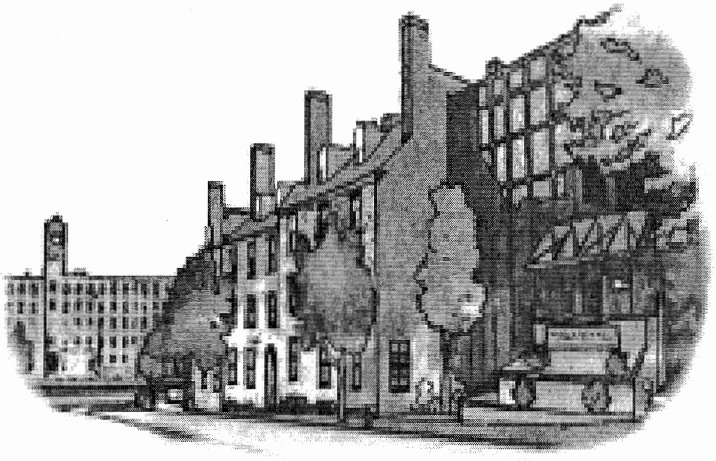
Understanding your Ethical Confidentiality Obligations under FERPA, 42 CFR Part 2, State Law and HIPAA

Presented to
NH Alcohol & Drug Abuse Counselors Association

September 15, 2021



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A Word of Caution

No two cases are exactly alike. This material is designed to provide substance use professionals, and school administrators working with substance use professionals, with an overview of the confidentiality rules that pertain to student records related to substance use diagnosis and treatment. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

Table of Contents

I. Overview and Purpose

The purpose of this material is to provide drug and alcohol use[1] counselors in the school setting, as well as administrators who work in conjunction with substance use counselors, with a working knowledge of the Family Education Rights and Privacy Act ["FERPA"], 42 CFR Part 2, and state law pertaining to the privacy of substance use patient records. The primary focus will be on obligations of such counselors and working in the K through 12 public-school setting, as well as providing administrators with an understanding of student privacy unique to substance use records. The intent of this material is not only to teach the minimal legal requirements, but to also to encourage these professionals as to the best practices to protect student privacy.

Importantly, an overarching theme found in the below materials and the applicable law pertaining to the privacy of substance use information is the fundamental idea that access to such information should be as limited as possible. In passing the laws addressed below, both the New Hampshire legislature and the federal government have emphasized the importance of encouraging those who need treatment to seek it out, and that this end is supported by providing significant protections to the records and information obtained and/or created by counselors or programs working with these individuals. Therefore, every substance use professional or administrator working with substance use patients and/or records should approach any request for access and/or disclosure of substance use information with the presumption that favors confidentiality of that information.

II. State Law Pertaining to Drug and Alcohol Use Counseling Professionals

A. RSA 330-C: Applicability

RSA 330-C is the New Hampshire statutory scheme governing the qualifications, education, training, and experience required for alcohol and other drug use professionals. The "practice of substance abuse counseling" is defined in New Hampshire as the:

> "rendering or offering to render professional service for any documented fee or other consideration to individuals, families, or groups. Those professional services include the application of the specific knowledge, skills, counseling theory, and application of techniques to assess, diagnose, define goals, and develop a treatment plan of action aimed toward prevention, education, or

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[1] It is the writers' understanding that the typical terminology used by professionals in this area is substance "use" or "misuse" as opposed to "abuse". However, it is worth noting that New Hampshire statutes and regulations refer to "substance abuse," see, e.g., RSA 330-C (governing the practice of substance abuse counseling), which differs from the terminology in the federal regulations, 42 C.F.R. Part 2, which refer to "substance use disorder." These materials will use the word "use" whenever they are not citing or referring to specific statutory provisions.

treatment in the recovery process of substance use disorders within the continuum of care network. The practice further includes, but is not limited to, networking and making referrals to medical, social services, mental health services, psychiatric, or legal resources when so indicated."

RSA 330-C:2, XVIII. "Substance use disorder" is defined as "a disorder related to the taking of a drug, including alcohol." RSA 330-C:2, XIX.

There are two types of alcohol and other drug use professionals that may provide such counseling, which are subject to RSA 330-C:

1. Licensed Alcohol and Drug Counselor ["LADC"]; and

2. Master Licensed Alcohol and Drug Counselor ["MLADC"].

Both are distinguished by the level of education and training required, as well as their scope of practice and whether they require supervision. See RSA 330-C:10 (MLADC); RSA 330-C:11 (LADC). RSA 330-C also provides for Certified Recovery Support Workers ["CRSWs"], which have a more limited scope of practice, see RSA 330-C:13, as well as Licensed Clinical Supervisors ["LCSs"], who are, as their name suggests, tasked with the oversight of other professionals licensed under this chapter, see RSA 330-C:12. In order to obtain a license as an LCS, an applicant must hold a current MLADC or LADC license (in addition to other requirements). See RSA 330-C:18.

B. Providers to Which RSA 330-C Does Not Apply

The provisions of RSA 330-C do *not* apply to qualified members of other professions or occupations (including but not limited to those licensed by the board of mental health practice, the board of medicine, and the board of nursing) who provide treatment for substance use disorders and co-occurring disorders within the authorized scope of practice of their profession or occupation and who do not represent themselves as LADCs, MLADCs, LCSs, or CRSWs. See RSA 330-C:33. Therefore, although there may be exceptions, generally school nurses, counselors, and other professionals in the schools who are not MLADCs, LADCs, or CRSWs do not fall under the provisions of this chapter.

Further, RSA 330-C does not apply to students or counselors engaged in entry-level internships in a licensed or certified facility and counselors working toward licensure in a licensed or certified facility, provided that the student or counselor is practicing as part of supervised work or course of study and designated by a title clearly indicating training status. Id.

By noting that RSA 330-C does not apply to these providers, these materials do not mean to suggest that these professional may not have separate ethical standards or

confidentiality obligations. However, any such obligations are beyond the scope of these materials.

C. Scope of Confidentiality Under RSA 330-C

Any communications between any provider licensed or certified under RSA 330-C, including LADCs, MLADCs, LCSs and/or CRSWs [collectively, "substance use professionals"] and their clients are privileged and confidential under RSA 330-C:26, which provides:

> "A person licensed or certified under this chapter or an employee of such person, shall not disclose any confidential information that the licensee, certificate holder, or employee may have acquired while performing substance use counseling services for a patient unless in accordance with the federal regulation regarding the Confidentiality of Alcohol and Drug Abuse Patient Records pursuant to 42 C.F.R. section 2.1 et seq."

Indeed, all licensees and certificate holders are bound by ethical requirements to maintain client confidentiality, which are found in the regulations promulgated by the Board of Licensing for Alcohol and Other Drug Use Professionals. See N.H. Admin. R., Alc 502.01(c)(9); N.H. Admin. R., Alc 502.01(d)(9). Specifically, the ethical requirements for CRSWs, LADCs, MLADCs, and LCSs include an obligation to:

1. Not reveal information relating to a client unless the client consents to such release of information in writing and after consultation with them, and

2. Preserve client records and information regardless of the media used to store such information.

The regulations further adopt the NAADAC: The Association of Addiction Professionals' Code of Ethics, as it was updated on December 8, 2016. See N.H. Admin. R. Alc App. B; see also https://www.naadac.org/assets/2416/naadac-code-of-ethics-033117.pdf (last accessed September 2, 2021). The current NAADAC Code of Ethics is available at: https://www.naadac.org/assets/2416/naadac_code_of_ethics_112021.pdf (accessed September 2, 2021). LCSs are further obligated to abide by the "Code of Ethics for Clinical Supervisors," written by the Clinical Supervision Committee of the ICRC, effective 1998. See N.H. Admin. R., Alc 502.01(e); see also N.H. Admin. R. Alc App. B (stating that these standards are available to members of the International Certification & Reciprocity Consortium at www.internationalcredentialing.org).

Importantly, failing to maintain the confidentiality under both RSA 330-C:26 and 42 C.F.R. Part 2 (federal regulations discussed in more depth below) is grounds for disciplinary action, see RSA 330-C:27, III(h), and may impact eligibility for licensure or certification, see RSA 330:C:15, I(e)(6); N.H. Admin. R. Alc 302.01(a)(3)(f).

D. An Exception to RSA 330-C Confidentiality: Duty to Warn of Violent Acts

It is important to note that, under New Hampshire law, a duty to warn of violent acts trumps the confidentiality required under RSA 330-C:26. Pursuant to RSA 330-C:25, I, any person licensed or certified under this chapter has a "duty to warn of, or to take reasonable precautions to provide protection from, a client's violent behavior when the client has communicated to such person a serious threat of physical violence against a clearly identified or reasonably identifiable victim or victims, or a serious threat of substantial damage to real property." Although not specifically stated in the statute, it is safe to assume that no prior consent (from either a parent or a minor) is required for actions under this section, as doing so could prompt a client to hasten any plans for violent acts prior to an attempt to prevent it.

