

# Healthy Students Promising Futures

## Appendix C: Exchanging Information and Data between Schools and Health Providers in Colorado: Quick Reference Chart to Confidentiality Laws

### Notes to Chart:

- This chart highlights some of the most relevant provisions of applicable federal and state confidentiality law when agencies are sharing information related to service provision for an individual youth or sharing data for population level evaluation of programs. The descriptions are brief. Agencies and providers should work with their legal counsel and reference the cited law for more information on context and applicability.
- This grid does not reference every information-sharing provision and exception in each law. Rather, key provisions were selected based on the data and information sharing goals of this project. The chart therefore should be understood in that context.
- Where an authorization to release information is required, the applicable law often requires the release form include certain information and/or elements to be valid. The law also will define who may or must sign the release. It is important to reference the applicable law for this information.
- Often there are limits that restrict the recipient of information from re-disclosing information. It is important to understand how these work.
- Information may become subject to different confidentiality laws and disclosure rules when provided to and then housed in another agency's file- for example, when a health agency shares information with a school and that information is placed in school file. It is important to consult the cited law and legal counsel for more information.
- This chart refers to schools and school employees and to community behavioral health providers. For this purpose, the chart only applies to schools and school employees that receive public funding<sup>1</sup> and to community behavioral health providers whose records are subject to HIPAA.

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		Recipient of Information						
		School officials	School nurse employed by school <sup>2</sup>	SBHC provider subject to HIPAA	Community health provider	Community MH/ BH provider <sup>3</sup>	Community Substance abuse provider	RAE
<b>Giver of Information</b>	<b>"School official"<sup>1</sup> disclosing information from "education record"<sup>4</sup></b>	<p>"School official" in the same agency or institution (e.g. school or LEA) may access information in "education record"<sup>4</sup> of student if official has "legitimate educational interests"<sup>5</sup> in information as these terms are defined in annual notice to parents.</p> <p><i>And see next row</i></p>		<i>See next row</i>			<i>See next row</i>	
		<p>Giver also may share with this recipient:</p> <ul style="list-style-type: none"> <li>• Pursuant to "FERPA compliant"<sup>6</sup> release of information form dated and signed by parent,<sup>7</sup> guardian or adult student.<sup>8</sup></li> <li>• If required by court order or lawful subpoena.<sup>9</sup></li> <li>• Information obtained through personal knowledge or observation that is not obtained from or recorded in "education record."<sup>10</sup></li> <li>• "Directory information" if district has complied with notice and opt out requirements.<sup>11</sup></li> <li>• Where disclosure may help avert an imminent threat to health or safety.<sup>12</sup></li> <li>• De-identified information (personally identifiable information removed) in certain circumstances.<sup>13</sup></li> <li>• If recipient is a consultant/contractor with school or district, is performing a duty on behalf of the school or district, and has met certain requirements and made certain commitments regarding protection and use of the information.<sup>14</sup></li> <li>• If recipient is an authorized representative of an SEA or LEA, disclosure is for purposes of audit and evaluation of federal or state supported education program, and have met requirements in FERPA.<sup>15</sup></li> <li>• If recipient is conducting certain types of studies on behalf of the educational agency and meets certain requirements regarding handling of information.<sup>16</sup></li> </ul>						

