When HIPAA and FERPA Apply to University Training Clinics

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University training clinics should carefully evaluate whether they are correctly applying HIPAA and FERPA to their clients. Their misapplication may not only violate federal law, but may also violate the ethics code, and cause significant harm to clients. Moreover, their proper use has taken on greater urgency because of several important, recent developments. This article details when HIPAA and FERPA apply to university training clinics and describes their effects on clients, student therapists, and their supervisors. It also makes recommendations for training student therapists about HIPAA and FERPA including when they both apply to a training clinic.

Keywords: HIPAA, FERPA, university training clinics, student

The complexities of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Family Educational Rights and Privacy Act (FERPA) make it difficult to determine when they apply to clients, how they affect clients’ rights, and how they impact student therapists’ and their supervisors’ legal obligations. Although these laws have been in effect for many years, their proper application has recently taken on a greater urgency. First, in November 2008, the U.S. Department of Health and Human Services (hereafter “HHS”) and the U.S. Department of Education (hereafter “DOE”) the two agencies respectively responsible for enforcing HIPAA and FERPA, issued a joint statement on the laws’ application to student health records (U.S. Department of Education & U.S. Department of Health & Human Services, 2008) Having clarified when they apply and having encouraged school officials to contact them with their questions about the laws, the agencies may be less tolerant than in the past of their misapplication to student health records and may be more likely now to impose harsher penalties for their violation.

Second, Congress recently enacted major amendments to HIPAA, which, among other changes, will result in stricter enforcement of HIPAA and more severe sanctions for its violation (Thompson Publishing, 2009). Accordingly, it is going to be more critical in the future for university training clinics to follow all of HIPAA’s requirements.

Third, the American Psychological Association’s (APA) ethic’s code (2002) requires psychologists to discuss with their clients the limits of confidentiality and to maintain the confidentiality of psychological records (Principles 4.01, 4.02, and 10.01) Because the confidentiality that HIPAA and FERPA accord psychological records differs significantly, student therapists need to know which law applies so they can accurately disclose the limits of confidentiality to their clients. Furthermore, as will be discussed later, if a student therapist and his or her supervisor apply HIPAA to a client’s psychological records when in fact FERPA applies, there is a very high probability that they will inadvertently convert them from treatment to educational records. This inadvertent conversion may constitute a failure to maintain the confidentiality of their client’s psychological records because it will likely substantially reduce the records’ confidentiality, substantially increase who can access the records, will be unnecessary, and will occur without the client’s consent.

Fifth, there are many significant and surprising differences between HIPAA and FERPA, which have increased with the recent amendments to HIPAA. Therefore, applying the wrong law to a client will virtually ensure that the student therapist and his or her supervisor will violate federal law. Finally, and most importantly, as will be subsequently described, applying the wrong law can cause significant harm to a client.

This article provides a brief overview of HIPAA and FERPA and discusses when they apply to university training clinics (i.e., university counseling and psychological service centers that train...
student therapists). It also describes their effects on clients, student therapists, and their supervisors, and makes recommendations for training student therapists about FERPA and HIPAA including when they both apply to a training clinic.

**HIPAA**

Congress enacted HIPAA in 1996 to enable individuals to change jobs without losing their health insurance, to reduce health care fraud and other kinds of financial waste, to decrease health care costs, and to protect the privacy of health care records. Title II of HIPAA includes three rules: the Transaction Rule, the Privacy Rule, and the Security Rule. The Transaction Rule requires the standard formatting of health information transmitted in electronic form for certain covered transactions. Covered transactions are transactions for which HHS has adopted a standard form such as health care claims sent to insurance companies or inquiries about a client’s health plan eligibility. The Privacy Rule determines when, to whom, and under what circumstances protected health information can be used and disclosed. The Security Rule protects the confidentiality of electronic protected health information through the use of various administrative, physical, and technical safeguards (Scaraglino, 2003; Zuckerman, 2003). Collectively these three rules and two other rules not discussed in this article are referred to as the Administrative Simplification Rules.

**HIPAA’s Scope**

HIPAA’s Administrative Simplification Rules apply to “covered entities,” which include health care providers that transmit electronically any health information for a covered transaction (HIPAA, 45 CFR 160.103). University training clinics, psychologists, and other mental health professionals are all health care providers under HIPAA. Therefore, once a training clinic transmits electronically health information for a covered transaction, HIPAA applies to the training clinic (See Table 1).

HIPAA safeguards “protected health information” (“PHI”), which consists of “individually identifiable health information” (HIPAA, 45 CFR Part 164). Health information is defined as: (a) a client’s past, present, or future physical or mental health or condition; (b) the provision of health care to a client; or (c) the client’s past, present, or future payment for the provision of health care. Health information is individually identifiable if it names the client, or there is a reasonable basis to believe it can be used to identify the client (e.g., it contains the client’s social security number). Information on the HIPAA Administrative Simplification Rules is available at: http://www.cms.hhs.gov/hipaageninfo/.

