

Mental Health Recordkeeping Procedural Guidance

# *April 2024*

# *Recordkeeping mental health records in schools is an extremely nuanced process with conflicting legal precedent and guidance that is unclear and has noted gaps. This guidance is meant to help CSI schools navigate these complicated procedures, and legal guidance should be sought.*

**Definitions:**

*"Mental health records"* are defined as: psychological or psychiatric tests, including neuropsychological testing in relation to or separate from special education procedures; reports that address psychological or psychiatric issues; division independent medical evaluation records and reports that address psychological or psychiatric issues; and records relating to the evaluation, diagnosis, or treatment of a substance use or abuse disorder; therapy, counseling or treatment notes that are generated from a licensed school mental health provider; notes from crisis interactions, suicidal and/or threat risk assessments; assessment results from a functional behavioral assessment and/or behavioral intervention plan; other records prepared by or for a school mental health provider;

*“Education records”* are broadly defined to mean those records that are: (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution;

*“Sole possession*” is a term that refers to the personal of a school mental health provider that are not seen or shared with any other person. If these records are shared, then they are no longer defined as “sole possession” but now become “mental health records” or “educational records” depending on the kind of disclosure that occurs.

*“Minimum necessary”* is a HIPAA term that refers to the “minimum necessary” information to be disclosed when it is either deemed necessary or as appropriately indicated by law or request.

*“Treatment records”* refer to mental health records that are maintained in a school by students who are over the age of 18 and still a high school student. These records are explicitly named in the law, and do not address the records of minor students.

*“Legitimate educational interest”* is a term that recognizes school officials or persons acting as a school official who would require the record in order to complete or fulfill their professional obligations to the school.

*“Confidentiality”* is a legal term that is only applicable to licensed clinicians that have an ethical and legal duty to limit the disclosure of identifiable information about an individual or group of individual persons.

*“Confidential [records]” is a term we are utilizing at this moment to note records schools may keep that may not be under sole possession, may or may not be created by a mental health provider. Confidential records may include mandatory reporting records, DHS visit or investigation information, visit data, records with Address Confidentiality Program addresses, or any other sensitive record that would not be appropriate for general staff to view, or would require special attention to secure, maintain and/or destroy.*