Notably, failure to warn under this section could result in civil liability; therefore, drug use professionals must take such threats seriously. To discharge one's duty under this section and therefore avoid civil liability, RSA 330-C:25, II provides professionals with the following options when confronted by a communicated threat by a client:

1. Make reasonable efforts to communicate the threat to the victim(s);

2. Notify the police department closest to the client's or potential victim's residence; or

3. Obtain civil commitment of the client to the state mental health system.

In order to protect professionals attempting to discharge their duty to warn under this section, RSA 330-C:25, III explicitly states that "[n]o monetary liability and no cause of action may arise concerning client privacy or confidentiality against any person licensed or certified under this chapter for information disclosed to third parties in an effort to discharge a duty under paragraph II." The applicable ethical requirements also contain exceptions for revealing confidential information to "public authorities and other professionals" to the extent necessary to prevent imminent danger of a client inflicting serious harm on either themselves or others. See N.H. Admin. R. Alc 502.01(c)(10) (for CRSWs); N.H. Admin. R. Alc 502.01(d)(10) (same for LADCs and MLADCs).

It is important to note that there is **not** a similar exception under 42 C.F.R. Part 2. And, as explained more below, part 2 specifically states that state law cannot authorize disclosures prohibited under federal law. See 42 C.F.R. 2.20. In analyzing these two provisions together, the Substance Abuse and Mental Health Services Administration ("SAMSHA") provided some guidance on its website, stating that, with respect to "Immediate threats to health or safety that do not involve medical emergencies or crimes on programs premises or against program personnel", "Part 2 programs and health care providers and HIOs who have received Part 2 patient information, can make reports to law enforcement about an immediate threat to the health or safety of an individual or the public if patient-identifying information is not disclosed. Immediate

threats to health or safety that do not involve a medical emergency or crimes (e.g., a fire) are not addressed in the regulations. Programs should evaluate those circumstances individually." See https://www.samhsa.gov/about-us/who-we-are/laws-regulations/confidentiality-regulations-faqs (last accessed September 9, 2021) (Emphasis in original).

Practice Pointer: Based on the ethical principles laid out in the regulations, as well as the federal guidance outlined above, the best option for a substance use professional whose client has communicated a serious threat of physical violence is to contact law enforcement closest to the client's or potential victim's residence, without providing client identifying information. Communication of threats to property (not involving the premises of part 2 program) is not authorized under part 2.

E. RSA 172:8-a: Additional Protection of Substance Use Disorder Records

RSA Chapter 172 governs the New Hampshire Substance Abuse Disorder System, which was created to establish, maintain, implement, and coordinate a system of substance use disorder treatment services under this chapter, and is supervised by the commissioner of health and human services.

One relevant aspect of this statutory scheme is a broad protection of information contained within the reports or records of any substance use client:

> "No reports or records or the information contained therein on any client of the program or a certified alcohol or drug abuse treatment facility or any client referred by the commissioner shall be discoverable by the state in any criminal prosecution. No such reports or records shall be used for other than rehabilitation, research, statistical or medical purpose, except upon the written consent of the person examined or treated. Confidentiality shall not be construed in such manner as to prevent recommendation by the commissioner to a referring court, nor shall it deny release of information through court order pursuant to appropriate federal regulations."

RSA 172:8-a.

It is worth noting that the Department of Health and Human Services Office of Alcohol and Drug Abuse Prevention had previously adopted a series of regulations addressing the certification and operation of alcohol and other drug use treatment programs. See generally N.H. Admin. R., He-A 300. Many of these regulations are no longer effective. While these provisions are not as relevant for a substance use professional in a school setting, to the extent a substance use professional working in a school setting also provides services in other contexts, these regulations may present as additional requirements.

III. 42 C.F.R. Part 2, the Federal Regulations Governing Confidentiality of Substance Use Disorder Patient Records

A. Overview and Reconciliation of Federal Regulations and State Law

As noted above, RSA 330-C:26 requires substance use professionals to also comply with the confidentiality requirements of 42 C.F.R. Part 2 ["part 2"], a series of federal regulations protecting the confidentiality of "substance use disorder" patient records. These regulations are relevant to substance use professionals in a school setting because, in addition to confidentiality requirements imposed based on their licensing/certification under State law, there is no doubt that part 2 applies to school-based substance use programs which receive federal assistance. See 42 C.F.R. 2.12(e)(1).

Part 2 was promulgated under authority granted by 42 U.S.C. 290dd-2(g), a "spending clause" statute, enacted under the Constitutional authority of Congress to spend funds to provide for the general welfare. See U.S. Const. Art. I, Sec. 8. Simply put, recipients of federal funds are required to meet certain statutory requirements in order to receive the funds available under the applicable federal program.

It is important to note that there have been many significant developments in the law with respect to 42 U.S.C. 290dd-2 and part 2. 42 U.S.C. 290dd-2 was revised on March 27, 2020 as part of the CARES Act. These materials are up to date with those changes. The CARES Act also directed The Secretary of Health and Human Services, in consultation with the appropriate Federal agencies, to propose amendments to part 2 by March 27, 2021, but, as of the date of this publication, these regulations have yet to be published; therefore, these changes could impact the information in these materials. Separate and apart from these developments, the Substance Abuse and Mental Health Services Administration ["SAMHSA"] had finalized other changes to the part 2 regulations, which were effective August 14, 2020. These materials are up to date with these changes, but a "fact sheet" outlining the major changes from these amendments are available on SAMHSA's website at https://www.samhsa.gov/newsroom/press-announcements/202007131330 (accessed September 3, 2021).

42 U.S.C. 290dd-2(a) generally provides that:

> "Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance use disorder education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b)."

Consistent with its promulgating statute, Part 2's stated purpose is to impose restrictions upon both the ***disclosure*** and the ***use*** of substance use disorder[2] patient records which are maintained in connection with the performance of covered substance use disorder programs. Their effect is to prohibit the disclosure and use of patient records absent a stated exception. These regulations do not *require* disclosure under any circumstances. 42 C.F.R. 2.2(b).

Importantly, neither part 2 nor 42 U.S.C. 290dd-2 were intended to preempt the field of law they cover, i.e., the privacy of substance use disorder patient records, to the exclusion of all state laws in the field. See 42 C.F.R. 2.20. Rather, substance use professionals covered by part 2 are required to comply with both State and federal law to the extent possible. Part 2 specifically explains that "[i]f a disclosure permitted under the regulations in this part is prohibited under state law, neither the regulations in this part nor the authorizing statute may be construed to authorize any violation of that state law. However, no state law may either authorize or compel any disclosure prohibited by the regulations in this part."

Practice Pointer: In analyzing their obligations under part 2 and other laws, substance use providers should always endeavor to err on the side of caution, and to comply with whichever law is more protective to patient privacy rights.

It is important to note that violations of the provisions of 42 U.S.C. 290dd-2 and/or any regulation issued pursuant thereto, including part 2, will result in criminal penalties, which would likely amount to a fine. See 42 U.S.C. 290dd-2(f); 42 C.F.R. 2.3. Because of the existence of this criminal penalty, the regulations specifically state that they are to be construed strictly in favor of a potential violator. 42 C.F.R. 2.2(b)(3).

Additionally, substance use professionals should be aware that the CARES Act has now added an affirmative obligation for covered programs to provide timely[3] notice to any patient whose records have been or that the program reasonably believes to have been breached. See 42 U.S.C. 290dd-2(j) ("The provisions of section 17932 of this title shall apply to a program or activity described in subsection (a), in case of a breach of records described in subsection (a), to the same extent and in the same manner as such provisions apply to a covered entity in the case of a breach of unsecured protected health information."); see also 42 U.S.C. 17932 (providing detailed instructions on required actions following a breach). If a breach involves more than 500 individuals, additional notice requirements apply. See generally 42 U.S.C. 17932(e). Substance use

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[2] Substance use disorder is defined as "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems such as impaired control, social impairment, risky use, and pharmacological tolerance and withdrawal." See 42 C.F.R. 2.11. Tobacco and caffeine use are not included within this definition.

[3] All notifications required shall be made "without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach..." 42 U.S.C. 17932(d).

professionals are encouraged to review these requirements, which are not discussed in detail in these materials.

Practice Pointer: If a substance use professional has any reason to believe that patient information has been in any way compromised, they are urged to contact their legal counsel so that they ensure they meet their notice obligations under 42 U.S.C. 290dd-2(j).

B. Scope

Part 2's restrictions apply to **covered records** maintained by **covered programs** under part 2.

Covered programs, also referred to as "part 2 programs" include the following federally assisted[4] programs:

- An individual or entity (other than a general medical facility) who holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment;

- An identified unit within a general medical facility that holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or

- Medical personnel or other staff in a general medical facility whose primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment and who are identified as such providers.

See 42 C.F.R. 2.11. Relevant here, a LADC, MLADC, CRSW, or LCS providing substance use services would likely fall under the first category of a part 2 program, unless they are employed or working in a general medical facility. However, regardless of the category, the regulations make clear that they apply to public schools receiving federal assistance because they explicitly state that they cover information obtained by "school-based programs". 42 C.F.R. 2.12(e)(1). Additionally, as noted above, New Hampshire substance use professionals are required to comply with part 2's confidentiality requirements under RSA 330-C:26.