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		Recipient of Information					
		School officials	School nurse	SBHC	Community health provider	Community MH/ BH provider	Subst. abuse provider
<b>Giver of Information</b>	SBHC subject to HIPAA, Community health provider subject to HIPAA	<p>May share proof of immunization with a school for student or prospective student if school is required to have that information by state or other law, parent or guardian agrees to disclosure, and health provider documents that agreement.<sup>17</sup></p> <p style="text-align: center;"><i>And see next row</i></p>	<i>See next row</i>				<ul style="list-style-type: none"> <li>• For health care operations.<sup>18</sup></li> <li>• For payment purposes.<sup>19</sup></li> <li>• For health oversight purposes.<sup>20</sup></li> </ul> <p style="text-align: center;"><i>See next row</i></p>
		<p>Giver also may share with recipient:</p> <ul style="list-style-type: none"> <li>• Pursuant to a HIPAA compliant<sup>21</sup> authorization to release information.<sup>22</sup></li> <li>• If state law or regulation requires or permits disclosure.<sup>23</sup></li> <li>• De-identified information that meets the HIPAA requirements for de-identification.<sup>24</sup></li> <li>• If recipient is a “business associate” and disclosure complies with business associate agreement.<sup>25</sup></li> <li>• For treatment purposes, including coordination or management of health care, consultation and referral, to certain individuals.<sup>26</sup></li> <li>• For research if complies with research exception.<sup>27</sup></li> <li>• For payment purposes.<sup>19</sup></li> <li>• For health care operations.<sup>18</sup></li> <li>• To any person who needs the information to avert a serious and imminent threat as described in the law.<sup>28</sup></li> <li>• If recipient is public health authority and disclosure is required by law.<sup>29</sup></li> </ul>					
<b>Giver of Information</b>	BH provider subject to HIPAA	<p><i>As in rows above for “community health provider subject to HIPAA” except:</i></p> <p>Cannot share psychotherapy notes without HIPAA compliant release of information.<sup>30</sup></p>					
	Substance Abuse Providers <sup>31</sup>	<i>See next row</i>					<p style="text-align: center;"><i>Medicaid or related audit and evaluation<sup>32</sup></i></p>
		<ul style="list-style-type: none"> <li>• May share pursuant to 42 CFR Part 2 compliant<sup>33</sup> release of information form.<sup>34</sup></li> <li>• May share pursuant to 42 CFR Part 2 compliant court order.<sup>35</sup> Must share if there are both subpoena and a court order.<sup>36</sup></li> <li>• May share in medical emergency with medical personnel who need the information to treat emergency situation.<sup>37</sup></li> </ul>					

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<sup>1</sup> Schools that receive public funding are subject to the Family Educational Rights and Privacy Act (FERPA) privacy and disclosure rules. 20 U.S.C. § 1232g; 34 C.F.R. § 99.1(a); Co. Rev. Stat. § 22-1-101, 22-1-123(1). The term “school official” in this chart includes school staff, such as teachers, counselors, principals, and school nurses, who work in schools that receive public funding. A school or district may define the term more broadly in its school policies so that it also includes outside consultants, contractors or volunteers to whom a school has outsourced a school function when certain conditions are met. 34 C.F.R. § 31(a)(1)(i).

<sup>2</sup> In most cases, school nurses are school employees/“school officials” whose records are subject to FERPA. This chart assumes nurses are “school officials” as defined by FERPA.

<sup>3</sup> This document assumes that behavioral health clinicians are “covered entities” subject to HIPAA. A licensee (psychologist, social worker, clinical social worker, MFT, licensed professional counselor or addition counselor), registrant or certificate holder, who is NOT a covered entity or business associate subject to HIPAA, may need to comply with Co. Rev. Stat. § 12-43-218 confidentiality restrictions.

<sup>4</sup> “Education records” are defined as records, files, documents, or other materials that contain information directly related to a student and are maintained by an educational agency or institution, or a person acting for such agency or institution. “Information directly related to a student” means any information “that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community . . . to identify the student with reasonable certainty.” 20 U.S.C. § 1232g(a)(4)(A), 34 C.F.R. § 99.3, Co. Rev. Stat. § 22-1-123(1)(education record in state law has same meaning as in FERPA).

<sup>5</sup> In order to share without a release, the school official must have a “legitimate educational interest” in the information. “Legitimate education interest” has been defined by the U.S. Department of Education to mean that the school official needs the information to perform his or her official duties. FERPA requires schools to include in their annual notices to parents a statement indicating whether the school has a policy of disclosing information from the education file to school officials, and, if so, which parties are considered school officials for this purpose and what the school considers to be a “legitimate educational interest.” 20 U.S.C. § 1232g(b)(1), 34 C.F.R. § 99.31(a)(1)(i)(a), Co. Rev. Stat. 22-1-123(3).

<sup>6</sup> To comply with FERPA, a written consent to release education records must: (1) Specify the records that may be disclosed; (2) State the purpose of the disclosure; (3) Identify the party or class of parties to whom the disclosure may be made; and (4) be signed and dated. “Signed and dated written consent” under this part may include a record and signature in electronic form that (1) Identifies and authenticates a particular person as the source of the electronic consent; and (2) Indicates such person's approval of the information contained in the electronic consent. 34 C.F.R. § 99.30.