**When PHI Can Be Used or Disclosed**

Under HIPAA, a university training clinic can use or disclose PHI only when either the Privacy Rule requires or permits its disclosure, or the client or his or her representative gives a written authorization to use or disclose the PHI (HIPAA, 45 CFR 164.502a). A use of PHI occurs when the training clinic itself utilizes the PHI. A disclosure consists of the clinic’s external disclosures of PHI (i.e., it sends the PHI to a person or entity who is not an employee or agent of the training clinic; Zuckerman, 2003). There are only two circumstances under HIPAA when a training clinic must disclose PHI: (a) When a client or his or her representative requests access to or an accounting of disclosures of his or her PHI; or (b) When HHS conducts a compliance investigation, a review, or an enforcement action (HIPAA, 45 CFR 164.502a(2)).

In addition, the acknowledgment a client signs after receiving the notice of privacy practices permits but does not require a university training clinic to use and disclose PHI in the following circumstances without authorization from the client or his or her representative: (a) To the client for circumstances other than when the client requests access to his or her PHI or wants an accounting of disclosures of his or her PHI; (b) for treatment, payment, and health care operations; (c) when the client was informed of the use or disclosure and had an opportunity to agree or object to it; (d) when PHI is used or disclosed incident to an otherwise permitted use or disclosure; and (e) for certain public purposes such as reporting incidents of abuse, neglect, or domestic violence to a government agency or providing PHI to a health oversight agency (HIPAA, 45 CFR 164.502a(1); see Table 1).

Generally, a training clinic may use or disclose only the “minimum necessary” PHI required for the use or disclosure. There are some exceptions to this rule. The exceptions include uses or disclosures: (a) for treatment; (b) for the client or his or her representative; (c) for HIPAA complaint investigations, compliance reviews, or enforcement actions; (d) for authorizations; or (e) for the HIPAA Administrative Simplification Rules or otherwise required by law (HIPAA, 45 CFR 164.502b & 164.514d).

**Supervision and Research**

Because the acknowledgment a client signs after receiving the notice of privacy practices permits the disclosure of PHI for treatment and because the minimum necessary rule does not apply to PHI disclosed for treatment, HIPPA does not generally affect a psychologist’s ability to supervise student therapists or to access a client’s PHI at a training clinic.

HIPAA regulations for using client data for research are complex and are only briefly discussed here. (For a more detailed explanation, see Scaraglino, 2003, pp. 562–567). There are four circumstances when HIPAA would permit a researcher to use clients’ PHI from a training clinic. First, if the clients sign valid authorizations permitting the use or disclosure of their PHI (HIPAA, 45CFR 164.508). Second, researchers may be able to review clients’ PHI if the university’s IRB signs a waiver, and the review is “necessary to prepare a research protocol or for similar purposes preparatory to research,” or if they only review the PHI of deceased clients (HIPAA, 45 CFR 164.512(1)). Third, researchers can examine PHI without the clients’ authorization if the clients’ identity cannot be determined from the PHI (i.e., De-Identified PHI; HIPAA, 45 CFR 164.514a). Finally, if certain

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1 This article is not intended to constitute legal advice. Because of space limitations and the complexity of these laws all significant aspects of the laws could not be discussed in the article. Moreover, their application to a university training clinics will depend on state and other applicable federal law and the facts and circumstances of a particular case. Accordingly, a training clinic should always consult university counsel about how best to implement HIPAA and FERPA and concerning any significant legal questions that arise about these two laws.
requirements are met, researchers can use limited data sets from a training clinic (HIPAA, 45 CFR 164.514e). Limited data sets exclude fewer personal identifiers from PHI than De-Identified PHI (Scaraglino, 2003).

Amendments to HIPAA

In 2009, Congress made significant changes to HIPAA. For example, the changes will result in “more enforcement against more people with higher penalties” (Thompson Publishing, 2009, p. 7). They also expand HIPAA’s scope to include paper health records, impose breach notification requirements upon covered entities, and expand the duties of business associates. Their exact effects will depend on future regulations that HHS enacts in response to the new law. In sum, university training clinics need to be aware that in the next few years there will be major changes to HIPAA, and they will have to amend their HIPAA policies and procedures to accommodate the changes (Thompson Publishing, 2009).

FERPA

FERPA is a federal law that protects the privacy of students’ education records (20 U.S.C. § 1232g; 34 CFR Part 99). The regulations and other helpful information about FERPA can be accessed at: http://www2.ed.gov/policy/gen/guid/fpco/index.html.