Covered records under part 2 are those maintained by a covered program, which:

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[4] A New Hampshire public school-based substance use disorder program would likely be considered federally assisted. 42 C.F.R. 2.12(b) contains the criteria for a program being considered federally assisted. However, this issue is somewhat moot as RSA 330-C:26 specifically imposes part 2's confidentiality requirements on MLADCs, LADCs, CRSWs, and LCSs.

1. Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

2. Contain drug use information obtained by federally assisted drug use program after March 20, 1972 (part 2 program), or contain alcohol use information obtained by a federally assisted alcohol use program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

42 C.F.R. 2.12(a)(1); see also 42 C.F.R. 2.11 (definition of "disclose"). "Records" under part 2 are defined very broadly as "[a]ny information, whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts) ..." Id. Records include both paper and electronic records.

Finally, part 2's protections apply to any individual who has been a patient, irrespective of whether or when such individual ceases to be a patient. 42 U.S.C. 290dd-2(d). A patient is defined as "any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program. Patient includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. This definition includes both current and former patients." 42 C.F.R. 2.11.

C. Restrictions on Disclosure

As noted above, part 2 places restrictions on the disclosure of covered records. Covered records may only be disclosed or used as permitted under part 2's regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority. However, such restrictions on disclosure do not apply to a patient's access to their own records, and no written consent or other authorization is required to provide access to the patient to their own records. 42 C.F.R. 2.23(a).

Permissible disclosures under part 2 typically fall under two categories: (1) disclosures based on a patient's and/or their parent or guardian's prior written consent, or (2) disclosures which are permissible regardless of a written prior consent.

Importantly, "any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure." 42 C.F.R. 2.13(a).

a. Disclosure Permitted with Patient's Written Consent.

42 U.S.C. 290dd–2(b) allows for the use or disclosure of covered records when made in accordance with the prior written consent of the patient whose records are sought. Such prior written consent may be made indefinitely until rescinded in writing for all such future uses or disclosures for purposes of treatment, payment, and health care operations.

Written consent to a disclosure may be by paper or electronic, so long as it includes the following required elements:

1. The name of the patient.

2. The specific names or general designations of the part 2 programs, entities, or individuals permitted to make the disclosure.

3. How much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed.

4. The names of the individuals or the names of the entities to which a disclosure is to be made[5].

5. The purpose of the disclosure.

6. A statement that the consent is subject to revocation at any time except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer.

7. The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is provided.

8. The signature of the patient and, when required for a patient who is a minor, the signature of an individual authorized to give consent under 42 C.F.R. 2.14; or, when required for a patient who is incompetent or deceased, the signature of an individual authorized to sign under 42 C.F.R. 2.15. Electronic signatures are permitted to the extent that they are not prohibited by any

[5] Please note that 42 C.F.R. 2.31(a)(4)(ii) includes additional, special instructions for entities that facilitate the exchange of health information and research institutions. Pursuant to 42 C.F.R. 2.13(d), patients are entitled to a list of disclosures made pursuant to 42 C.F.R. 2.31(a)(4)(ii)(B) on request.

applicable law.

9. The date on which the consent is signed.

42 C.F.R. 2.31(a).

Once a covered program has received written consent to disclosure of a patient's records, the program may disclose those records in accordance with that consent to any person or category of persons designated in the consent. 42 C.F.R. 2.33. Obviously, a disclosure cannot be made based on consent which has expired, substantially fails to conform to the above requirements, is known to be revoked, or is known (or in the exercise of reasonably diligence could be known) by the individual or entity holding the records to be materially false. 42 C.F.R. 2.31(b).

If a patient consents to a disclosure of their records for payment or health care operations activities, a lawful holder who receives such records under the terms of the written consent may further disclose those records as may be necessary for its contractors, subcontractors, or legal representatives to carry out payment and/or health care operations on behalf of such lawful holder. 42 C.F.R. 2.33(b). However, in order to disclose the records to such third parties, the lawful holder must have in place "a written contract or comparable legal instrument with the contractor or voluntary legal representative, which provides that the contractor, subcontractor, or voluntary legal representative is fully bound by the provisions of part 2 upon receipt of the patient identifying information." 42 C.F.R. 2.33(c). The lawful holder "may only disclose information to the contractor or subcontractor or voluntary legal representative that is necessary for the contractor or subcontractor or voluntary legal representative to perform its duties under the contract or comparable legal instrument." Id. Importantly, said contracts may *not* permit further re-disclosure of information to a third party "unless that third party is a contract agent of the contractor or subcontractor, helping them provide services described in the contract, and only as long as the agent only further discloses the information back to the contractor or lawful holder from which the information originated." Id.

Importantly, **any** disclosure made pursuant to a patient's written consent, regardless to whom the disclosure is made, must be accompanied by the following written statements:

1. This record which has been disclosed to you is protected by federal confidentiality rules (42 C.F.R. part 2). The federal rules prohibit you from making any further disclosure of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 C.F.R. part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose (see §2.31). The federal rules restrict any use of the

information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§ 2.12(c)(5) and 2.65; or

2. 42 CFR part 2 prohibits unauthorized disclosure of these records.

42 C.F.R. 2.32.

i. Disclosures to Criminal Justice System after Patient Referral Still Require Written Patient Consent

A covered program may disclose information about a patient to those individuals within the criminal justice system who have made participation in the part 2 program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody if:

1. The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient); and

2. The patient has signed a written consent.

42 C.F.R. 2.35.

Written consent pursuant to this section must state the duration of the consent and said duration must be reasonable, as analyzed based several factors that are outlined in 42 C.F.R. 2.35(b). Further, the written consent "must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified, ascertainable event" which cannot be "later than the final disposition of the conditional release or other action in connection with which consent was given." 42 C.F.R. 2.35(c).

Finally, any recipient of information under this section may only redisclose and use the information to carry out that individual's official duties related to the patient's conditional release or other action in connection with which the consent was given. 42 C.F.R. 2.35(d).

Practice Pointer: Any substance use professional employed by a school district should let the appropriate person at the district know if they are in receipt of a subpoena or court order seeking testimony or any other information related to substance use disorder patients. This way, the district may obtain the assistance of counsel if necessary.

b. Disclosures Permitted With or Without Patient Consent.

42 U.S.C. 290dd–2(b)(2) outlines the following situations where disclosure of patient substance records may be permitted, regardless of patient consent:

- To medical personnel to the extent necessary to meet a bona fide medical emergency.

- To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identifiers in any manner.

- If authorized by an appropriate order of a court of competent jurisdiction[6] granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

- To a public health authority, so long as such content meets the standards established in section 164.514(b) of title 45, Code of Federal Regulations (or successor regulations) for creating de-identified information.

Practice Pointer: All substance use professionals should be well versed in these four fundamental exceptions to disclosure without consent, as well as the specific situations outlined later on in these materials where part 2 does not apply, such as reports of child abuse and neglect. In all other circumstances, these professionals should obtain prior written consent prior to making a disclosure.

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[6] The part 2 regulations discuss a variety of situations where a judicial court may issue an order for the use and/or disclosure of patient records, as well as related procedures and safeguards to the disclosure, including: disclosures for non-criminal purposes, see 42 C.F.R. 2.64, situations where the records are for the purpose of criminally investigating or prosecuting patients, see 42 C.F.R. 2.65, an investigation or prosecution of a Part 2 program or person holding the records, see 42 C.F.R. 2.66, an authorization for the use of undercover agents/informants to investigate employees/agents of Part 2 program in criminal matter, see 42 C.F.R. 2.67, and a prohibition of disclosure/use of records obtained without consent to researchers, auditors, and evaluators in a criminal prosecution of the patient, see 42 C.F.R. 2.62.

i. Disclosure Related to Medical Emergencies

As noted above, patient identifying information may be disclosed to medical personnel to the extent necessary to:

1. Meet a bona fide medical emergency in which the patient's prior consent cannot be obtained; or

2. Meet a bona fide medical emergency in which a part 2 program is closed and unable to provide services or obtain prior written consent of the patient, during a temporary state of emergency declared by a state or federal authority as the result of a natural or major disaster, until such time that the part 2 program resumes.

42 C.F.R. 2.51. Additionally, patient information "may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers." Id.

If patient information is disclosed under this section, part 2 providers must immediately document the disclosure in the patient's records, which must include:

1. The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;

2. The name of the individual making the disclosure;

3. The date and time of the disclosure; and

4. The nature of the emergency (or error, if the report was to FDA).

ii. Disclosure for Audit, Evaluation and Research

The part 2 regulations make a distinction between a situation where covered records are downloaded, copied, or otherwise removed or forwarded from the premises of a covered program for the purpose of audit or evaluation, or when they are simply viewed on-site.

If covered records are not so removed or forwarded, patient identifying information may be disclosed in the course of a review of records *on the premises* of a covered program or other lawful holder to any individual or entity who agrees in writing to comply with the limitations on re-disclosure and use outlined in this section and who:

1. Performs the audit or evaluation on behalf of:

    a. Any federal, state, or local governmental agency that provides financial assistance to a part 2 program or other lawful holder, or is authorized by law to regulate the activities of the part 2 program or other lawful holder;

    b. Any individual or entity which provides financial assistance to the part 2 program or other lawful holder, which is a third-party payer covering patients in the part 2 program, or which is a quality improvement organization performing a QIO review, or the contractors, subcontractors, or legal representatives of such individual, entity, or quality improvement organization.

    c. An entity with direct administrative control over the part 2 program or lawful holder.