1. **What is the difference between mental health records and educational records?**
2. As a general rule, before proceeding with understanding records and record-keeping, schools should first define if they are providing services as an educational institution or as a health clinic located in a school. These decisions will impact the definition and procedures of records, and should be well-defined, understood and abided by all service providers to which confidentiality applies.
3. The term “education records” is broadly defined to mean those records that are: (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. See 34 CFR § 99.3. At the elementary or secondary level, a student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are “education records” subject to FERPA. In addition, records that schools maintain on special education students, including records on services provided to students under the Individuals with Disabilities Education Act (IDEA), are “education records” under FERPA. This is because these records are (1) directly related to a student, (2) maintained by the school or a party acting for the school, and (3) not excluded from the definition of “education records.” *See* [Pages 1-2](https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/hipaaferpajointguide.pdf)
4. FERPA does not carve out medical records, nor any other subcategory of student records, for greater restriction on disclosure to third parties. In fact, FERPA does not prohibit schools from including (or excluding) student mental health records in the same file as more traditional education records.
5. Other courts have not limited or further defined restrictions of educational records per FERPA because they “do not usually held the same highly personal information of mental health & medical records” further confusing the distinction between educational and mental health records.
6. **What about records related to the Address Confidentiality Program and/or students and families that live in housing where information is confidential/restricted?**
	1. **The priority/requirement here would be the removal of any actual addresses of residency. This could include marking out the address with a black marker before scanning a document. Or, Adobe has a redaction tool which is called "Sanitize Document."**
	2. **Sensitive information is limited to particular staff who perhaps need an access code or automatically have more permissions and information accessible with their log-in information.**
7. **If a parent requests educational records, do mental health records have to be released as well?**
8. Generally, yes.
9. Custodial guardians and parents have the right to request and inspect any educational records unless the school or school health care providers have a reasonable belief that disclosure could create danger for the minor or if the student is experiencing familial abuse, neglect, or domestic violence.
10. Records that are only “sole possession” records are not discoverable and cannot be released at the request of a custodial guardian or parent.
11. This also means that the records can also not be discoverable or providable to the student as well or the “sole possession” construct does not apply.
12. Treatment records (as defined as above) are generally not disclosable.
13. Parents with custodial rights over minor students have a right under FERPA to inspect and review these health and medical records because they are “education records” under FERPA. See 34 CFR §§ 99.10 – 99.12. In addition, these records may not be shared with third parties without written parental consent unless the disclosure meets one of the exceptions to FERPA’s general consent requirement. For instance, one of these exceptions allows schools to disclose a student’s health and medical information and other “education records” to staff and/or other school officials, without written consent, if these school officials have “legitimate educational interests” in accordance with school policy. See 34 CFR § 99.31(a)(1). Another exception permits the disclosure of education records, without consent, 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 34 CFR §§ 99.31(a)(10) and 99.36.
14. Schools always have the right to keep their school communities safe and may disclose information relevant for school safety to those with legitimate educational interests. It may behoove schools to consider adopting and incorporating the concept of “minimum necessary” in their recordkeeping policies to ensure when records are disclosed, only the minimum necessary records are disclosed, even in emergency situations. This guidance mirrors the Privacy Rule of HIPAA.
15. Although schools can release records upon the above appropriate requests, schools should make clear what records, if applicable, can be released in accordance with recordkeeping policies *before* an emergency occurs.

If a person or entity acting on behalf of a school subject to FERPA, such as a school nurse or school mental health provider that provides services to students under contract with or otherwise under the direct control of the school, maintains student health records, these records are education records under FERPA, just as they would be if the school maintained the records directly. This is the case regardless of whether the health care is provided to students on school grounds or off-site. As education records, the information is protected under FERPA and not HIPAA.

Some outside parties provide services directly to students and are not employed by, under contract to, or otherwise acting on behalf of the school. In these circumstances, these records are not “education records” subject to FERPA, even if the services are provided on school grounds, because the party creating and maintaining the records is not acting on behalf of the school. For example, the records created by a public health nurse who provides immunization or other health services to students on school grounds or otherwise in connection with school activities but who is not acting on behalf of the school would not be “education records” under FERPA. In such situations, a school that wishes to disclose to this outside party health care provider any personally identifiable information from education records would have to comply with FERPA and obtain parental consent. See 34 CFR § 99.30.

With respect to HIPAA, even where student health records maintained by a health care provider are not education records protected by FERPA, the HIPAA Privacy Rule would apply to such records only if the provider conducts one or more of the HIPAA transactions electronically, e.g., billing a health plan electronically for his or her services, making the provider a HIPAA covered entity.

*See* [Pages 4](https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/hipaaferpajointguide.pdf)-5

