

# *Privacy and Safety on Campus: A Legal Framework*



THE STATE UNIVERSITY *of* NEW YORK

Guidance on Information Sharing for  
Faculty, Staff & Law Enforcement

State University of New York  
Office of University Counsel  
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## I. **Introduction:**

The tragedies at Virginia Tech in 2007 and Northern Illinois University in 2008 highlight the challenges that campus officials face today. The all-too-frequent instances where students threaten or attempt suicide present similar challenges. In these situations, one must assess whether a student poses a danger to him or herself or others -- a decision which, in the best of circumstances, is difficult to make. In making a safety assessment, campus officials must be careful not to improperly ignore a student's privacy rights. Conversely, they must be careful not to endanger the entire campus or inhibit assistance being rendered to a student by failing to disclose information that legally can and should be shared. Faculty members face similar issues in dealing with students who, while not a danger to the entire campus, are nevertheless disruptive in class. Many fear that they will be rewarded with a lawsuit for trying to maintain an orderly class or seeking to help a student get counseling or other assistance.

This document responds to the recommendations set forth in the report issued in 2007 by the State University of New York Chancellor's Task Force on Critical Incident Management. That report emphasized that the laws protecting student information pose a challenge to campus safety. This document explains the various laws and discusses their practical applications. The appendices contain further resources, a list of campus departments subject to HIPAA, and a model form for campuses to determine whether students are claimed as dependents.

There are no simple rules as to when student information can be disclosed; each situation requires an individual assessment. We encourage campus officials to work with each other and in concert with Counsel's Office to provide the specific review necessitated by each set of facts.

## II. **General Concepts and Definitions:**

### A. **FERPA:**

The safety and security of college campuses may depend, at least in part, on the ability of faculty and staff to share information about students in ways that assure an appropriate response to aberrant behavior and potential danger. The law does not pose an obstacle to such sharing when, under the circumstances, there is a rational basis to do so. The most frequently invoked statute governing information sharing is the Family Educational Rights and Privacy Act of 1974 or FERPA. As noted in many of the studies that followed the 2007 Virginia Tech incident, many people misunderstand the restrictions imposed by FERPA.

FERPA is the Federal law that governs access to, and disclosure of, student education records. It is enforced by the Family Policy Compliance Office (FPCO) of the U.S. Department of Education, which also issues regulations and opinion letters. FERPA provides students with rights of access to their own records, of course, but also governs the circumstances when institutions of higher education and their staff may disclose information in student education records to third parties, including parents, other college staff members, the public and other external requestors. The general rule in this regard is that unless an exception applies, information in a student's education record may not be disclosed without the student's written consent.

FERPA only protects a student's "education records" as defined by FERPA. Education records are "those records, files, documents, and other materials which contain information directly related to a student" that are maintained by SUNY (or a SUNY campus), or by a person or designated agent acting on its behalf. "Education records" include class schedules, student e-mail, disciplinary files, transcripts, and course work.

1. **Information that is not covered by FERPA:**

FERPA's definition of "education records" does not cover information obtained by personal observation or conversation or personal knowledge relating to a student derived from an interaction with the student. Such information may be shared without the student's consent.

Additionally, FERPA's definition of "education records" specifically does not include:

- a. **Treatment Records:** Records "made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his [or her] professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;"
- b. **Law Enforcement Records:** Records maintained by a law enforcement unit of the institution that were created by that unit for the purpose of law enforcement; and
- c. **Sole Possession Records:** Records "of instructional, supervisory and administrative personnel ... which are in the *sole possession* of the maker thereof and are not accessible or revealed to any other person except a substitute" (e.g., personal notes of a faculty member).

While records within the above categories are not protected by FERPA, other regulations or policies may limit what one may do with them (see e.g., § III [B] on Treatment Records).

2. **Disclosing Student Records: Exceptions to FERPA:**

Even education records, however, may be disclosed without student consent if they fall into certain exceptions relevant to campus and student safety:

a. **Dependent Student Exception:**

FERPA permits, but does not mandate, campuses to share with parents of a dependent student information contained in education records. Campuses may provide the student information to either parent, even to a divorced or non-custodial parent. A student may fall into the "dependent student" category until they are 24.

