA guidance on disclosing PII based on a New Mexico communicable disease reporting law.²⁴ Since New Mexico law specified which communicable diseases constituted an emergency that required immediate reporting of PII, USED found that the law likely aligned with FERPA's health or safety emergency exception and was not preempted. However, USED noted that FERPA does require schools to perform a case-by-case analysis of whether they could disclose PII before reporting information as New Mexico's law required. This analysis should

include whether there is “an identified communicable disease, [that] presents an imminent danger or threat to students or other members of the community, that the release is narrowly tailored to meet the emergency, and that reports are made to appropriate authorities within the health department.” USED emphasized that sharing PII was not allowed in the case of routine or non-emergency reporting that might be required by state or local policies, such as PII regarding students with cancer.

If a school is subject to a state mandatory reporting law regarding pandemics like COVID-19, school officials should determine whether the law's requirements are aligned with FERPA's health or safety emergency exception. As discussed in question 1, a COVID-19 outbreak in a district is a reasonable basis to find that there is an emergency, so school officials just need to determine whether they think the public health agency needs to know that information in order to protect the health or safety of others.

7. Do interagency agreements with other state or local agencies allow schools to disclose education records without obtaining consent?

No. Per previous department guidance, “[i]nteragency agreements do not supersede the consent requirements under FERPA. Although an interagency agreement could be a helpful tool for planning purposes, schools must comply with FERPA’s requirements regarding the disclosure of personally identifiable information from students’ education records.”²⁵ If consent is not obtained, any nonconsensual disclosure to a state or local agency must meet an exception to FERPA’s consent requirement as described above, such as the health or safety emergency exception.

This resource is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

ENDNOTES

U.S. Department of Education, *FERPA and the Coronavirus Disease 2019 (COVID-19)*, (March 12, 2020), <https://studentprivacy.ed.gov/resources/ferpa-and-coronavirus-disease-2019-covid-19>.

The Network for Public Health Law, *Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws (Part II)* (January 23, 2020), <https://www.networkforphl.org/resources/data-privacy-in-school-nursing-navigating-the-complex-landscape-of-data-privacy-laws-part-ii>.

U.S. Department of Education, *Personally Identifiable Information for Education Records*, <https://studentprivacy.ed.gov/content/personally-identifiable-information-education-records>.

U.S. Department of Education, *What is an education record?*, <https://studentprivacy.ed.gov/faq/what-education-record>.

U.S. Department of Education, *Educational Agency*, <https://studentprivacy.ed.gov/content/educational-agency>.

U.S. Department of Education, *Eligible Student*, <https://studentprivacy.ed.gov/content/eligible-student>.

U.S. Department of Education, *When is it permissible to utilize FERPA's health or safety emergency exception for disclosures?*, <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures>.

U.S. Department of Education, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements* (2004), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html>.

The Network for Public Health Law, *Data Privacy in School Nursing: Navigating the Complex Landscape of Data Privacy Laws (Part I)* (2019), <https://www.networkforphl.org/resources/data-privacy-in-school-nursing-navigating-the-complex-landscape-of-data-privacy-laws-part-i/>.

See endnote 1.

Privacy Technical Assistance Center, *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)*, (2019), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf#page=1

Ibid.

See endnote 1.

U.S. Department of Education, *Family Educational Rights and Privacy Act (FERPA) and H1N1* (2009), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-h1n1.pdf#page=3.

U.S. Department of Education, *Does a school have to record disclosures made under FERPA's health or safety emergency exception?*, <https://studentprivacy.ed.gov/faq/does-school-have-record-disclosures-made-under-ferpa%E2%80%99s-health-or-safety-emergency-exception>.

U.S. Department of Education, *Are there any limitations to sharing information based on personal knowledge or observations?*, <https://studentprivacy.ed.gov/faq/are-there-any-limitations-sharing-information-based-personal-knowledge-or-observations>.

Ropes & Gray, *Coronavirus Teleconference: Legal Aspects of the Public Health Response, and What Employers Should Be Doing Now* (2020), page 22, https://www.ropesgray.com/-/media/Files/Event-Media-Library/Teleconferences/2020/20200305_COVID_Transcript.pdf.

See endnote 16.

U.S. Department of Education & U.S. Department of Health & Human Services, *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* (2019), <https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance-508.pdf>.

U.S. Department of Health & Human Services, *HIPAA Privacy and Novel Coronavirus*, (2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99.

U.S. Department of Education, *Data De-identification: An Overview of Basic Terms* (2012), <https://studentprivacy.ed.gov/resources/data-de-identification-overview-basic-terms>.

U.S. Department of Education, *Frequently Asked Questions - Disclosure Avoidance* (2012), <https://studentprivacy.ed.gov/resources/frequently-asked-questions-disclosure-avoidance>.

See endnote 8.

U.S. Department of Education, *Family Educational Rights and Privacy Act (FERPA) and the Disclosure of Student Information Related to Emergencies and Disasters*, (2010), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf>.