1. **Where should mental health records be stored? Who should have access to them? Can schools use mental health note programs to store their notes?**
2. This is a school level decision, but they should be stored in a locked place (either physical or virtually) where they can be accessed by the correct custodian of record, and not accessed by individuals that should not have access to the records. School should have policies in place to ensure the records are maintained appropriately while the student is an active student, as well as after the student leaves the school either from withdrawal or graduation, etc.. School policy should also address access of records if custodian of record dies or becomes incapacitated.
3. Schools providing any mental health services would need to set up a firewall between their school service provision and the rest of the school records to prevent unauthorized access.
4. Internal disclosure to other persons within the school health clinic for treatment purposes is permitted. These records may be shared with providers who are treating the student in common.
5. Remember that third party records are not discoverable because they are not school records.
6. You may want to consider including a section that addresses the following:
7. What must a FERPA compliant authorization include?
8. To comply with FERPA, a written consent to release education records must:
9. (1) Specify the records that may be disclosed;
10. (2) State the purpose of the disclosure;
11. (3) Identify the party or class of parties to whom the disclosure may be made; and
12. (4) Be signed and dated. *See* [page 7](https://healthystudentspromisingfutures.org/wp-content/uploads/2020/02/COLegalGuideSchoolHealthInformationDataSharing.pdf)
13. **Are there differences between special education mental health records & general education student mental health records?**
14. *See* #1 above.
15. Student health records maintained by a school or school employee, such as treatment records, IEP assessments, or immunization documents, are part of the education file and subject to FERPA. FERPA does not establish different disclosures rules for personally identifiable health information in an education record. That means that for the purposes of disclosure, personally identifiable health and mental health records in a minor’s education file are treated the same as most other information in the file, such as grades or attendance information.*See* also [pages 5-6](https://healthystudentspromisingfutures.org/wp-content/uploads/2020/02/COLegalGuideSchoolHealthInformationDataSharing.pdf)
16. Other courts have not limited or further defined restrictions of educational records per FERPA because they “do not usually held the same highly personal information of mental health & medical records” further confusing the distinction between educational and mental health records.
17. **What happens if mental health records are requested by a lawyer?**
18. Information recorded in an education file, including attendance and health information in that file, is protected by FERPA. The information can always be disclosed pursuant to a valid FERPA-compliant written authorization. If there is no authorization in place, personally identifiable information can only be disclosed if the disclosure meets an exception in FERPA. The relevant exceptions, including legal citations, are summarized in the Colorado information sharing grid at Appendix C *See* [Page 8](https://healthystudentspromisingfutures.org/wp-content/uploads/2020/02/COLegalGuideSchoolHealthInformationDataSharing.pdf)
19. School mental care providers may also choose not to release PHI if there is a reasonable belief the disclosure could create danger for the minor in areas of abuse, neglect, or domestic violence.
20. **How should documentation of mandatory reporting be handled?**
21. All staff working in schools are mandated reporters, although there are some staff, such as school mental health providers and nurses, that may be more likely to submit reports and receive reports than other staff members. Therefore, a school’s recordkeeping policy should include provisions of mandatory reporting documentation.
22. Records should be secured in a locked place (either physical or virtual) and should not be able to be accessed to those without a legitimate educational interest or to those whom it would cause the student harm if they were released.
23. Schools should also have in place documentation procedures when DHS interviews occur on campus to ensure records are kept of who is interviewing students and their credentials.
24. *See* [page 6 and beyond](https://cdpsdocs.state.co.us/safeschools/Resources/CDE%20Colorado%20Department%20of%20Education/CDE%20Child%20Abuse%20and%20Prevention.pdf)
25. *See* [also this manual](https://cdpsdocs.state.co.us/safeschools/Resources/CDE%20Colorado%20Department%20of%20Education/CDE%20Prevention%20and%20Reporting%20Child%20Abuse%20and%20Neglect%20manual_2002.pdf)
26. **How can students seek services without parental permission but parents still have access to their mental health records?**
27. Colorado laws allow community mental health professionals to provide mental health treatment to students aged 12 and over without parental permission. Schools that provide mental health services districts that house community mental health therapists should have policies and procedures in place to ensure that parents are informed about and involved with any mental health support provided to their students, as well as rights students have to solicit treatment. Schools should be clear to both students and custodial guardians & parents that students have the rights to request services, and custodial parents and guardians have the rights to educational records per the determination above.  Parents should check with administrators to determine the procedures at their school. *See* [page 16](https://www.cde.state.co.us/sites/default/files/documents/healthandwellness/download/guide2mntlhlthsvcs.pdf)
28. See above on definitions of records and access (#1).
29. **What happens to mental health records after a clinician leaves? Or a student graduates?**
30. Once a student graduates, the student record should be maintained in accordance with the [State Archives Records Retention Schedule.](https://drive.google.com/file/d/15k_VFFbi1XwGZ2kNOxf6DvbbiTcbBh3W/view) *See* Page 11.
31. After a clinician leaves, mental health records remain in the same possession as the school recordkeeping policies dictate. Sole possession records are not discoverable if a clinician leaves or dies, and must be destroyed.
32. Record Maintenance and Destruction
	1. SPED law says to maintain records 5 years after services have ended; mental health statutes say 7 years commencing on the termination of [mental health] services or on the date of last contact with the client, whichever is later.
33. In the case where mental health records, mandatory reporting records or any confidential information where the maintenance and/or destruction of the records could foreseeably be harmful to individuals if released, special consideration should be given to the destruction of said records. Although there are no current statutes that regulate the destruction of said records, here are options a school could utilize:
	1. Ensure that confidential [records] are destroyed by an authorized agent that has confidentiality protections as a part of their job description and/or license;
	2. Parent/guardian/Student of record maintenance age provided with a record destruction form with a general list of the records that are being destroyed, and the consent form of record destruction would stay in the file;
	3. Parent/guardian/Student of record maintenance age provided with a record transfer form with a general list of the records that are being transferred, and the consent form of record transfer would stay in the file.

