



## **FERPA and the Medical Forensic Sexual Assault Exam**

For Sexual Assault Nurse Examiners (SANEs) that work in campus settings, understanding and explaining student victims' privacy rights can be challenging in the face of so many relevant laws and regulations. Yet, student victims often express concern about their privacy and want to know their options for keeping information from being shared among their peers or accessed by their parents and others. In this context, it is critical for SANEs to be able to provide student victims with information in order for them to make informed decisions about disclosure and accessing records. This resource was developed to equip SANEs with information about and implications of the Family Educational Rights and Privacy Act (FERPA) as it applies to students and their medical forensic examination (MFE) records.

There are two federal laws governing the privacy of campus victims' MFE records, FERPA and the Health Information Portability and Accountability Act (HIPAA).<sup>1</sup> It's important to know that these two federal laws are mutually exclusive; that is, **only one of them will apply** to the student's MFE.

**What is FERPA?** FERPA is a federal law designed to protect student privacy. It applies to elementary, secondary, and post-secondary educational agencies or institutions that receive federal money. FERPA defines and limits access to a student's education record.

**Who is considered a student?** A student is anyone enrolled in or attending an educational institution either online or in person. This does *not* include an individual who has been accepted but has not yet attended any classes or an individual who merely audits.

**How do you know if FERPA applies to an MFE record?** FERPA applies to an MFE record when the victim is a student and the record is maintained by an educational institution. For instance, records maintained by an on-campus student health center would be governed by FERPA. A record maintained by a community hospital would be covered by HIPAA.

**May a student-victim's FERPA-protected MFE record be disclosed without the victim's consent?** In general, no. FERPA differentiates between two types of student records: a) education records and b) treatment records. An education record is comprised of any and all records related to the student that are maintained by an educational institution. *For example*, transcripts, class schedules, student financial information, and student discipline files will all be part of a student's education record. An education record by definition does not include treatment records.

To be considered a treatment record, the following elements must be met. The record must be:

- A medical or mental health record created at a post-secondary institution;
- Containing the medical and/or psychological treatment information of a student;
- Made, maintained, and used *only* in connection with treatment; and

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<sup>1</sup> Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (1974); Health Information Portability and Accountability Act, P.L. No. 104-191, 110 Stat. 1936 (1996).



- Disclosed only to treatment providers for a treatment purpose.

An MFE record created at a postsecondary institution is a treatment record **as long as it is only disclosed to treatment providers for treatment purposes.**

If an institution discloses a student’s medical/mental health record for any purposes other than treatment (including giving it to the student), the record will no longer be considered a treatment record and will become part of the FERPA education record. This is critical because education records are more easily accessed by non-treatment providers than treatment records.<sup>2</sup>

**What if a student requests their own FERPA-protected MFE record?** Students may request access to their treatment records, but FERPA itself does not require access. That said, there may be laws in your jurisdiction that permit victims to access these records. If the treatment records are provided to or accessed by the student, however, they will lose their status as treatment records and become part of the education record. This highlights the importance of providing student-victims with information so that they can make informed decisions about their privacy.

**Can law enforcement access a student-victim’s MFE record without the victim’s consent?**

FERPA does not contain an exception or mechanism that allows law enforcement to access treatment records. If an MFE record is a treatment record, then law enforcement cannot access it. If the treatment record has been disclosed to someone other than a treatment provider for a treatment purpose and is, therefore, part of the education record, FERPA permits those records to be released to law enforcement when a state statute authorizes the release, pursuant to a subpoena, or in connection with an emergency. In those limited circumstances, law enforcement may access an MFE record that is part of an education record.

**Can a Title IX investigator access a student-victim’s MFE records without the victim’s consent?**

Treatment records are by definition not available to anyone other than professionals providing treatment or to “a physician or other appropriate professional of the student’s choice.”<sup>3</sup> If an MFE record falls within the definition of a treatment record, it should not be made available to the investigator because they are not a treatment provider and are asking for investigatory, not treatment, purposes. This changes if the MFE record is part of the education record, though, depending on how the institution defines “legitimate educational interest in the records” and its institutional policies.<sup>4</sup> There may be additional jurisdiction-specific privileges attached to the record, so it is important for a student victim to understand all of the implications of requesting a copy of their own treatment record before it is released.

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<sup>2</sup> There are some exceptions in FERPA related to the nonconsensual disclosure of personally identifiable information contained in an education record. These are generally in connection with an emergency, pursuant to a lawfully issued subpoena, when “school officials” with a “legitimate educational interest” request it, and in a few additional circumstances. See 34 C.F.R. § 99.31.

<sup>3</sup> 34 C.F.R. § 99.3.

<sup>4</sup> 34 CFR § 99.31(a)(1).



Additional Resources:

- U.S. Department of Education, *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records* (December 2019 Update) accessed here: <https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf>.
- U.S. Department of Education, *Protecting Student Privacy: Frequently Asked Questions*, accessed here: <https://studentprivacy.ed.gov/frequently-asked-questions>.
- Victim Rights Law Center, *Privacy on Campus: A Workbook for Advocates* (2020) accessed here: <https://victimrights.org/wp-content/uploads/2021/01/Privacy-on-Campus-A-Workbook-for-Advocates.pdf>.

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