2. Is determined by the part 2 program or other lawful holder to be qualified to conduct an audit or evaluation of the part 2 program or other lawful holder.

42 C.F.R. 2.53(a).

In contrast, where the covered records are copied, removed, downloaded, or forwarded, the records may only be copied or removed by any individual or entity who:

1. Agrees in writing to:

    a. Maintain and destroy the patient identifying information in a manner consistent with the policies and procedures established under § 2.16;

    b. Retain records in compliance with applicable federal, state, and local record retention laws; and

    c. Comply with the limitations on disclosure and use outline this section; and

2. Performs the audit or evaluation on behalf of:

    a. Any federal, state, or local governmental agency that provides financial assistance to the part 2 program or other lawful holder, or is authorized by law to regulate the activities of the part 2 program or other lawful holder; or

    b. Any individual or entity which provides financial assistance to the part 2 program or other lawful holder, which is a third-party payer covering

patients in the part 2 program, or which is a quality improvement organization performing a QIO review, or the contractors, subcontractors, or legal representatives of such individual, entity, or quality improvement organization.

c. An entity with direct administrative control over the part 2 program or lawful holder.

42 C.F.R. 2.53(b).

Once patient identifying information is disclosed under this section, it may only be disclosed only back to the covered program or other lawful holder from which it was obtained and may be used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities of the covered program or legal holder, as authorized by a court order entered under 42 C.F.R. 2.66. The one exception to this limitation is in the event of a Medicare, Medicaid, Children's Health Insurance Program (CHIP), or related audit or evaluation, which is addressed in 42 C.F.R. 2.53(e).

See 42 C.F.R. 2.53(f).

It is important to note that 42 C.F.R. 2.53 provides a detailed description of the types of audits and evaluations permitted under this section, as well as additional requirements which protect patient privacy. Substance use professionals considering a disclosure under this section are encouraged to review these provisions in detail prior to making such disclosure to ensure compliance.

Although not likely a common issue facing a substance use professional in the school setting, 42 C.F.R. 2.52 also allows for patient identifying information to be disclosed for the purpose of the recipient conducting scientific research. In doing so, the regulations place numerous highly specific conditions on allowing the disclosure which incorporate elements of HIPAA and other regulations. Professionals considering disclosure for the purposes of research are encouraged to seek the advice of counsel to ensure that the disclosure fits the requirements of this section.

iii. Impact of a Court Order on the Use and Disclosure of Substance Use Disorder Records

As noted above, a court order may ***permit*** the use or disclosure of patient information that would otherwise be prohibited by part 2 and 42 U.S.C. 290dd–2. However, any such court order does not ***compel*** disclosure. See 42 C.F.R. 2.61(a). Rather, a "subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations in this part." Id.

Therefore, a subpoena without a court order does not permit disclosure, and a court order without a subpoena leaves the choice to the part 2 provider on whether to make the disclosure. However, upon the issuance of a subpoena and a court order, or other similar legal mandate, the provider must disclose the records unless there is a valid legal defense (which would not include the confidentiality under part 2).

With respect to confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment, a court may only authorize disclosure if:

1. As noted above, the disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

2. The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

3. The disclosure is in connection with litigation or an administrative proceeding in which *the patient* offers testimony or other evidence pertaining to the content of the confidential communications.

42 C.F.R. 2.63.

c. Other Miscellaneous Situations Where Disclosures Are Permitted

Part 2 outlines several other highly specific situations where disclosures are permitted, which are not discussed in these materials, but can be found at the following regulations:

1. Disclosures to Prescription Drug Monitoring Programs, see 42 C.F.R. 2.36; and

2. Disclosures to Prevent Multiple Enrollments, see 42 C.F.R. 2.34.

Substance use professionals are encouraged to examine these regulations if they are relevant to their role.

d. Other Considerations Related to Disclosure

i. Responding to requests and/or acknowledging the presence of patients

Part 2 prohibits providers from responding to *any* requests for information about patients in any way that affirmatively reveals that an identified individual has been, or is being, diagnosed or treated for a substance use disorder.

This prohibition includes refraining from acknowledging the presence of an identified patient in a health care facility or component of a health care facility which is publicly identified as a place where only substance use disorder diagnosis, treatment, or referral for treatment is provided. Such an acknowledgement is only permissible if the patient's written consent is obtained or if there is an authorizing court order.

However, acknowledgement of the presence of an identified patient in a health care facility or part of a health care facility is permitted if said facility is not publicly identified as only a substance use disorder diagnosis, treatment, or referral for treatment facility, and if the acknowledgement does not otherwise reveal that the patient has a substance use disorder.

42 C.F.R. 2.13(c).

ii. Rights of Minor Patients

The vast majority of students in the K through 12 setting are minors, meaning they are under the age of 18. See RSA 21:44; see also 42 C.F.R. 2.11. Therefore, a common issue that may arise is whether parental consent would be required to disclose a minor's substance use disorder patient records.

Under part 2, whether parental consent is required for disclosure turns on whether State law requires consent for the treatment at issue. Pursuant to 42 C.F.R. 2.14, "[i]f a minor patient acting alone has the legal capacity under the applicable state law to apply for and obtain substance use disorder treatment, any written consent for disclosure authorized under subpart C of this part may be given only by the minor patient." Relatedly, this restriction includes any disclosure of patient identifying information to the minor's parent or guardian. However, "where state law requires consent of a parent, guardian, or other individual for a minor to obtain treatment for a substance use disorder, any written consent for disclosure authorized under subpart C of this part must be given by both the minor **and** their parent, guardian, or other individual authorized under state law to act in the minor's behalf." (Emphasis added).

In New Hampshire, the cut off age for parental consent for drug use[7] treatment is 12 years old. See RSA 318-B:12-a[8]. Therefore, a student over the age of 12 must consent to the disclosure of patient identifying information to any other person or entity, including to their parents. In that instance, where a parent has not consented to the treatment at issue, the parent or legal guardian would not be held financially liable for said treatment.

Practice Pointer: Substance use professionals should always obtain a minor patient's written consent prior to disclosing covered records/patient identifying information to anyone. For disclosure of information on minor patients under the age of 12, parental consent is also required, subject to the exceptions discussed supra.

Part 2 also addresses the situation where parental consent for treatment is required, but the minor makes an application for treatment under part 2 on their own. In that instance, the fact of a minor's application for treatment may only be communicated to the minor's parent or guardian if:

1. The minor has given written consent to the disclosure; or

2. The minor lacks the capacity to make a rational choice regarding such consent as judged by the part 2 program director.

42 C.F.R. 2.14(b)(2). In order to determine a minor lacks capacity to make a rational choice, the program director must judge that:

1. A minor applicant for services lacks capacity because of extreme youth or mental or physical condition to make a rational decision on whether to consent to a disclosure under subpart C of this part to their parent, guardian, or other individual authorized under state law to act in the minor's behalf; and

2. The minor applicant's situation poses a substantial threat to the life or physical well-being of the minor applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf.

Id. If a program director makes such a judgment, only facts relevant to reducing a substantial threat to the life or physical well-being of the minor applicant or any other individual may be disclosed to the parent or guardian. Id.

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[7] It is worth noting that this provision does not specifically address treatment for alcohol abuse. However, there is an argument to be made that, based on the definitions included in this section, alcohol was intended to be included and, further, there is no reason to treat treatment for alcohol abuse any differently.

[8] The rights of minor patients under part 2 differs from the rights found in FERPA, where privacy rights do not transfer to students (separate from their parents or guardians) until the age of 18.

Practice Pointer: The person or persons required to consent to disclosure will almost always be defined by who was required to consent to treatment. However, once a student turns 12, unless they lack capacity to consent to treatment, only the student can consent to disclosure.

iii. Incapacitated and Deceased Patients

If a patient has been adjudicated as lacking the capacity to manage their own affairs[9], any consent required under part 2 may be given by the person's guardian, or any other person authorized under state law to act on the patient's behalf. If there has been no such adjudication of incompetency (nor a patient who is a minor), a part 2 program director may exercise the right of the patient to consent to a disclosure for the sole purpose of obtaining payment for services from a third-party payer. 42 C.F.R. 2.15(a).

With respect to deceased patients, protected information is still subject to part 2's restrictions on disclosure. If a written consent to the disclosure is required, that consent may be given by an executor, administrator, or other personal representative appointed under applicable state law. If there is no such applicable state law appointment, the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family. 42 C.F.R. 2.15(b).

e. Restrictions on (Re)disclosures by Recipients of Substance Use Disorder Information

Pursuant to 42 C.F.R. 2.12(d)(2), the restrictions on disclosure in the regulations in this part also apply to:

1. Third-party payers with regard to records disclosed to them by part 2 programs or under § 2.31(a)(4)(l);

2. Entities having direct administrative control over part 2 programs with regard to information that is subject to the regulations in this part communicated to them by the part 2 program under paragraph (c)(3) of that section; and

3. Individuals or entities who receive patient records directly from a part 2 program or other lawful holder of patient identifying information and who are notified of the prohibition on re-disclosure in accordance with § 2.32.