<sup>7</sup> Under FERPA, “parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.” This term, and who may sign a release, also may be defined in more detail in local district policy. 34 C.F.R. § 99.3.

<sup>8</sup> The general rule is that schools shall not release information from an education record without prior written consent from a “parent.” 20 U.S.C. § 1232g(b)(2), 34 C.F.R. § 99.30, Co. Rev. Stat. § 22-1-123(3).

<sup>9</sup> 34 C.F.R. § 99.31(a)(9)(i), Co. Rev. Stat. § 22-1-123(3).

<sup>10</sup> FERPA provides several examples of information that are not part of the “education record” and thus not subject to FERPA. 20 U.S.C. § 1232g(a)(4)(A), 34 C.F.R. § 99.3. This is one example. According to guidance from the U.S. Department of Education, “FERPA does not prohibit a school official from releasing information about a student that was obtained through the school official’s personal knowledge or observation *unless* that knowledge is obtained through his or her official role in making a determination maintained in an education records about the student.” See “*Are there any limitations to sharing information based*

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on personal knowledge?” available at <https://studentprivacy.ed.gov/fag/are-there-any-limitations-sharing-information-based-personal-knowledge-or-observations>.

<sup>11</sup> Schools may release “directory information” about students to the public generally if the school and district first have given public notice to parents about the types of information the school and district consider directory information, the parents’ right to refuse directory disclosures, and how long parents have to inform the school or district about their intent to opt out. This notice must happen every year. 20 U.S.C. §1232g(a)(5)(A), 34 C.F.R. §§ 99.31(a)(11), 99.37. The scope of the term ‘directory information’ will depend on district policy, but can include the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See also* Co. Rev. Stat. § 22-1-123(1),(4)(school district shall not release directory information without first complying with the provisions of FERPA relating to allowing a parent or guardian to prohibit such release without prior consent.).

<sup>12</sup> “An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 20 U.S.C. § 1232g(b)(1), 34 C.F.R. § 99.31(a)(10), 34 C.F.R. § 99.36, Co. Rev. Stat. § 22-1-123(3). The release may occur “if the agency or institution determines, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or 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.” U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Ms. Martha Holloway, Alabama Dept. of Educ.”, Feb. 25, 2004.

<sup>13</sup> 34 C.F.R. § 99.31(b), Co. Rev. Stat. § 22-1-123(3).

<sup>14</sup> According to guidance from the U.S. Department of Education, “agencies and institutions subject to FERPA are not precluded from disclosing education records to parties to whom they have outsourced services so long as they do so under the same conditions applicable to school officials who are actually employed.” The guidance reminds schools and educational agencies that “an educational agency or institution may not disclose education records without prior written consent merely because it has entered into a contract or agreement with an outside party. Rather, the agency or institution must be able to show that 1) the outside party provides a service for the agency or institution that it would otherwise provide for itself using employees; 2) the outside party would have “legitimate educational interests” in the information disclosed if the service were performed by employees; and 3) the outside party is under the direct control of the educational agency or institution with respect to the use and maintenance of information from educational records.” The guidance reminds districts that they remain completely responsible for their contractor’s compliance with FERPA requirements in these situations and states “[f]or that reason, we recommend that these specific protections be incorporated into any contract or agreement between an educational agency or institution and any non-employees it retains to provide institutional services.” The U.S. Department of Education adds that if the school has not “listed contractors and other outside service providers as ‘school officials’ in its annual § 99.7 FERPA notification, then it is required to record each disclosure to a qualifying contractor in accordance with § 99.32(a).” U.S. Dept. of Educ., Family Policy Compliance Office, “Letter to Clark County School District (NV) re: Disclosure of Education Records to Outside Service Providers,” June 28, 2006, available at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html>.