FERPA applies to any educational institution that receives funding from the DOE. Consequently, almost all private and public colleges and universities are subject to FERPA (20 U.S.C. § 1232g; FERPA, 34 CFR 99.1d). Colleges and universities subject to FERPA cannot disclose personally identifiable information from education records without an eligible student’s written consent unless an exception applies (FERPA, 34 CFR 99.30; see Table 1). The limitation on disclosure of information in education records applies even if the information in the education record is publicly available, or the student has previously disclosed the information in his or her record (Tribbensee, 2008). For the many exceptions to the general consent rule, see 34 CFR 99.31. An eligible student is any student who is 18 years of age or older, or who attends a college or university at any age (FERPA, 34 CFR 99.3 and 99.5a).

FERPA defines education records broadly as any record that is directly related to a student and maintained by a college or university or a party acting for them (20 U.S.C. § 1232g4A; FERPA, 34 CFR 99.3). Therefore, education records are not limited to words or information contained in written records but include any permanent recording of a student such as tapes, films, pictures, or computer files. FERPA also applies to any education records in a training clinic’s possession that it did not create such as an evaluation from a psychiatrist in independent practice that was disclosed to the student (Daggett, 1997).

FERPA’s Scope

FERPA only applies to a student’s education records. For instance, FERPA does not apply to direct experiences or observations of a client at a training clinic that are not documented in a record. As Tribbensee (2008) states: FERPA is a “student record privacy law” not a “student privacy law.” (p. 396). Thus FERPA differs in this respect from HIPAA which protects the confidentiality of all protected health information no matter what its form (i.e., whether the information is contained in a client’s record, transmitted by fax, or communicated verbally; HIPAA, 45 CFR 160.103, 164.501).

FERPA provides that psychological and medical records are not educational records, and therefore are not subject to FERPA, so long as they are made, maintained, and used solely for treatment and disclosed only to persons providing treatment to the student (20 U.S.C. § 1232g4Biv; FERPA, 34 CFR 99.3). HIPAA’s Privacy Rule also does not apply to student’s psychological records because it explicitly excludes health information covered by FERPA from the definition of protected health information whether the student’s health information constitutes treatment or education records (20 U.S.C. §1232g4Biv; 42 U.S.C. § 1320d; HIPAA, 45 CFR 160.103). Moreover, HHS and DOE have stated in their recent joint statement that HIPAA’s Security Rule does not
apply to student psychological records because the Security Rule concerns “a subset of information covered by the Privacy Rule.” (U.S. Department of Health and Human Services & U.S. Department of Education, 2008, p. 3). Thus both HIPPA’s Privacy and Security Rules do not apply to the psychological records of college students treated at their university training clinics. Instead, state and in some instances other federal law governs the confidentiality of student psychological records if they are treatment records. (Tribbensee, 2008).

Conversions of Students’ Records

Although FERPA does not apply to treatment records, it nonetheless still has a substantial effect on university training clinics. For example, it is very easy to convert a student’s psychological records from treatment to educational records, and once this occurs FERPA applies to them. Consequently, it is essential that student therapists and their supervisors know how FERPA defines a conversion so they can prevent it from occurring inadvertently. A conversion under FERPA takes place whenever a student’s psychological records are not made, maintained, or used strictly for treatment or if they are disclosed to a person who is not treating the student (20 U.S.C. § 1232g4Biv).

For example, if student clients at a training clinic are given tests to assess their progress in therapy and researchers use the tests to measure the efficacy of the therapy, the clients’ tests data would be converted from treatment to education records. A conversion would occur because the researchers did not use the test data to treat the clients. If the researchers were also not treating the clients, their lack of involvement in the clients’ treatment would constitute a second reason for the conversion.

Another example of when a conversion may occur is if the judicial affairs department of a university mandated that a student obtain treatment at the university’s training clinic and then requested information about the student’s progress. Any psychological records that the training clinic sent to judicial affairs about the student’s progress would be converted to education records. The records would be converted because judicial affairs used the records to monitor the student’s progress rather than to treat the student, and judicial affairs examined the records even though its members were not treating the student.2 In short, to maintain psychological records’ status as treatment records, student therapists and their supervisors must strictly limit their access and disclosure to persons who are treating the student, and they must use the records only for treatment.

This limitation applies even to the student who is the subject of the records (U.S. Department of Health and Human Services & U.S. Department of Education, 2008, p. 7; 20 USC 1232g4Biv). Consequently, students should be warned about the dangers of converting their psychological records into education records by examining them and generally counseled against choosing this option. Moreover, if state and other applicable federal law does not grant students a right to access their records, then students have no right to examine their psychological records under FERPA unless a university training clinic gives students permission to do so. In circumstances where the student chooses not to examine his or her records or a training clinic denies the student access to part or all of his or her records, the student has the right under FERPA to have a physician or another appropriate professional of his or her choice review his or her psychological records. Such a review by a physician or other appropriate professional does not convert the student’s psychological records into educational records (FERPA, 34 CFR 99.10f).