However, it is important to note that a non-part 2 treating provider may record information about a substance use disorder and its treatment that identifies a patient. The regulations specifically state that this is permitted and does not constitute a record that has been re-disclosed under part 2, provided that any records received from a part

[9] Incapacity due to minority is not included in this section. Minors are discussed in 32 C.F.R. 2.14.

2 program or other lawful holder are segregated or segmented. The act of recording information about a substance use disorder and its treatment does not by itself render a medical record which is created by a non-part 2 treating provider subject to the restrictions of this part 2. Id.

Similarly, information conveyed orally by a part 2 program to a non-part 2 provider for treatment purposes with the consent of the patient does not become a record subject to this part in the possession of the non-part 2 provider merely because that information is reduced to writing by that non-part 2 provider. Records otherwise transmitted by a part 2 program to a non-part 2 provider retain their characteristic as records in the hands of the non-part 2 provider, but may be segregated by that provider. 42 C.F.R. 2.11.

D. Restrictions on Use

42 U.S.C. 290dd–2(c) places a broad prohibition on the disclosure and use of substance use disorder patient records, or testimony relaying the information contained therein, in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient. This includes the following activities:

1. Such record or testimony shall not be entered into evidence in any criminal prosecution or civil action before a Federal or State court.

2. Such record or testimony shall not form part of the record for decision or otherwise be taken into account in any proceeding before a Federal, State, or local agency.

3. Such record or testimony shall not be used by any Federal, State, or local agency for a law enforcement purpose or to conduct any law enforcement investigation.

4. Such record or testimony shall not be used in any application for a warrant.

Part 2 specifies that the restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to ***any*** information, whether or not recorded, which is drug use information obtained by a federally assisted drug use program after March 20, 1972 (part 2 program), or is alcohol use information obtained by a federally assisted alcohol use program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment. 42 C.F.R. 2.12(a)(2).

The restrictions on use found in part 2 apply equally to any person who receives substance use patient information from a part 2 program, regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations in this part. 42 C.F.R. 2.12(d)(1). This would include a situation where the information was obtained through a patient's access to their own patient record. See 42 C.F.R. 2.23(b). Indeed, the only way such information may be used in any proceeding is through patient consent or by court order, as discussed above.

E. Exceptions to the Applicability of Part 2 Regulations

As with all rules, there are several pertinent exceptions to part 2's prohibition on use and disclosure. They are as follows:

a. Communication within a part 2 program or between a part 2 program and an entity having direct administrative control over that part 2 program.

The restrictions on ***disclosure*** in the regulations in this part do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are:

(i) Within a part 2 program; or

(ii) Between a part 2 program and an entity that has direct administrative control over the program.

42 C.F.R. 2.12(c)(3).

Practice Pointer: While this provision likely allows a substance use professional employed by the school district to provide some information to other administrators within the school district, professionals should limit such disclosures to those administrators with direct supervisory authority over them and only disclosing limited information that is necessary for the operation of the program. Any records created by the substance use professional should be maintained in a location separate from the rest of a student's records.

b. Qualified service organizations

The restrictions on ***disclosure*** in the regulations in this part do not apply to communications between a covered program and a qualified service organization of information needed by the qualified service organization to provide services to the program.

Qualified service organizations are defined as an individual or entity who:

1. Provides services to a part 2 program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, accounting, population health management, medical staffing, or other professional services, or services to prevent or treat child abuse or neglect, including training on nutrition and childcare and individual and group therapy, and

2. Has entered into a written agreement with a part 2 program under which that individual or entity:

    a. Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the part 2 program, it is fully bound by the regulations in this part; and

    b. If necessary, will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment except as permitted by the regulations in this part.

42 C.F.R. 2.12(c)(4); see also 42 C.F.R. 2.11.

c. Reports of suspected child abuse and neglect

The restrictions on ***disclosure*** and ***use*** in the regulations in this part do not apply to the reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities. However, the restrictions continue to apply to the original substance use disorder patient records maintained by the covered program, including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect. 42 C.F.R. 2.12(c)(6); see also 42 U.S.C. 290dd–2(e).

New Hampshire's law related to the reporting of child abuse or neglect is found within RSA 169-C:

> "Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian Science practitioner, **teacher, school official, school nurse, school counselor, social worker, day care worker,** any other child or foster care worker, law enforcement official, priest, minister, or rabbi or **any other person** having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter."

RSA 169-C:29 (emphasis added). The requirements of said report are in RSA 169-C:30, and reports are to be made to the Department of Health and Human Services.

Importantly, RSA 169-C:31 grants immunity from any liability arising out of a good faith report of abuse and neglect:

> "Anyone participating in good faith in the making of a report pursuant to this chapter or who provides information or assistance, including medical evaluations or consultations, in connection with a report, investigation, or legal intervention pursuant to a good faith report of child abuse or neglect, is immune from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant has the same immunity with respect to participation in any investigation by the department or judicial proceeding resulting from such report."

Practice Pointer: Substance use professionals who become aware of or have any reason to suspect that a child has been abused or neglected should customarily err on the side of caution and make the mandated report. However, it is advisable that such professionals consult any supervisor and/or their attorneys to aid in making said report.

d. Crimes committed on part 2 program premises or against part 2 personnel.

The restrictions on ***disclosure*** and ***use*** in the regulations in this part do not apply to communications from covered program personnel to law enforcement agencies or officials which:

1. Are directly related to a patient's commission of a crime on the premises of the part 2 program or against part 2 program personnel or to a threat to commit such a crime; and

2. Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address, and that individual's last known whereabouts.

42 C.F.R. 2.12(c)(5).

Practice Pointer: This exception is consistent with New Hampshire's Safe School Zone's Act, which requires school employees to make a report of any acts of theft, destruction, or violence to local law enforcement. See RSA 193-D:4. Relevant here, RSA 193-D:1 includes the "illegal sale or possession of a controlled drug under RSA 318-B" as such an act requiring a report.

e. Department of Veteran Affairs and the Armed Forces

While likely not relevant for a substance use professional working in the K through 12 school setting, there are exceptions pertaining to information on patients maintained in connection with the Department of Veteran Affairs' provision of medical and other services under Title 38, U.S.C. These records are governed by 38 U.S.C. 7332. Similarly, there are exceptions where there is an interchange of information within the Armed Forces, and between the Armed Forces and Department of Veteran Affairs. To the extent these situations are relevant to a substance use professional's role, they should reference 42 C.F.R. 2.12(c)(1-2).

F. Record Security

Any covered program or other lawful holder of patient identifying information must have in place formal policies and procedures to reasonably protect against unauthorized uses and disclosures of patient identifying information and to protect against reasonably anticipated threats or hazards to the security of patient identifying information.

These policies must, at a minimum, address:

1. Paper records, including:
    a. Transferring and removing such records;
    b. Destroying such records, including sanitizing the hard copy media associated with the paper printouts, to render the patient identifying information non-retrievable;
    c. Maintaining such records in a secure room, locked file cabinet, safe, or other similar container, or storage facility when not in use;
    d. Using and accessing workstations, secure rooms, locked file cabinets, safes, or other similar containers, and storage facilities that use or store such information; and
    e. Rendering patient identifying information non-identifiable in a manner that creates a very low risk of re-identification (e.g., removing direct identifiers).
2. Electronic records, including:
    a. Creating, receiving, maintaining, and transmitting such records;

b. Destroying such records, including sanitizing the electronic media on which such records are stored, to render the patient identifying information non-retrievable;

c. Using and accessing electronic records or other electronic media containing patient identifying information; and

d. Rendering the patient identifying information non-identifiable in a manner that creates a very low risk of reidentification (e.g., removing direct identifiers).

42 C.F.R. 2.16.

Practice Pointer: A substance use professional working within a school would want to ensure that the storage of their records is also compliant with FERPA. In analyzing the two federal requirements together, the professional should seek to implement any provisions which are more stringent and protective of student privacy.

Relatedly, part 2 contains detailed instructions on the proper disposition of records by covered programs upon being discontinued. Such programs are generally required to either remove patient identifying information from its records or destroy its records (both hard and electronic copies) in a manner that renders patient identifying information non-retrievable. Obviously, there are exceptions to this rule based on patient written consent or laws imposing record retention requirements; however, any substance use professional who is considering discontinuing their program and/or practice should consult 42 C.F.R. 2.19 to ensure they meet part 2's requirements.

G. Required Notice to Patients of Federal Confidentiality Requirements

42 C.F.R. 2.22(a) requires that, at the time of admission to a covered program or, if a patient does not have capacity upon admission to understand his or her medical status, as soon thereafter as the patient attains such capacity, each covered program:

1. Communicate to the patient that federal law and regulations protect the confidentiality of substance use disorder patient records; and

2. Give to the patient a summary in writing of the federal law and regulations.

This summary must include:

1. A general description of the limited circumstances under which a part 2 program may acknowledge that an individual is present or disclose outside the part 2 program information identifying a patient as having or having had a substance use disorder;

2. A statement that violation of the federal law and regulations by a part 2 program is a crime and that suspected violations may be reported to appropriate authorities consistent with § 2.4, along with contact information;

3. A statement that information related to a patient's commission of a crime on the premises of the part 2 program or against personnel of the part 2 program is not protected;

4. A statement that reports of suspected child abuse and neglect made under state law to appropriate state or local authorities are not protected; and

5. A citation to the federal law and regulations.

42 C.F.R. 2.22(b). A program may also include information on state law or the program's policies on this notice, provided that they are not inconsistent with state and federal law on the subject of confidentiality of substance use disorder patient records.