**Additional Notes:**

1. Protection of confidential mental health records should not be confused with the legal and necessary disclosure of information in situations where the safety of a student, situation or school are in question. Schools shall not fall prey to “FERPA Phobia” and shall disclose the minimum necessary information to agents with a legitimate educational interest in keeping the school and all members of the school safe (including from themselves). Furthermore, confidentiality with respect to mental health records is only extended to licensed clinicians.
2. School recordkeeping policies and professional ethics may seem to collide as FERPA does not explicitly address mental health records while every national school mental health organization does have explicit ethical expectations of mental health record management. This can explain why school leaders may be quick to disclose mental health records as a result of a request, whereas school mental health providers may be horrified by this practice. The ethical mandates for each national school mental health organization is located in the Appendix and can help a school mental health & legal team understand the comprehensive ethical guidance that is readily available on each national organizations’ website.
3. Schools should always follow the latest Title IX guidelines when it comes to student records, names and privacy. For a full discussion on this guidance, please see CSI’s Title IX Resource Page: <https://resources.csi.state.co.us/title-ix/>, including CSI’s guidance for Ethical Obligations for Transgender and Genderqueer Students.
4. *Schools have requested assistance in navigating custodial disputes with respect to records and that guidance has meaningful overlap to mental health records and custodial disputes. Records should only be accessed by adults with educational rights addressed within the custodial agreement. In addition, although schools may be asked to participate in custodial proceedings, schools should be very cautious about being involved in areas in which they are not experts. Schools should have procedures in place to respond to the release of records in the event custodial disputes, as well as procedures in place for responding to requests to appear in custodial hearings and testifying in court cases. CSI would not recommend schools or individuals becoming involved in legal cases they are not experts in or have direct knowledge of.*

Additional Resources:

[The Duty to Record: Ethical, Legal and Professional Considerations for Colorado Psychologists](https://www.apadivisions.org/division-31/publications/records/colorado-record-keeping-laws.pdf)

[Records Required to be Kept and Record Retention](https://casetext.com/regulation/colorado-administrative-code/department-700-department-of-regulatory-agencies/division-726-division-of-professions-and-occupations-state-board-of-social-work-examiners/rule-4-ccr-726-1-social-work-examiners-rules-and-regulations/section-4-ccr-726-116-records-required-to-be-kept-and-record-retention-crs-sections-12-245-2044-12-245-2241u) (C.R.S. sections 12-245-204(4), 12-245-224(1)(u))