Consequences of a Conversion

Once a student’s psychological records are converted into educational records access to and permissible disclosures of the records are likely to increase substantially under FERPA. For instance, psychological records that are educational records can be disclosed to the parents of the student without the student’s permission if the student is a dependent of the parents for federal tax purposes (20 U.S.C. § 1232g1H). Universities may inform parents about a student’s possession of alcohol or a controlled substance if it constitutes a violation of university policy or the law, and the student is under the age of 21 (20 U.S.C. § 1232q1). Consequently, a student’s psychological records that contain information about a student’s illicit substance use could potentially be disclosed to the student’s parents if they are education records.

School officials can inspect a student’s educational records without the student’s consent and without an accounting of the disclosure if they have a “legitimate educational interest” in the records (FERPA, 34 CFR 99.31a1). The definition of a school official and a legitimate educational interest may be broad and need not be strictly limited to a ‘need to know basis.’” (Tribbensee, 2008, p. 400). Thus an instructor may be able to access a student’s psychological records that are education records when the student is having academic difficulties or creating disciplinary problems in the instructor’s class. Moreover, a legitimate educational interest does not just pertain to academic or educational matters and does not require that the disclosure benefit the student or be in the student’s best interest (Tribbensee, 2008). For instance, campus security and administrators may be able to examine a student’s psychological records that are education records if they have a legitimate concern about the student’s safety or if the student poses a threat to others.

When a student applies to or enrolls in another college or university his or her education records, including information about the student’s health or dangerousness, can be transferred to the new college or university without the student’s permission (FERPA, 34 CFR 99.31a; Tribbensee, 2008). If a college or university sues a student or a student sues a college or university, the college or university may disclose to the court any education records that are relevant to the lawsuit (FERPA, 34 CFR 99.3a9iiIA). Furthermore, FERPA gives students complete access to their education records within 45 days of the receipt of the request. Consequently, if a student’s psychological records are education records, the student has right to access the entire record even if parts of the records are psychotherapy notes, contain

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2 If a student therapist and his or her supervisor are required to send a progress report to judicial affairs or another entity, if possible they should not include any treatment records with the report because they would be converted to educational records. Instead they should submit only a report, and the report should contain as little confidential information as possible. The report would constitute an education record even if was never sent to judicial affairs or another entity because it was not made to treat the student but rather to report to an outside entity the client’s progress in therapy.
information that may cause harm to the student or others, or were prepared in anticipation of litigation (FERPA, 34 CFR 99.10).

If psychological tests are part of the psychological record, the student also may be able to access them (Daggert, 2008). Once a client’s psychological records are disclosed to third parties, the client-therapist privilege for the information disclosed may be waived. Moreover, when psychological records become education records, as we have seen, university personnel who are not mental health or medical professionals can access the student’s psychological records. Their access can greatly compromise the privacy of psychological records, because unlike mental health and medical professionals, they are not bound by ethical codes and laws that generally require a client’s psychological record to be kept confidential (Daggert, 2008).

Finally, as Daggert (2008) states: “Civil litigants and criminal defendants, citizens, and the media exercising rights under state public record laws, researchers, and commercial entities are increasingly demanding access to student records” (p. 92). Universities and courts have not always been diligent in protecting the confidentiality of education records (Daggert, 2008). In summary, because of the many dangers posed to the confidentiality of psychological records when they are converted into education records and because of the potential liability of a training clinic for the adverse consequences of a conversion of a student’s psychological records, students should generally be counseled against taking any action that will have this effect.

**Other Reasons FERPA Is Relevant**

There are two additional reasons why FERPA is relevant to university training clinics even though it does not apply to treatment records. Student psychological records can be converted from treatment to educational records only when the disclosure is permissible under FERPA as well as state and other applicable federal law. Although state and other federal confidentiality laws usually afford greater protection to client confidentiality than FERPA, and therefore if the conversion is permissible under state law it will also generally be permissible under FERPA, this may not be true in all cases (Tribbensee, 2008). Furthermore, because some student records at university training clinics are not made, maintained, or used for treatment, they are governed by FERPA. For example, billing records of students are education and not treatment records. Consequently, billing records of a student are subject to FERPA, and can be disclosed only when FERPA permits the disclosure.

