



HIPAA and the Medical Forensic Sexual Assault Exam in Campus-Based Settings

When students undergo a medical forensic sexual assault exam (MFE), they may have questions about the privacy protections of that record. Medical records are typically covered by the Health Information Portability and Accountability Act (HIPAA).¹ HIPAA contains a privacy rule that shields protected health information (PHI) from being disclosed without written authorization by the patient (or the patient's parent/guardian) with limited exceptions. However, in a campus or school setting, medical records may be protected by the Family Education Rights and Privacy Act (FERPA).² For Sexual Assault Nurse Examiners (SANEs) who work in these settings, it is important to understand which federal law applies and the implications of accessing the MFE record. While these are the two federal privacy laws that are generally applicable to MFE records, there may also be jurisdiction-specific privacy laws, privileges, or ethical confidentiality requirements that are also applicable. Please refer to a resource in your local jurisdiction to understand other privacy requirements that may be relevant to your practice.

Below are some frequently asked questions that arise in the context of student victims of sexual assault seeking to understand their HIPAA privacy rights and protections of MFE records. For a FERPA-specific resource, please access the following: [FERPA and the Medical Forensic Sexual Assault Exam](#).

Would an MFE record contain Protected Health Information (PHI)? PHI is "individually identifiable health information" maintained or transmitted by a covered entity.³ A covered entity is an organization or person that transmits health information electronically or someone who works for an entity that does. For example, a healthcare provider who uses electronic health records to track patient charts and information and to bill insurance companies would be considered a covered entity. Most - but not all - healthcare providers are covered entities. The exception is the provider who never transmits any records or bills electronically.

Generally, PHI is related to past, present, or future physical or mental health regarding the provision of individual healthcare or payment for healthcare. An MFE record would contain PHI.

When does HIPAA apply when the victim is a student? If the victim is a student, the applicability of HIPAA or FERPA will be related to where the MFE record is maintained.

IF AN MFE RECORD IS MAINTAINED AT A COVERED ENTITY, THEN HIPAA WILL APPLY AND FERPA WILL NOT.

IF THE RECORD IS MAINTAINED BY AN EDUCATIONAL INSTITUTION, FERPA WILL APPLY, AND HIPAA WILL NOT.

¹ P.L. No. 104-191, 110 Stat. 1936 (1996).

² 20 U.S.C. § 1232g; 34 C.F.R. Part 99 (1974).

³ 45 C.F.R. 160.103.



For example, if a student-victim goes to a local community hospital for a medical forensic examination, the record will be HIPAA-protected. If that student-victim requests that the hospital send a copy of their record to their university student health center, the copy at the health center will be FERPA-protected while the original hospital record will maintain its HIPAA protection. It is important to remember that FERPA and HIPAA have different rules around disclosure. For instance, if a student-victim goes to their university student health center for a medical forensic exam, the MFE record will be FERPA-protected and is likely to be considered a treatment record that is not part of the student's education record as long as it is made, maintained, and used in connection with the treatment of the student and disclosed only to individuals providing the treatment. If this record is disclosed to another individual or entity, the treatment record will become part of the student's education record and therefore be accessible under the general FERPA disclosure framework.⁴ Unlike treatment records under FERPA, however, accessing a HIPAA-protected record does not fundamentally change the privacy protections of the record maintained at the covered entity.⁵

If the victim is *not* a student and receives a medical forensic examination at a university student health center, HIPAA would apply due to FERPA's specific applicability to students.

Remember, HIPAA and FERPA are mutually exclusive; only one of them applies to an MFE record.

Can a HIPAA-protected MFE record be shared with a school for the purposes of a Title IX investigation? A student-victim may obtain a medical forensic examination at a local hospital or other covered entity and pursue a Title IX process on their campus related to the sexual assault. In these situations, the MFE record may be sought during the investigation. A determination about whether the MFE record may be shared has to do first with who is making that request. A student-victim may provide written authorization to release a copy of their MFE record to the Title IX investigator.⁶ In this circumstance, the covered entity is able to provide a copy. [Note that the copy provided to the student is no longer protected by HIPAA whereas the copy maintained in the hospital is.]

If a Title IX investigator reaches out to the covered entity related to the MFE record without written permission or request from the student-victim, it is important to consider the circumstances in which HIPAA allows for release without the student-victim's consent:

There are two situations when a covered entity must disclose PHI irrespective of the student-victim's written consent. They must disclose PHI a) directly to patients when they request access orally or in writing; and b) to the U.S. Department of Health and Human Services during a compliance investigation, review, or enforcement action.⁷

⁴ For additional information on FERPA privacy protections and rules around disclosure, please access to the following FERPA-specific resource: [FERPA and the Medical Forensic Sexual Assault Exam](#).

⁵ For a comprehensive list of permitted disclosures without the patient's written authorization, please see 45 C.F.R. 164.512.

⁶ HIPAA states that no PHI may be used or disclosed without written authorization by the patient. 45 C.F.R. 160, 164(a), 164(e).

⁷ 45 C.F.R. 164.502(a)(2).



A covered entity may disclose PHI without the patient's written consent in limited circumstances.⁸ These may include mandatory reporting obligations or judicial or administrative proceedings. Importantly, *none of these apply to Title IX investigations*. First, Title IX investigators are not law enforcement. Secondly, mandatory reporting is directed to appropriate government authorities and Title IX investigators are not government authorities. Thirdly, a Title IX process, including a Title IX hearing, is not a government administrative body or a court. Therefore, in order to release the MFE record, the covered entity would need to obtain written permission from the patient or the patient would need to provide the investigator a copy directly.

Does HIPAA apply to records held by non-medical providers, such as law enforcement?

HIPAA only applies to records held by covered entities. Law enforcement is not considered a covered entity and therefore HIPAA does not control access to law enforcement records. If a student-victim is interested in accessing law enforcement records, they would need to look at the laws of their specific jurisdiction to identify other potential rights of access.

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

HIPAA allows for a covered entity to release a patient's MFE record without the patient's consent in certain limited circumstances. First, a covered entity may release limited information for "the purpose of identifying or locating a suspect, fugitive, material witness, or missing person."⁹ Under this exception, only specific information may be shared in response. Second, a covered entity may release information in response to law enforcement's request for information about a patient suspected to be a victim of a crime, but only if the covered entity is unable to obtain the patient's agreement due to incapacity or other emergency circumstances.¹⁰ Importantly, the covered entity must make a professional judgment about whether the disclosure is in the best interests of the patient. Third, a covered entity is allowed to disclose information to law enforcement when providing an emergency healthcare response if the disclosure appears necessary to alert law enforcement to the commission and nature of the crime, the location of the crime and/or victims of the crime, and specific information about the perpetrator.¹¹ Additionally, if there is a court order or court-issued subpoena then a covered entity may release the MFE record to comply with such an order.¹²

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⁸ See 45 C.F.R. 164.512 for a comprehensive list of permitted disclosures without the patient's written authorization.

⁹ 45 C.F.R. 164.512(f)(2).

¹⁰ 45 C.F.R. 164.512(f)(3).

¹¹ 45 C.F.R. 164.512(f)(6).

¹² 45 CFR 164.512(f)(1)(ii)(A)-(B)).