[Legal Guide to School Health Information and Data Sharing in Colorado](https://healthystudentspromisingfutures.org/wp-content/uploads/2020/02/COLegalGuideSchoolHealthInformationDataSharing.pdf)

[Colorado Mental Health Practice Act](https://sehd.ucdenver.edu/cpce-internships/files/2010/08/Statute.pdf)

[Colorado Minor Consent & Confidentiality Laws](https://healthystudentspromisingfutures.org/wp-content/uploads/2020/02/COMinorConsentConfidentialityLaws_AppendixB.pdf)

[U.S. Department of Education FERPA Protections for Student Health Records](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Know%20Your%20Rights%20-%20FERPA%20Protections%20for%20Student%20Health%20Records.pdf)

**Appendix: Ethical Standards for Recordkeeping from each National School Mental Health Organization**

[ASCA’s Ethical Standards for Confidentiality for School Counselors](https://www.schoolcounselor.org/About-School-Counseling/Ethical-Legal-Responsibilities)

A.2. Confidentiality

School counselors:

* 1. Promote awareness of school counselors’ ethical standards and legal mandates regarding confidentiality and the appropriate rationale and procedures for disclosure of student data and information to school staff.
	2. Inform students of the purposes, goals, techniques, rules and procedures under which they may receive counseling. Disclosure includes informed consent and clarification of the limits of confidentiality.
	3. Recognize that informed consent requires competence, voluntariness and knowledge on students’ part to understand the limits of confidentiality and, therefore, can be difficult to obtain from students of certain developmental levels and special-needs populations. The school counselor should make attempts to gain assent appropriate to the individual student (e.g., in the student’s preferred language) prior to disclosure.
	4. Are aware that even though attempts are made to obtain informed consent, it is not always possible. When needed, school counselors make decisions on students’ behalf that promote students’ welfare.
	5. Explain the limits of confidentiality in developmentally appropriate terms through multiple methods, such as student handbooks; classroom lessons; verbal notification to individual students; and school counseling department websites, brochures and social media accounts.
	6. Keep information confidential unless legal requirements demand confidential information be revealed or a breach is required to prevent serious and foreseeable harm to the student or others. Serious and foreseeable harm is different for each minor in schools and is determined by a student’s developmental and chronological age, the setting, parental/guardian rights and the nature of the harm. School counselors consult with appropriate professionals when in doubt as to the validity of an exception.
	7. Recognize their primary ethical obligation for confidentiality is to the students but balance that obligation with an understanding of parents’/guardians’ legal and inherent rights to be the guiding voice in their children’s lives. School counselors understand the need to balance students’ ethical rights to make choices, their capacity to give consent or assent, and parental or familial legal rights and responsibilities to make decisions on their child’s behalf.
	8. Collaborate with and involve students to the extent possible and use the most appropriate and least intrusive method to breach confidentiality if such action is warranted. The child’s developmental age and the circumstances requiring the breach are considered and, as appropriate, students are engaged in a discussion about the method and timing of the breach. Consultation with professional peers and/or supervision is recommended.
	9. Request of the court that disclosure not be required when the school counselor’s testimony or case notes are subpoenaed if the release of confidential information may potentially harm a student or the counseling relationship.
	10. Protect the confidentiality of students’ records and release of personal data in accordance with prescribed federal and state laws and district and school policies.
	11. Recognize the vulnerability of confidentiality in electronic communications and only transmit student information electronically in a way that follows currently accepted security standards and meets federal, state and local laws and school board policy.
	12. Convey a student’s highly sensitive information (e.g., a student’s suicidal ideation) through personal contact such as a phone call or visit and not less-secure means such as a notation in the educational record or an email. Adhere to federal, state and local laws and school board policy when conveying sensitive information.
	13. Advocate for appropriate safeguards and protocols so highly sensitive student information is not disclosed accidentally to individuals who do not have a need to know such information. Best practice suggests a very limited number of educators would have access to highly sensitive information on a need-to-know basis.
	14. Advocate with appropriate school officials for acceptable encryption standards to be utilized for stored data and currently acceptable algorithms to be utilized for data in transit.
	15. Avoid using software programs without the technological capabilities to protect student information based upon legal specifications and currently acceptable security standards.
	16. Advocate for physical and virtual workspaces that are arranged to protect the confidentiality of students’ communications and records.