**Supervision and Research**

Because psychologists who supervise student therapists at a training clinic are involved in the treatment of their students’ clients, psychologists’ examination of the clients’ treatment records does not generally convert them into education records. Accordingly, FERPA does not usually affect a psychologist’s ability to supervise student therapists at a training clinic.

We have seen, however, when researchers use treatment records at a training clinic, they convert them to education records because the records are no longer being used solely for treatment, and also because the researchers are frequently not involved in the clients’ treatment. Consequently, FERPA permits treatment records at a training clinic to be used for research only if student clients consent to their use, all information that could identify the clients is removed from the records, or a FERPA exception permits the training clinic to release the records to the researchers without the clients’ consent (FERPA, 34 CFR 99.3, 99.30a, and 99.31). The same requirements would apply if researchers wanted to use clients’ records at a training clinic that were education records. In addition, if the records are treatment records, the researchers would also have to comply with state law and any other applicable federal law on the use of psychological records.

**When HIPAA and FERPA Apply to University Training Clinics**

**When Only HIPAA Applies**

Only HIPAA and not FERPA will apply to a university training clinic if two conditions are met: First, the clinic provides services solely to nonstudents such as members of the general public, staff of the university, or family members of students. Second, the training clinic is a “covered entity” for the purposes of HIPAA (i.e., it conducts one or more covered transaction electronically such as billing an insurance company for psychotherapy; see Table 2, When HIPAA Applies).

**When Only FERPA Applies**

If a university training clinic is not a covered entity for the purposes of HIPAA and only provides services to its college students then FERPA, state law, or other applicable federal law or some combination of these laws will govern the students’ psychological records but not HIPAA. The training clinic is not subject to HIPAA’s Transaction Rule because it is not a covered entity since it does not transact any covered transaction electronically. HIPAA’s Privacy Rule will not protect the student’s psychological records because, as previously stated, it excludes health information covered by FERPA from the definition of protected health information whether the student’s health information constitutes treatment or education records (20 U.S.C. §1232g4Biv; 42 U.S.C. § 1320d; HIPAA, 45 CFR 160.103). Moreover, as we have seen, HHS and DOE recently stated that HIPAA’s Security Rule also does not apply to students’ health records (U.S. Department of Health and Human Services & U.S. Department of Education, 2008, p. 3).

In addition, FERPA will not apply to students’ psychological records if they are treatment records. Instead state and any other applicable federal law govern their confidentiality. If a student’s psychological records are converted into education records, by for example disclosing them to a person who is not treating the student, the disclosure must be permissible under state and other applicable federal law as well as under FERPA. Once a student’s records have been converted into an education record, they are governed by FERPA (Tribbensee, 2008; See Table 2, When FERPA Applies).

As previously mentioned, because some student records at a university training clinic are not made, maintained, or used for treatment such as student billing records, they are education and not treatment records. Consequently, they are subject to FERPA and can be disclosed only when FERPA permits the disclosure.
When Both HIPAA and FERPA Apply

There are two circumstances when a university training clinic is subject to both HIPAA and FERPA. The first occurs when a clinic transmits electronically a covered transaction and provides services to both students and nonstudents. In such circumstances, HIPAA will apply to its nonstudent clients. For its student clients, HIPAA’s Transaction Rule will govern any electronic covered transactions for the students. HIPAA’s Privacy and Security Rules will not apply, however, to the students’ psychological records. They are not controlling because, as previously stated, they never apply to a student’s records even if the training clinic is subject to HIPAA because it transmitted a covered transaction electronically. Instead state law and any other applicable federal law govern the student’s records so long as they are treatment records. If, however, the student’s psychological records are converted into education records, FERPA applies to them. FERPA also determines the permissible uses and disclosures of any other education records at a training clinic (See Table 2, When Both HIPAA and FERPA Apply, Situation A.)

The second circumstance where both federal laws apply is when a university training clinic provides services only to college students but transmits electronically covered transactions such as submitting claims to students’ insurance companies. Then HIPAA’s Transaction Rule will control the electronic transactions for the students, but state and any other applicable federal law will govern the students’ psychological records that are treatment records. If the student’s psychological records are converted to education records, then FERPA controls the confidentiality of the psychological records and other student records at the university training clinic that are education records. (See Table 2, When Both HIPAA and FERPA Apply, Situation B.)

When Neither HIPAA nor FERPA Apply

If a university training clinic only treats nonstudents and does not conduct any covered transaction electronically, it will not be subject to either HIPAA or FERPA. Instead state and any other applicable federal law will control the confidentiality of its clients’ records (See Table 2, When Neither HIPAA nor FERPA Apply).