<sup>15</sup> FERPA allows disclosures, subject to the requirements of [§ 99.35](#), to authorized representatives of state and local educational authorities. Section 99.35 says the State or local educational authority or agency is responsible for using reasonable methods to ensure to the greatest extent practicable that any entity or individual designated as its authorized representative—

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- (i) Uses personally identifiable information only to carry out an audit or evaluation of Federal- or State-supported education programs, or for the enforcement of or compliance with Federal legal requirements related to these programs;
- (ii) Protects the personally identifiable information from further disclosures or other uses, except as authorized in paragraph (b)(1) of this section; and
- (iii) Destroys the personally identifiable information in accordance with the requirements of paragraphs (b) and (c) of this section.

The State or local educational authority or agency must use a written agreement to designate any authorized representative, other than an employee. The written agreement must—

- (i) Designate the individual or entity as an authorized representative;
- (ii) Specify—
  - (A) The personally identifiable information from education records to be disclosed;
  - (B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and
  - (C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of [§ 99.31\(a\)\(3\)](#), including a description of how the personally identifiable information from education records will be used;
- (iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;
- (iv) Specify the time period in which the information must be destroyed; and
- (v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

Information that is collected for an audit or evaluation must—

- (1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in [§ 99.31\(a\)\(3\)](#) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in [§ 99.31\(a\)\(3\)](#) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of [§ 99.33\(b\)](#); and
- (2) Be destroyed when no longer needed for the purposes listed.

The restrictions on disclosure of PII and the requirement for destruction of records does not apply if:

- (1) The parent or eligible student has given written consent for the disclosure under [§ 99.30](#); or
- (2) The collection of personally identifiable information is specifically authorized by Federal law.

34 C.F.R. §§ 99.31(a)(3), 99.35.

<sup>16</sup> FERPA allows disclosures to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

- (A) Develop, validate, or administer predictive tests;
- (B) Administer student aid programs; or

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(C) Improve instruction.

Nothing in FERPA prevents a state or local educational authority or agency headed by an official listed in paragraph (a)(3) of section 99.31 from entering into agreements with organizations conducting studies under paragraph (a)(6)(i) of this section and redisclosing personally identifiable information from education records on behalf of educational agencies and institutions that disclosed the information to the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section in accordance with the requirements of [§ 99.33\(b\)](#).

An educational agency or institution may disclose personally identifiable information, and a State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section may redisclose personally identifiable information under this section, only if—

- (A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization that have legitimate interests in the information;
- (B) The information is destroyed when no longer needed for the purposes for which the study was conducted; and
- (C) The educational agency or institution or the State or local educational authority or agency headed by an official listed in paragraph (a)(3) of this section enters into a written agreement with the organization that—
  - (1) Specifies the purpose, scope, and duration of the study or studies and the information to be disclosed;
  - (2) Requires the organization to use personally identifiable information from education records only to meet the purpose or purposes of the study as stated in the written agreement;
  - (3) Requires the organization to conduct the study in a manner that does not permit personal identification of parents and students, as defined in this part, by anyone other than representatives of the organization with legitimate interests;and
  - (4) Requires the organization to destroy all personally identifiable information when the information is no longer needed for the purposes for which the study was conducted and specifies the time period in which the information must be destroyed.

An educational agency or institution or State or local educational authority or Federal agency headed by an official listed in paragraph (a)(3) of this section is not required to initiate a study or agree with or endorse the conclusions or results of the study.

For the purposes of this section, the term organization includes, but is not limited to, Federal, State, and local agencies, and independent organizations.  
34 C.F.R. §§ 99.31(a)(6), 99.32.

<sup>17</sup> A covered entity may share with “[a] school, about an individual who is a student or prospective student of the school, if:

- (A) The protected health information that is disclosed is limited to proof of immunization;
- (B) The school is required by State or other law to have such proof of immunization prior to admitting the individual; and
- (C) The covered entity obtains and documents the agreement to the disclosure from either:
  - (1) A parent, guardian, or other person acting in loco parentis of the individual, if the individual is an unemancipated minor; or
  - (2) The individual, if the individual is an adult or emancipated minor.” 45 C.F.R. § 164.512(b)(1)(vi).