[NASP’s PROFESSIONAL STANDARDS](https://www.nasponline.org/standards-and-certification/professional-ethics)

GUIDING PRINCIPLE

I.2 PRIVACY AND CONFIDENTIALITY

School psychologists respect the right of persons to choose for themselves whether to disclose their private thoughts, feelings, beliefs, and behaviors.

Standard I.2.1 Sensitive Information

School psychologists minimize intrusions on privacy. They do not seek or store private information about clients that is not needed in the provision of services. School psychologists recognize that client–school psychologist communications intended only for the school psychologist are privileged in most jurisdictions. They do not disclose or store in education records any privileged information except as permitted by the mental health provider–client privilege laws in their state. School psychologists use a problem-solving model to consider carefully whether to share with third parties information that could put the student, family, or others at legal, social, or other risk. When school psychologists receive a report from a professional outside the school system that includes information that is intrusive of family privacy and not necessary for school decision making, the school psychologist considers whether returning the report to the maker with a request for redaction of the problematic information is the best course of action.

Standard I.2.2 Boundaries of Confidentiality

School psychologists inform students and other clients of the boundaries of confidentiality at the outset of establishing a professional relationship. They seek a shared understanding with clients regarding the types of information that will and will not be shared with third parties. However, if a child or adolescent is in immediate need of assistance, it is permissible to delay the discussion of confidentiality until the immediate crisis is resolved. School psychologists recognize that it may be necessary to discuss confidentiality at multiple points in a professional relationship to ensure the client’s understanding and agreement regarding how sensitive disclosures will be handled.

Standard I.2.3 Consent for Disclosure of Information

School psychologists respect the confidentiality of information obtained during their professional work. Information is not revealed to third parties without the agreement of a minor child’s parent, legal guardian, or of an adult student, except in those situations in which failure to release information could result in danger to the student or others, or where otherwise required by law. Whenever feasible, the student’s assent is obtained prior to disclosure of their confidences to third parties, including disclosures to the student’s parents. When seeking consultation about a student or other client in a nonprivate forum (e.g., online discussion group), school psychologists ensure that the information they disclose is not sufficient to result in discovery of the client’s identity.  C

Standard I.2.4 Need to Know

School psychologists discuss and/or release confidential information only for professional purposes and only with persons who have a legitimate need to know. They do so within the strict boundaries of relevant privacy statutes.

Standard I.2.5 Privacy Related to Sexual Orientation and Gender Identity and Expression

School psychologists respect the right of privacy of students, parents, and colleagues with regard to sexual orientation, gender identity, or transgender status. They do not share information about the sexual orientation, gender identity, or

transgender status of a student (including minors), parent, or school employee with anyone without that individual’s permission.

Standard I.2.6 Privacy of Health Information

School psychologists respect the right of privacy of students, their parents and other family members, and colleagues with regard to sensitive health information (e.g., presence of a communicable disease). They do not share sensitive health information about a student, parent, or school employee with others without that individual’s permission (or the permission of a parent or guardian in the case of a minor). School psychologists consult their state laws and department of public health for guidance if they believe a client poses a health risk to others.

 [School Social Work Association of America](https://www.sswaa.org/ethical-guidelines)

Confidentiality

1. School social workers take appropriate and necessary proactive and reactive measures to protect the confidentiality of students and families, including, but not limited to, in individual and student group social-emotional-behavioral interventions.
2. School social workers share information about students and families only with professional colleagues who need this information to provide instruction or services, consistent with state and federal statutes and local school district policy. See definition of “legitimate educational interest”.