Training Student Therapists About HIPAA and FERPA

HIPAA training programs should at a minimum convey the following basic facts and principles about HIPAA to student therapists. First, HIPAA only sets the minimum level of protection for clients’ psychological records. If state law provides clients with more privacy protection or greater access and control over their psychological records than HIPAA, then state law and not HIPAA governs the confidentiality of their clients’ psychological records. Consequently, student therapists need to be familiar not only with HIPAA but also with state law. Second, student therapists must understand what constitutes PHI under HIPAA. They also should know the differences between routine therapy notes and psychotherapy notes, what types of PHI are included in each of these different types of notes, how the confidentiality that HIPAA provides to routine and psychotherapy notes differs, and how to create and maintain the confidentiality of psychotherapy notes.

Third, student therapists must be aware of what HIPAA requires for the use and disclosure of PHI. In other words, whether the use or disclosure of PHI necessitates the client’s consent, authorization, or can occur without the client’s consent or authorization (e.g., reporting child abuse). They also need to know what consti-
tutes a valid consent and authorization under HIPAA, when HIPAA permits them to disclose only the minimum necessary PHI for a use or disclosure, and when it does not impose this restriction. Student therapists should further comprehend that the minimum necessary rule generally means that all personnel of a university training clinic should have access to a client’s PHI only when they need it to perform their job duties. Fifth, they must know what rights HIPAA gives to clients such as the right to receive a timely privacy notice, to amend their psychological records, to obtain a list of PHI disclosures, and so forth. Finally, they should be familiar with and understand the reasons for the safeguards that their training clinic has implemented to protect the confidentiality of PHI. For example, they should understand the reasons behind the precautions that they must take when they fax PHI (e.g., contact the recipient to make sure they have the right number and confirm that he or she received it).

Only FERPA Applies to a Training Clinic

If only FERPA applies to a university training clinic, the most important principle to convey to student therapists is that generally a student’s psychological records should not be converted into educational records. Maintaining psychological records as treatment records means that they can only be made, maintained, and used for treatment, and access to the records is restricted to persons who are treating the client. Consequently, student clients should be warned about the danger of converting their psychological records into education records, and should usually be counseled against taking any action that has this effect.

Office staff or any other person not involved in the student’s treatment at a training clinic generally should not be permitted to access a student’s psychological records. Any client information that the office staff needs to access about a client (e.g., the student’s phone number) should be placed on the front cover of the student’s psychological records or contained in a separate document. Furthermore, student therapists should always confer with their supervisor before letting anyone other than themselves or their supervisor examine a student’s psychological records.

The student therapist should inform the student client either prior to or during the first session that FERPA, state law, and any other applicable federal law apply to the student’s psychological records, what rights the student client has under FERPA and these other laws, and how they affect the confidentiality of the student’s records. The student therapist should not give student clients a HIPAA Notice of Privacy Practices and should not obtain a signed consent acknowledging the receipt of the notice from student clients if only FERPA applies to them (i.e., the client is a student and there are no electronic transmission of students’ health information). If this occurs, a court could rule that a psychological facility has “impliedly” agreed to apply both HIPAA and FERPA to a student client depending on which law gives the student greater rights and privacy protection (Scaraglino, 2003). It would also misrepresent to the student that HIPAA controls the confidentiality of his or her psychological records when in fact FERPA, state, and other applicable federal law apply.

If the student therapist and his or her supervisor decide to disclose information in a student’s psychological records, FERPA, state, and other applicable federal law must permit the disclosure (i.e., the student client consented to the disclosure or FERPA, state, and other applicable federal law permits the disclosure without the student’s consent). If part of the psychological record is converted into an education record, the student therapist should place the portion of the record converted into an education record into a separate file to clearly differentiate it from the portion of the student’s psychological records that remain treatment records. The student’s psychological records should be clearly labeled as education and treatment records. The student therapist should document the reason for the conversion, and also where applicable that the student client was consulted about the disclosure, warned about the consequences of the conversion, and his or her written consent obtained. Moreover, once a psychological record is converted into an education record, the university training clinic must permit the student client to access those records, to amend them, and to obtain an accounting of disclosures from them. Therefore, the student therapist should notify the appropriate personnel in the training clinic to this change in status for that portion of the student’s psychological records that has been converted into an education record.

We have assumed that the Family Policy Compliance Office (FPCO) and courts will hold that if a student examines his psychological file only that portion of the file that the student examines will be converted into education records. We have made this assumption because it seems the most logical resolution of the question about what should occur when a client views only part of his or her psychological file. The plain language of the statute also supports this conclusion. We asked FPCO, which is part of DOE and enforces FERPA, this question and it responded: “We cannot provide you a specific response at this time concerning whether a disclosure of any part of a treatment record would render all such records to be education records.” (K. Wolan, personal communication, December 29, 2009).