Practice Pointer: The best practice for a substance use professional, including those in a public school setting, is to put together a handout for all new patients/clients and/or their parents (depending on age), which contains all required notices under state and federal law. These professionals are encouraged to run such notices by their attorneys and/or school district administration to ensure compliance with the applicable laws.

IV. The Interplay between The Family Educational Rights and Privacy Act ["FERPA"] and The Health Insurance Affordability and Accountability Act of 1996 ["HIPAA"]

The Health Insurance Affordability and Accountability Act of 1996 ["HIPAA"] protects protected health information from disclosure. When HIPAA was first adopted questions arose as to whether HIPAA applied to school districts. Student health records are "education records" subject The Family Educational Rights and Privacy Act ["FERPA"], and not HIPAA. See 45 C.F.R. 160.103 ("Protected health information excludes individually identifiable health information... In education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g").

Therefore, for substance use professionals employed by a New Hampshire public K through 12 school, where their substance use records are securely segregated but maintained as part of a student's educational record, HIPAA likely does not apply. However, if a substance use professional is seeing a student as part of their private practice apart from the school, they should consult their attorneys to assess whether the HIPAA regulations apply to their practice. The HIPAA regulations are outside the scope of these materials.

V. The Family Educational Rights and Privacy Act ["FERPA"]

A. Overview

Substance use professionals frequently work as student support professionals in schools. In those cases, these professionals are also subject to the privacy provisions of The Family Educational Rights and Privacy Act ["FERPA"].

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students[10] in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records. FERPA is another "spending clause" statute, imposing requirements on recipients of federal funds administered by the US Department of Education as a precondition to their receipt of such funds.

FERPA applies to any:

- State or local educational agency ["LEA"];
- Institution of higher education;
- Community college;
- School;
- Agency offering a preschool program; or
- Other educational institution.

School districts are considered "local educational agencies" and thus are subject to FERPA. FERPA does not apply to private and parochial schools that do not receive funding from the US Department of Education.

B. Defining an "Education Record" under FERPA

The intent of FERPA is to extend privacy and access rights to "education records." Therefore, it is vital that student support professionals, who may include substance use professionals understand what constitutes an education record under FERPA.

The statute defines educational records as: "those records, files, documents, and other materials which:

i. Contain information directly related to a student; and

[10] When a student turns 18 years of age, the permission/consent requirements of FERPA, as well as the right to access records, and all other FEPRA rights, transfer to the student; throughout these materials, this group of students is referred to as "adult students." 20 USC 1232g(d). Unless otherwise noted, references to "parents" include references to "adult students."

ii. Are maintained by an educational agency or institution or by a person acting for such agency or institution."

20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. 99.3.

The term "record" means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. 99.3.

However, educational records do not include:

i. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker[11], and which are not accessible or revealed to any other person except a substitute;

ii. Records maintained by a law enforcement unit of the school district that were created by that law enforcement unit for the purpose of law enforcement[12];

iii. In the case of persons who are employed by a school district but who are not attending a school district, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose;

iv. Records on a student who is 18 years of age or older, or is attending a college or other postsecondary institution, 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

[11] While not included in the federal statute, FERPA's implementing regulations include a further limitation of this exception, stating that said records "are used only as a personal memory aid." See 34 C.F.R. 99.3.
[12] Such records do not include "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 [r]ecords 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 C.F.R. 99.8(b).

treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;

v. Records created or received by a school district after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; or,

vi. Grades on peer-graded papers before they are collected and recorded by a teacher.

20 U.S.C. 1232g(a)(4)(B) (emphasis added); 34 CFR 99.3.

Records that are not maintained in the "sole possession" of the educator will constitute education records under FERPA, and therefore, must be made available to the parent/adult student, upon request.

Paper educational records should be stored in a locked cabinet and in a manner that maintains student confidentiality and privacy. Electronic student records should be maintained in accordance with District's data and privacy governance plan, which should, at a minimum, meet the requirements of FERPA and RSA 189:66, V.

DCYF reports will likely constitute student records if they are accessible to anyone other than the individual making the report. To that end, those records will need to be maintained in accord with FERPA. Many districts store these records in a separate file in either the school counselor's office or in the principal's office.

C. Rights of Parents and Adult Students

FERPA enumerates a number of rights that Parents and adult students have with regard to student records. This section discusses those rights and how they are actualized.

1. The right to inspect, review and access education records

Simply put, parents have the right to inspect and review the education records of their children. When the information in the record pertains to more than one child the parent has the right "to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material." 20 U.S.C. 1232g(a)(1)(A). The privacy rights of other students are implicated in these circumstances, and the District is required to redact the names and other personally identifiable information about other students that may be included in the child's education records. As a matter of best practice, student records should be generated in a manner which, to the extent possible, keeps the records student specific.

New Hampshire law requires that when a parent makes a request to inspect and review his or her child's education records the District must provide the parent with access within 14 days of the request. RSA 189:66, IV(a); see also 20 U.S.C. 1232g(a)(1)(A); 34 C.F.R. 99.10(b). The best practice is not to delay disclosure. When a parent has made a request, the District should promptly allow access.

The right of access includes the right to request copies of education records. The District has a duty to provide copies to parents, but it may charge a reasonable duplication fee for those copies, so long as the fee does not "effectively prevent" a parent from obtaining the copy. However, the District may not charge a fee to search for or to retrieve the education records. 34 C.F.R. 99.11.

2. The right to challenge the content of education records

A parent/adult student has the right to challenge the content of their education records. 20 U.S.C. 1232g(a)(2); 34 C.F.R. 99.20.

Upon receipt of a challenge, the District has a choice:

- To agree to amend the record within a reasonable time after receiving the request; or

- To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If, after hearing, the information in the record is not found to be inaccurate, misleading, or otherwise in violation of the privacy rights of the student, the District is required to offer the parent the right to place a statement in their child's record, which will be kept and disclosed with the record in question. 34 C.F.R. 99.21. A District that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

3. The right to consent to the disclosure of education records

The parent/adult student retains the right to consent to the release/disclosure of education records and to consent to the disclosure of personally identifiable information contained in educational records (other than directory information, as discussed below). 20 U.S.C. 1232g(b).

Personally identifiable information includes, but is not limited to:

- The student's name;

- The name of the student's parent or other family members;
- The address of the student or the student's family;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. 99.3.

FERPA creates a general presumption that a school district **may not release** the **education records**, **or personally identifiable information** contained in educational records, of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of ***directory information*** and the concept of certain ***exceptions to the prior written consent rule.***

Directory information is defined as information that a district may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- electronic mail address;
- photograph;
- date and place of birth;

- major field of study;
- grade level;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;
- dates of attendance;
- degrees, honors, and awards received; and,
- the most recent educational institution attended.

20 U.S.C. 1232g(a)(1)(5)(A); 34 C.F.R. 99.3; see also RSA 189:1-e (authorizing local educational agencies to provide information designated as directory information consistent with FERPA, and defining directory information as "information not generally considered harmful or an invasion of privacy if disclosed," which "may include: name and address of a student; field of study; weight and height of athletes; most recent previous school attended; date and place of birth; participation in officially recognized activities and sports; and, date of attendance, degrees, and awards").

Directory information does not include a student's social security number. 34 C.F.R. 99.3. A student's identification number or other personal identifier may constitute directory information, depending on whether it can be used to gain access to education records. Even if it can, the number can still be considered directory information if said access is only permitted when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password, or other factor known or possessed only by the authorized user.

In order for a District to be free to release directory information without prior written consent, the District must provide public notice of the areas of information that it has designated as "directory information," and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent. 20 U.S.C. 1232g(a)(1)(5)(B); see also 34 C.F.R. 99.37 (outlining contents of notice).

The Every Student Succeeds Act ("ESSA") addresses the disclosure of directory information, such as student's names, addresses, and telephone numbers to military recruiters and institutions of higher education, requiring, with some exceptions, such as parental refusal, that districts disclose this information to military recruiters and institutions of higher education. See 20 U.S.C. 7908.

There are twelve (12) relevant ***exceptions to the "prior written consent" rule***. 20 U.S.C. 1232g(b); 34 C.F.R. 99.31(a). They are as follows:

a. Other school officials, including teachers within the local educational agency, who have been determined to have a legitimate educational interest in the information.

Prior written consent is not required for disclosure of education records to teachers and other school officials who have a "legitimate educational interest" in reviewing the records. 34 C.F.R. 99.31(a)(1).

It is the school which makes the determination as to which educators have a "legitimate educational interest" in obtaining the records. The District must include "a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest" in its annual FERPA notification. 34 C.F.R. 99.7(a)(3)(iii).