<sup>18</sup> A covered entity may share for purpose of health care operations in compliance with section 164.506. 45 C.F.R. § 164.502(a)(1)(ii). Section 164.506 says “a covered entity may disclose protected health information to another covered entity for health care operations activities of the entity that receives the

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information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship, and the disclosure is: (i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or (ii) For the purpose of health care fraud and abuse detection or compliance.<sup>19</sup> A covered entity that participates in an organized health care arrangement may disclose protected health information about an individual to other participants in the organized health care arrangement for any health care operations activities of the organized health care arrangement.” 45 C.F.R. § 164.506. HIPAA defines health care operations as:

- (1) Conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; patient safety activities (as defined in [42 CFR 3.20](#)); population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment;
- (2) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities;
- (3) Except as prohibited under § 164.502(a)(5)(i), underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care (including stop-loss insurance and excess of loss insurance), provided that the requirements of § 164.514(g) are met, if applicable;
- (4) Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs;
- (5) Business planning and development, such as conducting cost-management and planning-related analyses related to managing and operating the entity, including formulary development and administration, development or improvement of methods of payment or coverage policies; and
- (6) Business management and general administrative activities of the entity, including, but not limited to:
  - (i) Management activities relating to implementation of and compliance with the requirements of this subchapter;
  - (ii) Customer service, including the provision of data analyses for policy holders, plan sponsors, or other customers, provided that protected health information is not disclosed to such policy holder, plan sponsor, or customer.
  - (iii) Resolution of internal grievances;
  - (iv) The sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity, or an entity that following such activity will become a covered entity and due diligence related to such activity; and
  - (v) Consistent with the applicable requirements of § 164.514, creating de-identified health information or a limited data set, and fundraising for the benefit of the covered entity.” 45 C.F.R. § 164.501.

<sup>19</sup> Covered entity may share information for payment purposes in compliance with 164.506. 45 C.F.R. § 164.502(a)(1)(ii). Section 164.506 says a covered entity may use or disclose protected health information for its own treatment, payment, or health care operations as well as to another covered entity or a health care provider for the payment activities of the entity that receives the information. 45 C.F.R. § 164.506(c).



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“Payment means:

(1) The activities undertaken by:

- (i) Except as prohibited under § 164.502(a)(5)(i), a health plan to obtain premiums or to determine or fulfill its responsibility for coverage and provision of benefits under the health plan; or
- (ii) A health care provider or health plan to obtain or provide reimbursement for the provision of health care; and

(2) The activities in paragraph (1) of this definition relate to the individual to whom health care is provided and include, but are not limited to:

- (i) Determinations of eligibility or coverage (including coordination of benefits or the determination of cost sharing amounts), and adjudication or subrogation of health benefit claims;
- (ii) Risk adjusting amounts due based on enrollee health status and demographic characteristics;
- (iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance (including stop-loss insurance and excess of loss insurance), and related health care data processing;
- (iv) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;
- (v) Utilization review activities, including precertification and preauthorization of services, concurrent and retrospective review of services; and
- (vi) Disclosure to consumer reporting agencies of any of the following protected health information relating to collection of premiums or reimbursement:
  - (A) Name and address;
  - (B) Date of birth;
  - (C) Social security number;
  - (D) Payment history;
  - (E) Account number; and
  - (F) Name and address of the health care provider and/or health plan.”

45 C.F.R. § 164.501.

<sup>20</sup> “A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

- (i) The health care system;
- (ii) Government benefit programs for which health information is relevant to beneficiary eligibility;
- (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

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(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.” 45 C.F.R. § 164.512(d). Health oversight agency means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.

45 C.F.R. § 164.512(d).

<sup>21</sup> A compliant form must be written in plain language and include certain elements as well as certain statements. These are described in 45 C.F.R. § 164.508(c).

<sup>22</sup> Providers may share pursuant to compliant release form. 45 C.F.R. § 164.502(a).

<sup>23</sup> The covered entity may disclose if another state law permits or requires the disclosure. 45 C.F.R. § 164.512(a)(1).