In light of FPCO’s response, students should be warned that there is a possibility that even examining a part of their psychological file will convert the entire file into an education record. Student therapists and their supervisors should also keep this possibility in mind when deciding whether to give students or other persons who are not treating the student access to a student’s psychological file.

Student therapists should be instructed that any student records in the training clinic that are not made, maintained, or used for treatment are education records subject to FERPA. Consequently, student therapists can only divulge these records when FERPA permits the disclosure, and must allow student clients to inspect, amend, and obtain an accounting of disclosures from them.

Although FERPA, unlike HIPAA, does not require the appointment of a privacy officer, we nonetheless recommend that university psychological facilities appoint a FERPA privacy officer. The FERPA privacy officers should train student therapists, supervisors, and staff about FERPA and be capable of answering most questions about FERPA.

Both HIPAA and FERPA Apply to a Training Clinic

Because of the important differences between HIPAA and FERPA, we advise that the cover of a client’s records should clearly indicate which law applies. Furthermore, where possible
HIPAA files should be separated from FERPA files to ensure there is no confusion about which law applies to a client (i.e., stored in separate file cabinets). FERPA unlike HIPAA does not require a training clinic to have written policies and procedures for implementing and enforcing FERPA. Nonetheless, it may be beneficial to create both a HIPAA and FERPA manual especially when they both apply. If HIPAA and FERPA both apply because the training clinic has transmitted health information electronically for a covered transaction, the Notice of Privacy Practices given to student clients should state that FERPA, state law, and any other federal law and not HIPAA govern the confidentiality of their psychological records.

HIPAA requires training clinics that are covered entities to provide student therapists and other personnel with “necessary and appropriate” training about their policies and procedures for PHI. (HIPAA, 45 CFR 164.530b1). A training clinic that is a covered entity must also document the training it provides (HIPAA, 45 CFR 160.530b2i). The type of training that HIPAA requires depends on the size and resources of the training clinic and the services it offers (Scaraglino, 2003). Thus small training clinics with few resources who offer limited services can provide less training to student therapists about HIPAA than large clinics with greater resources and who offer a wide array of services. HIPAA also requires training clinics that are covered entities to impose “appropriate sanctions” against student therapists and others who violate its HIPAA policy and procedures or HIPAA regulations and to mitigate the extent it is practical the harm resulting from a violation (HIPAA, 45 CFR 164.530e1; 45 CFR 164.530f).

Although FERPA does not have specific training requirements or require training clinics to impose sanctions for violations or mitigate harm like HIPAA, providing students with adequate training about FERPA is nonetheless essential. Adequate training about FERPA is necessary so that student therapists can fulfill their ethical obligation to disclose to clients the limits of confidentiality, so they do not violate their clients’ FERPA rights, and so they do not inadvertently convert clients’ treatment records to education records. Finally, training clinics should consult with university counsel about how best to implement HIPAA and FERPA, and the type of training they should provide to student therapists about HIPAA and FERPA. It is university counsel’s responsibility to make sure that a training clinic has the legal knowledge it needs to comply with HIPAA and FERPA and to train student therapists about them (See Table 3).

### Conclusions

Whether HIPAA or FERPA applies to a client’s psychological records has important consequences for university training clinics, student therapists, their supervisors, and most importantly the client. If the wrong law is applied to a client, not only may the student therapist and his or her supervisor violate federal law and the ethics code, but they may also cause irreparable damage to the client and the therapeutic relationship by jeopardizing the confidentiality of information that the client rightfully assumed would remain private. We strongly urge university training clinics as quickly as possible to implement changes that are necessary to ensure that they are properly applying HIPAA and FERPA to their clients.