The US Department of Education's FERPA Model Notification of Rights defines "school official" as:

> "A school official typically includes a person employed by the school or school district as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel) or a person serving on the school board. A school official also may include a volunteer, contractor, or consultant who, while not employed by the school, performs an institutional service or function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of PII from education records, such as an attorney, auditor, medical consultant, or therapist; a parent or student volunteering to serve on an official committee, such as a disciplinary or grievance committee; or a parent, student, or other volunteer assisting another school official in performing his or her tasks."

See Model Notification of Rights under FERPA for Elementary and Secondary Schools, available at: https://studentprivacy.ed.gov/resources/ferpa-model-notification-rights-elementary-secondary-schools (accessed September 9, 2021).

A school official typically has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility. Id.

An individual with a legitimate educational interest to access an educational record may not disclose the information from the record to any other individual, unless the subsequent disclosure is authorized by FERPA.

b. Officials of other schools or school systems in which the student seeks or intends to enroll.

A district may release education records to other schools or school systems in which the student is enrolled or intends to enroll upon the following conditions:

- The district makes a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:
    - The parent or adult student requested that the records be disclosed or,
    - The District's annual FERPA notification includes a statement that it forwards education records to other agencies or institutions that have requested the records, so long as the disclosure is for purposes of the student's enrollment.
- The parent or adult student receive a copy of the records, if desired; and
- The parent or adult student have an opportunity for a hearing to challenge the content of the record.

34 C.F.R. 99.31(a)(2); 34 C.F.R. 99.34. See also Academy 20 Sch. Dist., 114 LRP 27950 (Colo. SEA May 1, 2014) (holding that a district did not violate FERPA by obtaining records (without parental consent) from school districts where a newly-enrolled student had previously resided because the student had transferred to the district).

Districts must have a procedure in place to ensure that disciplinary records pertaining to a student's suspension or expulsion are transferred to any elementary or secondary school where the student is enrolled or intends to enroll. 34 C.F.R. 99.31(a)(2).

c. Authorized representatives of the Comptroller General of the United States, the Attorney General of the United States, the Secretary of the U.S. Department of Education, the State Department of Education, or State and local educational authorities.

State and local education officials have access to student or other records which may be necessary in connection with the audit of their programs. For example, state

auditors may request student records in order to audit a state supported program. 34 C.F.R. 99.31(a)(3); see also 34 C.F.R. 99.35.

d. Financial Aid Officials.

This exception permits appropriate officials in connection with a student's application for, or receipt of, financial aid to obtain education records, including a student's social security number, so long as the disclosure is necessary to determine the eligibility for the aid, the amount of the aid, the conditions for the aid, or enforce the terms and conditions of the aid. 34 C.F.R. 99.31(4).

e. Persons subject to a Subpoena or Court Order.

FERPA allows education records to be released pursuant to a court order or lawfully issued subpoena upon condition that parents and adult students are notified in advance of compliance with the subpoena. This notification requirement does not apply if the subpoena is a Federal grand jury subpoena or if the subpoena has been issued for law enforcement purposes, and the court or issuing agency has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed. 34 C.F.R. 99.31(a)(9).

Districts are not required to provide parents with notice prior to disclosing the records if the disclosure is made pursuant to a court order in a proceeding involving child abuse or neglect, and the order is issued in the context of that proceeding. 20 U.S.C. 1232g(b)(2)(B).

f. Disclosure to State and local officials in connection with the state's juvenile justice system under specified conditions.

FERPA allows educators to share information verbally with organizations such as Child Protective Services agencies. 34 CFR 99.31(a)(5). For example, FERPA does not prohibit an educator from making a verbal report to the Division for Children, Youth and Family.

In addition, schools may receive and use information from law enforcement courts and other justice system components in order to provide services to students and to maintain a safe and effective learning environment. However, once the information is received and maintained by the school, it becomes subject to FERPA and the FERPA exceptions.

Educators are also permitted to make disclosure to state and local officials or authorities in compliance with a state statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication the student whose records are being released. For example, when a district has been joined by the court in

a juvenile system it may share information with the court as part of the joinder and evaluation process.

It is also important to remember that information garnered by a school resource officer (under the "law enforcement unit" exception) is not considered an "education record," under FERPA. If, for example, a school resource officer creates a file and places a report in it pertaining to a school-based investigation, a school resource officer is entitled to share that information with a law enforcement unit or for that matter any other law enforcement unit.

g. Organizations conducting studies for educational agencies.

This exception includes organizations conducting studies for, or on behalf of educational agencies for purpose of developing, validating or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and that such information will be destroyed once no longer needed. 34 C.F.R. 99.31(a)(6).

The district must enter into a written agreement with the organization, and the written agreement must: specify the purpose, scope, and duration of the study or studies and the information to be disclosed; require that the organization use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement; require that the organization conduct the study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the organization with legitimate interests; and, require that the organization destroy all personally identifiable information when it is no longer needed for the purpose for which the study was conducted and specify the time period in which the information must be destroyed. Id.

h. Accrediting organizations.

Organizations which carry out accrediting functions are exempt from the prior written disclosure requirement. 34 C.F.R. 99.31(a)(7).

i. Parents.

Parents of dependent students as defined in the IRS Code are exempt from the prior written consent requirement by virtue of their status as the child's parent. 34 C.F.R. 99.31(a)(8).

j. Health or safety emergencies.

Appropriate persons in connection with a health or safety emergency are entitled to obtain education records if the knowledge of the information is necessary to protect the health or safety of the student or other persons. 34 C.F.R. 99.31(a)(10); 34 C.F.R. 99.36(a).

When making this determination, the district may "take into account the totality of the circumstances pertaining to the threat to the health or safety of a student or other individuals." If the district determines that there is "an articulable and significant threat to the health or safety of a 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." 34 C.F.R. 99.36(c).

In addition, FERPA does not prohibit schools "from including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or... disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student." 20 U.S.C. 1232g(h); 34 C.F.R. 99.36(b)(1)-(2).

In Letter to Strayer University (March 11, 2005), the Family Policy Compliance Office (FPCO) addressed the limits of this exception. See https://studentprivacy.ed.gov/resources/letter-strayer-university-finding-re-school-official-using-access-education-records (accessed JSeptember 9, 2021).

In that case, an adult student complained that the University violated FERPA when an employee accessed the University's computer database, without Student's consent, to obtain personal information about Student (name, address, date of birth, height, weight and driver's license number) to file a personal complaint against Student with the local police.

In November 2003, Student and an employee had a disagreement regarding the Student's use of the admissions office fax machine. Two days later, Student and employee "exchanged unpleasantries and [Student] allegedly threw a brass business cardholder at [Employee]. [Employee] felt threatened and called the police to report the incident."

In responding to the complaint, the University asserted that if the employee had accessed Student's records, he either had a legitimate educational interest in doing such, or did such to address a health or safety emergency.[13]

[13] Student had opted out of the disclosure of directory information.

FPCO rejected the "health or safety emergency" exception argument, noting that the allegations did not rise to an emergency. "The Department has consistently interpreted this provision narrowly by limiting its application to a specific situation that presents imminent danger to students or other members of the community, or that requires an immediate need for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals." Id. (emphasis in original).

FPCO also rejected the argument that the employee had a legitimate educational interest in accessing the records, because he was using the information to file a police report, and not for an educational purpose.

k. The Patriot Act of 2001.

The USA Patriot Act of 2001 added a new subsection that allows the US Attorney General to apply for an ex parte order requiring an educational agency to allow the Attorney General to collect and use education records relevant to investigations and prosecutions of specified crimes or acts of terrorism, whether domestic or international. 20 U.S.C. 1232g(j).

l. Any agency caseworker or other representative of a State or local child welfare agency, or tribal organization, who has the right to access a student's case plan, as defined by the State, when such agency or organization is legally responsible, in accord with State law, for the care and protection of the student.

The agency or organization is prohibited from disclosing the educational records, or the personally identifiable information contained in such records, except to an individual or entity engaged in addressing the student's education needs and authorized by such agency or organization to receive such disclosure and such disclosure is consistent with State or tribal laws applicable to protecting the confidentiality of a student's education records.

This provision is known as the "Uninterrupted Scholars Act." 20 U.S.C. 1232g(b)(1)(L).

D. Record Keeping Requirements under FERPA

There is a mandated record keeping requirement with regard to FERPA. The school district is required to keep a log with the education records of each student which indicates:

- All individuals, agencies or organizations that have requested or obtained access to a student's education records; and

- The legitimate interest that each of the above has in obtaining the information.

In addition, if the information was disclosed due to a health or safety emergency, the record must also include:

- The articulable and significant threat to the health or safety of a student or other individuals that formed the basis of the disclosure; and

- The parties to whom the school district disclosed the information.

34 C.F.R. 99.32(a). The record-keeping requirement does not apply to school officials with a legitimate educational interest in accessing the record. 34 C.F.R. 99.32(d)(2).

The record of access is available only to parents and school officials responsible for custody of the records.

E. Penalties for Redisclosure by Third Parties

Personally identifiable information from covered records can only be transferred to a third party on condition that they will not permit any other person access to the records without the parent's written consent, unless redisclosure of the information would be permitted under one of FERPA's exceptions to the prior written consent rule. 34 C.F.R. 99.33(a)(1).