<sup>24</sup> Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information. 45 C.F.R. § 164.514(a). A covered entity may determine that health information is not individually identifiable health information only if:

(1) A person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable:

- (i) Applying such principles and methods, determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information; and
- (ii) Documents the methods and results of the analysis that justify such determination; or

(2)(i) The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:

- (A) Names;
- (B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:
  - (1) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and
  - (2) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000.
- (C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
- (D) Telephone numbers;
- (E) Fax numbers;
- (F) Electronic mail addresses;
- (G) Social security numbers;
- (H) Medical record numbers;
- (I) Health plan beneficiary numbers;
- (J) Account numbers;

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- (K) Certificate/license numbers;
  - (L) Vehicle identifiers and serial numbers, including license plate numbers;
  - (M) Device identifiers and serial numbers;
  - (N) Web Universal Resource Locators (URLs);
  - (O) Internet Protocol (IP) address numbers;
  - (P) Biometric identifiers, including finger and voice prints;
  - (Q) Full face photographic images and any comparable images; and
  - (R) Any other unique identifying number, characteristic, or code, except as permitted by paragraph (c) of this section; and
- (ii) The covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. 45 C.F.R. § 164.514(b).

<sup>25</sup> “A business associate may use or disclose protected health information only as permitted or required by its business associate contract or other arrangement pursuant to § 164.504(e) or as required by law. The business associate may not use or disclose protected health information in a manner that would violate the requirements of this subpart, if done by the covered entity, except for the purposes specified under § 164.504(e)(2)(i)(A) or (B) if such uses or disclosures are permitted by its contract or other arrangement.” 45 C.F.R. § 164.502(a)(3).

Business associate means, “with respect to a covered entity, a person who:

- (i) On behalf of such covered entity or of an organized health care arrangement (as defined in this section) in which the covered entity participates, but other than in the capacity of a member of the workforce of such covered entity or arrangement, creates, receives, maintains, or transmits protected health information for a function or activity regulated by this subchapter, including claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities listed at 42 CFR 3.20, billing, benefit management, practice management, and repricing; or
- (ii) Provides, other than in the capacity of a member of the workforce of such covered entity, legal, actuarial, accounting, consulting, data aggregation (as defined in § 164.501 of this subchapter), management, administrative, accreditation, or financial services to or for such covered entity, or to or for an organized health care arrangement in which the covered entity participates, where the provision of the service involves the disclosure of protected health information from such covered entity or arrangement, or from another business associate of such covered entity or arrangement, to the person.

(2) A covered entity may be a business associate of another covered entity.

(3) Business associate includes:

- (i) A Health Information Organization, E-prescribing Gateway, or other person that provides data transmission services with respect to protected health information to a covered entity and that requires access on a routine basis to such protected health information.
- (ii) A person that offers a personal health record to one or more individuals on behalf of a covered entity.
- (iii) A subcontractor that creates, receives, maintains, or transmits protected health information on behalf of the business associate.

(4) Business associate does not include:

- (i) A health care provider, with respect to disclosures by a covered entity to the health care provider concerning the treatment of the individual.
- (ii) A plan sponsor, with respect to disclosures by a group health plan (or by a health insurance issuer or HMO with respect to a group health plan) to the plan sponsor, to the extent that the requirements of [§ 164.504\(f\)](#) of this subchapter apply and are met.

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- (iii) A government agency, with respect to determining eligibility for, or enrollment in, a government health plan that provides public benefits and is administered by another government agency, or collecting protected health information for such purposes, to the extent such activities are authorized by law.
- (iv) A covered entity participating in an organized health care arrangement that performs a function or activity as described by paragraph (1)(i) of this definition for or on behalf of such organized health care arrangement, or that provides a service as described in paragraph (1)(ii) of this definition to or for such organized health care arrangement by virtue of such activities or services.” 45 CFR 160.103.

<sup>26</sup>HIPAA allows a covered entity to share a patient’s medical information “for treatment purposes” in compliance with section 164.506. Section 164.506 says that a covered entity may use or disclose protected health information for its own treatment, payment, or health care operations, and a covered entity may disclose protected health information for treatment activities of a health care provider. 45 C.F.R. §§ 164.502(a)(1)(ii);164.506. HIPAA defines “treatment” broadly in this context to include coordination or management of health care and related services by one or more health care providers, including coordination or management of health care by a health care provider with a third party, consultation between providers, and referral from one provider to another. 45 C.F.R. 164.501.

HIPAA limits providers from sharing psychotherapy notes without written client authorization. For a definition of psychotherapy notes, see 45 C.F.R § 164.501, fn. 30, and speak to your own counsel. 45 C.F.R. §§ 164.502(a)(1)(ii); 164.506; 164.508(a)(2).