### Table 3

**Summary of Main Points About HIPAA and FERPA**

<table>
<thead>
<tr>
<th>HIPAA</th>
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</thead>
<tbody>
<tr>
<td>1. HIPAA applies only to training clinics that are a “covered entity” (i.e., the clinic conducts one or more covered transaction electronically such as billing an insurance company for psychotherapy).</td>
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</tr>
<tr>
<td>2. Even if HIPAA applies to a clinic, it controls the confidentiality of a training clinic’s psychological records only for non-students such as members of the general public, staff of the university, or family members of students.</td>
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</tr>
<tr>
<td>3. For student clients treated at a training clinic subject to HIPAA, HIPAA will only apply to covered transactions for the student client (e.g., when the clinic electronically bills a student’s insurance company for therapy).</td>
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</tr>
<tr>
<td>4. HIPAA’s Privacy Rule and Security Rule never control the confidentiality of students’ psychological records even if the training clinic is subject to HIPAA.</td>
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<tr>
<td>5. When HIPAA applies to a client, generally the training clinic can use or disclose only the minimum necessary PHI that is required for the use or disclosure.</td>
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<tr>
<td>6. Congress has recently enacted major amendments to HIPAA, which will result in stricter enforcement of HIPAA and severer penalties for its violation. The amendments to HIPAA will also require university training clinics to make significant changes to their HIPAA policies and procedures.</td>
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<table>
<thead>
<tr>
<th>FERPA</th>
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<tbody>
<tr>
<td>1. State and other applicable federal law protect the confidentiality of student psychological records if they are treatment records.</td>
<td></td>
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<tr>
<td>2. Once a student’s psychological records are converted from treatment to education records by showing them to a person who is not treating the student or by using them for a purpose not related to treatment, FERPA applies to the records.</td>
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</tr>
<tr>
<td>3. Generally converting a student’s psychological records from treatment to educational records will substantially decrease their confidentiality and substantially increase who can access the records. Moreover, once they become educational records, students can access all the information in their records even if they contain psychotherapy notes, information harmful to the students or others, psychological tests, or information prepared in anticipation of litigation.</td>
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<tr>
<td>4. Therefore, students generally should be counseled against taking any action that converts their psychological records into education records.</td>
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<tr>
<td>5. Student therapists and their supervisors should carefully guard against the inadvertent conversion of psychological records from treatment into education records.</td>
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<tr>
<td>6. When a conversion occurs the student therapist should document the reasons for the conversion, and where appropriate obtain the client’s consent to the conversion. The psychological records of the student that constitute education records after the conversion should be placed into a separate file from the remaining psychological records of the student that are still treatment records.</td>
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</tbody>
</table>
References


Appendix

Glossary of Key Terms

A. HIPAA

1. Administrative Simplification Rule- Includes the Transaction Rule, the Privacy Rule, and the Security Rule and two other HIPAA rules not discussed in this article.

2. Authorization- Requirement that the client sign a proper authorization for all uses and disclosures of PHI which are not for treatment, for payment, for routine health care operations, for the client, or for which the law does not require the client’s consent (e.g., reporting child abuse).

3. Consent- Form signed after the client reads the Notice of Privacy Practices that permits a mental health facility to use a client’s PHI for treatment, payment, and routine health care operations.

4. Covered Entity- Entities and persons who are subject to HIPAA because they have transmitted electronically health information for a covered transaction.

5. Covered Transaction- Electronic transactions for which HHS has adopted a standard form such as healthcare claims sent to insurance companies.

6. Disclosure- A training clinic’s external disclosures of PHI (i.e., the clinic sends the PHI to a person or entity who is not an employee or agent of the clinic).

7. Healthcare provider- Any person or entity who provides, bills, or receives payment for healthcare as part of their normal business.

8. Notice of Privacy Practices- The written notice that training clinics must give to clients under HIPAA. It describes the uses and disclosures of PHI that the clinic may make, the client’s rights under HIPAA, and the clinic’s legal duties regarding the clients’ PHI.

9. Health information- Information pertaining to a client’s past, present, or future physical or mental health or condition; the provision of healthcare to a client; or the client’s past, present, or future payment for the provision of healthcare.

10. Identifiable Health Information- Information that names a client or can be used to identify a client (e.g., a social security number).

11. Minimum necessary rule- Generally under HIPAA you can only reveal the minimum necessary PHI that is required for a use or disclosure.

12. Protected Health Information (PHI)- Individually identifiable health information

13. Privacy Rule- Determines when, to whom, and under what circumstances protected health information can be used and disclosed.

14. Security Rule- Protects the confidentiality of electronic protected health information through the use of various administrative, physical, and technical safeguards.

15. Therapy notes- Contain the usual content of mental health notes such as the duration of a therapy session, diagnosis, treatment plan, modalities of treatment, progress notes, etc.

16. Psychotherapy notes- Contain sensitive information that is only relevant to the therapist such as the therapist’s impressions of the client, hypotheses, speculations, etc.

17. Transaction Rule- Requires the standard formatting of health information transmitted in electronic form for certain covered transactions such as healthcare claims sent to insurance companies.

18. Use- When a training clinic utilizes PHI.

B. FERPA

1. Conversion- The change in the status of a student’s psychological records from treatment records into education records because they were disclosed to a person who was not treating the student or used for a purpose that was not related to the student’s treatment.

2. Educational record- Any record that is directly related to a student and maintained by a college or university or a party acting for them.

3. Education officials- University employees who can examine a student’s education records if they have a legitimate educational interest in them.

4. Eligible student- Any student who is 18 years of age or older, or who attends a college or university at any age.

5. Legitimate educational interest- The standard an education official must meet before he or she can examine a student’s education records.

6. Treatment record- Psychological and medical records that are made, maintained, and used solely for treatment and disclosed only to persons who are treating the student.

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