F. Electronic Consent

As indicated above, a school must have a signed and dated written consent prior to disclosing personally identifiable information from educational records. The written consent must:

- Specify the records that may be disclosed;

- State the purpose of the disclosure; and,

- Identify the party or class of parties to whom the disclosure may be made.

34 C.F.R. 99.30(b).

This written consent may "include a record and signature in electronic form that - (1) [i]dentifies and authenticates a particular person as the source of the electronic

consent; and (2) [i]ndicates such person's approval of the information contained in the electronic consent." 34 C.F.R. 99.30(d).

Upon request, the district must provide the parent with a copy of the records disclosed. 34 C.F.R. 99.30(c).

G. Pertinent Decisions and Rulings Pertaining to FERPA

The Family Policy Compliance Office is the office primarily responsible for issuing opinions with regard to FERPA. These opinions provide guidance to the educator as to the interpretation of FERPA.

1. A Parent's Due Process Rights Do Not Entitle Them to Access Records Regarding Other Children

In Letter to Attorney for School District, 40 IDELR 99 (FPCO October 31, 2003), an attorney asked for an official opinion as to whether FERPA permits a school district to release information in education records related to one student to the parents of another student. An impartial due process hearing officer had ordered that the parents be provided with a "complete and accurate copy" of their son's disciplinary records which would include the names and other personally identifiable information of other students. The FPCO ruled that the IDEA did not trump FERPA and that the IDEA regulations did not give the parents a greater right of access to the education records belonging to other students simply because they were involved in a due process hearing.

2. FERPA Compliance in Proposed Survey of Children with Disabilities

In Letter to Lloyd-Jones, 41 IDELR 67 (FPCO 2004), the Compliance Office found that there was no FERPA exception that would allow the State Department of Education to disclose students' personally identifiable information to the State's Health Services Department. The Office further noted that nothing in FERPA prohibited the State Department or districts and schools from disclosing information in the aggregate or in another non-personally identifiable form. However, before making the disclosure, the agency would need to remove the students' names, ID numbers and any personal characteristics that would make the child's identity "easily traceable."

3. The IDEA Also Protects Student Privacy

In Douglas County School District, 41 IDELR 258 (SEA CO 2004) the hearing officer ruled that a Colorado school district violated the IDEA when a principal made comments about a student's cognitive and social/emotional level to parents of another student. The investigating officer refused to consider whether the disclosure denied the child FAPE since such an allegation should be resolved at due process.

It is important to note that the IDEA also contains non-disclosure provisions which are based on the similar provisions of FERPA. 34 CFR 300.571(a)(1) (the IDEA regulation) generally requires parental consent before personally identifiable information contained in their child's educational records may be disclosed to anyone other than school officials.

In Greater Hoyt (SD) School Board, 20 IDELR 105 (FPCO 1993), the Compliance Office found that a district violated FERPA after it disclosed information contained in a student's "IEP Addendum" to the newspaper and at a board meeting. The IEP Addendum contained information such as: details stating that Student's parent would be reimbursed for 8 trips to visit student at an out of state school and information pertaining to reimbursement to the parents for the costs associated with the Student's placement. In making the disclosure, the district did not specifically name the student; however, the district disclosed enough "personally identifiable information" to enable a third party to identify the student. Thus, it was irrelevant that the student's name was not released.

4. Untimely Disclosure of Records Could Expose a District to a Claim of Denial of FAPE

In Council Rock School District, 41 IDELR 204 (SEA PA 2004), the hearing officer rejected a claim by the parents that the district's failure to provide a timely and complete set of educational records pertaining to their student amounted to a denial of FAPE. The Appeals Panel hearing the case concluded that, "the case law is overwhelming that procedural violations that are not prejudicial failed to establish denial of FAPE." The Panel acknowledged however that it was conceivable that a breach of FAPE could occur based solely on a records violation. The educator is best advised to diligently and timely disclose records to parents who request access.

5. OCR Does Not Have Jurisdiction Over Personal Privacy Claims

In Jonesboro Consolidated Community School District No. 43, 41 IDELR 99 (OCR, Chicago (IL) 2003), OCR issued a ruling explaining that it had no authority to address an allegation that a special education teacher discussed a child's disability and testing information with the child's neighbor. OCR noted that the privacy claim is best addressed by FERPA and directed the parent to contact the Family Policy Compliance Office.

6. Non-Custodial Parents Have the Right to Access Records, Absent a Court Order Stating Otherwise

In contrast, in Letter to Lianides, 113 LRP 7159 (FPCO Oct. 9, 2012), the FPCO found in favor of a non-custodial parent who was denied access to her minor daughter's

educational records. In that case, the student was in the custody of her paternal grandmother, who requested that the school prohibit both parents from accessing student's records. When the non-custodial parent requested access to the records, the district denied the request and the parent complained.

FPCO opined that the district should have provided the parent with access to the records. FPCO noted that schools are required to provide custodial and noncustodial parents alike with full rights under FERPA unless the school has been provided with evidence that there is a court order, state statute, or other legally binding document that specifically revokes these rights. The district was not provided with any of these documents, therefore, the district violated FERPA when it refused to provide the parent with access to the records.

7. Inadvertent Disclosure of Records

A district's response to the inadvertent disclosure and/or theft of educational records may impact whether the loss of records violates FERPA. Letter to Fagan, 113 LRP 7161 (FPCO Oct. 9, 2012) addresses the inadvertent disclosure of records that were contained on a flash drive. A school attorney wrote to the FPCO requesting guidance as to whether a disclosure of records may have occurred when the flash drive could not be located.

FPCO opined that the district's response to the loss of an electronic data storage device from a classroom will determine whether it violated FERPA. The FERPA safeguarding recommendations recognize that no system is perfect and sometimes information will get out. FERPA does not dictate requirements for safeguarding education records, but the FPCO encourages the holders of personally identifiable information to consider actions that mitigate the risk and are reasonably calculated to protect such information.

Schools may use any reasonable method to protect the information. The FERPA Safeguarding Recommendations specify that an educational agency or institution that has experienced a theft of files should consider one or more of the following steps:

1. Report the incident to law enforcement authorities.
2. Determine exactly what information was compromised.
3. Take steps immediately to retrieve data and prevent any further disclosures.
4. Identify all affected records and students.
5. Determine how the incident occurred.
6. Determine whether institutional policies and procedures were breached.
7. Determine whether the incident occurred because of a lack of monitoring and oversight.
8. Determine steps that will prevent the incident from happening in the future.

9. Notify students of steps they should take if they believe their information was stolen.

Failure to take reasonable and appropriate steps to protect education records could result in the release or disclosure of personally identifiable information from education records and may constitute a policy or practice of permitting the release or disclosure of education records in violation of FERPA requirements. See Letter to Tobias, 115 LRP 33135 (FPCO May 8, 2015); Letter to Lacey, 114 LRP 30849 (FPCO March 12, 2014).

8. Communications with Private Physicians

In Letter to Anonymous, 114 LRP 37980 (FPCO May 19, 2014), the FPCO found that a district did not violate FERPA after a guidance counselor spoke with a child's physician regarding records submitted by the parent.

In that case, the parent complained that the guidance counselor contacted the private physician and disclosed information from educational records, without parental consent. FPCO noted that the information provided from the parent and the school indicated that the guidance counselor called the doctor (in response to a letter from the doctor) to request clarification about the date he was recommending the student could return to school, and did not disclose any information other than information that was already in the letter.

FPCO noted that FERPA defines "disclosure" as "to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, *to any party except the party identified as the party that provided or created the record.*" 34 C.F.R. 99.3 (emphasis added). Thus, FPCO concluded that FERPA would permit the guidance counselor to contact the doctor to verify the information that the doctor included in his letter.

VI. Conclusion

Battling a substance use disorder is an incredibly difficult experience for any person. This experience would be even more challenging for a student if they had to seek treatment at the cost of their personal privacy. Therefore, it is not surprising that there are several statutory and regulatory schemes, both at the State and federal level, protecting such individuals from having information related to their substance use struggles disclosed or used against them. Safeguarding substance use information shields both students and their families from suffering the stigma of having this sensitive information known and allows them the opportunity to seek help for their recovery without fear of exposure.

While there are several laws that overlap in protecting this information, it is important for substance use professionals to recognize that they need to consider all in conjunction, and where there is conflict, to comply with the provisions which are most protective of student privacy. In looking at the federal laws, one can view HIPAA and FERPA as two bodies of law broadly protecting different types of records: educational records and protected health information, i.e., health records. By the terms of HIPAA's regulations, an "educational record" cannot also fall under HIPAA's definition of the protected health information it protects; therefore, these two statutes do not overlap. However, part 2 can form a subset of records covered by either HIPAA or FERPA, depending on who is providing the services. Because part 2 has a much narrower focus and is more protective, substance use professionals and related administrators in the public school setting should treat covered records as a more protected subset of the records they maintain, ensuring compliance with both FERPA and part 2 when possible. When there is conflict, the more stringent requirements should prevail.

Finally, despite the importance of protecting student/patient privacy related to their substance use, there are situations where a substance use professional or administrator can (and should) disclose protected information. As outlined and circumscribed above, substance use professionals and administrators are permitted to disclose information to prevent an imminent threat of harm; therefore, training in the relevant exceptions above are key to allow for intervention prior to any harm to the student or others.