<sup>27</sup> A covered entity may use or disclose protected health information for research, regardless of the source of funding of the research, provided that:

- (i) The covered entity obtains documentation that an alteration to or waiver, in whole or in part, of the individual authorization required by HIPAA has been approved by either:
  - (A) An Institutional Review Board (IRB), as described by HIPAA, or
  - (B) A privacy board that:
    - (1) Has members with varying backgrounds and appropriate professional competency as necessary to review the effect of the research protocol on the individual's privacy rights and related interests;
    - (2) Includes at least one member who is not affiliated with the covered entity, not affiliated with any entity conducting or sponsoring the research, and not related to any person who is affiliated with any of such entities; and
    - (3) Does not have any member participating in a review of any project in which the member has a conflict of interest.
- (ii) The covered entity obtains from the researcher representations that:
  - (A) Use or disclosure is sought solely to review protected health information as necessary to prepare a research protocol or for similar purposes preparatory to research;
  - (B) No protected health information is to be removed from the covered entity by the researcher in the course of the review; and
  - (C) The protected health information for which use or access is sought is necessary for the research purposes.

For a use or disclosure to be permitted based on documentation of approval of an alteration or waiver, the documentation must include all of the following:

- (i) Identification and date of action. A statement identifying the IRB or privacy board and the date on which the alteration or waiver of authorization was approved;
- (ii) Waiver criteria. A statement that the IRB or privacy board has determined that the alteration or waiver, in whole or in part, of authorization satisfies the following criteria:

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- (A) The use or disclosure of protected health information involves no more than a minimal risk to the privacy of individuals, based on, at least, the presence of the following elements;
    - (1) An adequate plan to protect the identifiers from improper use and disclosure;
    - (2) An adequate plan to destroy the identifiers at the earliest opportunity consistent with conduct of the research, unless there is a health or research justification for retaining the identifiers or such retention is otherwise required by law; and
    - (3) Adequate written assurances that the protected health information will not be reused or disclosed to any other person or entity, except as required by law, for authorized oversight of the research study, or for other research for which the use or disclosure of protected health information would be permitted by this subpart;
  - (B) The research could not practicably be conducted without the waiver or alteration; and
  - (C) The research could not practicably be conducted without access to and use of the protected health information.
- (iii) A brief description of the protected health information for which use or access has been determined to be necessary by the institutional review board or privacy board, pursuant to paragraph (i)(2)(ii)(C) of this section;
- (iv) A statement that the alteration or waiver of authorization has been reviewed and approved under either normal or expedited review procedures, as described in HIPAA; and
- (v) The documentation of the alteration or waiver of authorization must be signed by the chair or other member, as designated by the chair, of the IRB or the privacy board, as applicable.<sup>45 C.F.R. § 164.512(i).</sup>

<sup>28</sup> A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

- (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
- (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. 45 C.F.R. § 164.512(j)(1). Therapists are permitted to disclose psychotherapy notes without authorization under emergency circumstances. 45 C.F.R. § 164.508(a)(2)(ii). “Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” 45 C.F.R. § 164.501.

<sup>29</sup> “Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

- (i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.” 45 C.F.R. § 164.512(b)(1)(i).

<sup>30</sup> Psychotherapy notes require a release in most circumstances. 45 C.F.R. § 164.508(a)(2). “Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” 45 C.F.R. § 164.501.

<sup>31</sup> 42 C.F.R. Part 2.

<sup>32</sup> Patient identifying information can be shared as part of certain audits and evaluations, as described in section 2.53. 42 C.F.R. § 2.53.

<sup>33</sup> A compliant release form must include multiple required elements and notices to be valid. The requirements are described in 42 C.F.R. § 2.31.

<sup>34</sup> 42 C.F.R. §§ 2.31, 2.33.

<sup>35</sup> 42 C.F.R. § 2.61-2.67.

<sup>36</sup> 42 C.F.R. § 2.61.

<sup>37</sup> Patient identifying information may be disclosed to medical personnel to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained. Immediately following disclosure, the part 2 program shall document, in writing, the disclosure in the patient's records, including:

- (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). 42 C.F.R. § 2.51.