We recommend that campuses obtain annual statements from students as to their dependent or nondependent status (see form at Appendix C). The campus need not

review the parent's tax return. We also recommend that campuses maintain this information in a database accessible to school officials who are identified in campus policy as having a legitimate educational interest and who may be asked by parents to share information in the official's possession.

b. **Drug and Alcohol Violation Exception:**

Disclosure to parents, regardless of a student's dependency status, is permissible in the limited case of violations of law or campus policy by a student under the age of 21 at the time of the report, concerning the use or possession of alcohol or controlled substance. Where drug or alcohol violations are not at issue, and the student is not a dependent, student consent is necessary unless another exception, such as health or safety, applies.

c. **Health or Safety Emergency Exception:**

FERPA recognizes the need to share information in cases of emergency. This is a limited authorization, which does not create blanket rules about specific factual situations. Case-by-case review is essential. Additionally:

- i. Disclosures under this exception must be limited to those who are in a position to act to protect health or safety, such as parents (of course, be mindful of those situations where the parents could exacerbate the problem) or professionals trained to handle emergencies;
- ii. The emergency must be serious and imminent as determined by the campus using a rational basis standard; once the campus rationally believes that a threat has dissipated, the exception no longer applies;
- iii. FPCO opinions have found emergency releases of information to third parties appropriate in cases of smallpox, anthrax and bioterrorism attack, in cases of a student's suicidal statements coupled with unsafe conduct and threats against another student, and in cases of reporting incidents of identified communicable diseases to a State Health Department.

d. **School Officials with Legitimate Educational Interests Exception:**

This exception permits information sharing among faculty and staff at a campus. FERPA allows each campus to define for itself in an annual notice to students who qualifies as a "school official" and what is a "legitimate educational interest." Campuses should define these terms broadly and may include non-employees (such as agents and contractors who provide a service the University would otherwise undertake itself). SUNY's FERPA Policy defines a school official as a:

- i. person employed by the campus in an administrative, supervisory, academic or research, or support staff position, including health or medical staff;
- ii. member of University's Board of Trustees;
- iii. person employed by or under contract to the campus to perform a special task, such as an attorney or auditor;

- iv. person who is employed by the campus's law enforcement unit; or
- v. student serving on an official committee, such as a disciplinary or grievance committee, or who is assisting another school official in performing his or her tasks.

SUNY Policy provides that a legitimate educational interest exists where an official requires the information for the purpose of fulfilling official duties, including but not limited to:

- i. performing a task that is specified in his or her position description or contract agreement;
- ii. performing a task related to a student's education;
- iii. performing a task related to the discipline of a student;
- iv. providing a service or benefit relating to the student or student's family, such as health care, counseling, job placement or financial aid; or
- v. maintaining the safety and security of the campus.

In summary, absent either an exclusion from the definition of education records or a statutory exception to the general rule (others that are not described in this memorandum can be found in 34 CFR Part 99), campuses must have student consent in order to release information to third parties. Valid consent must conform to the following criteria:

- i. It must be in writing, dated, specify the records to be disclosed, purpose of the disclosure and the party to whom disclosure may be made.
- ii. While consent can be sought on an annual basis for a range of records, it cannot be required as a condition of acceptance or for the receipt of educational services.

While FERPA governs sharing educational information about college students, HIPAA and laws governing privileged communications and relationships may also shape how a campus handles a question of whether to share information about a student.

## **B. HIPAA:**

A common misunderstanding is that the Privacy Rule in HIPAA (the Health Insurance Portability and Accountability Act of 1996) prohibits the release of mental health and medical records on all campuses. While HIPAA does apply to records held by outside health care providers and some SUNY components such as the university hospitals, as a practical matter, FERPA is the relevant statute for most campus situations addressed by this memorandum. For most SUNY campuses, there will be no need to consider the requirements or limitations imposed by HIPAA. HIPAA is only applicable for those campus departments within SUNY listed in Appendix B to this document.

HIPAA generally covers health care providers that transmit health care information in an electronic form in connection with an electronic billing transaction. While HIPAA provides for the privacy of “protected health information” (PHI), it excludes from that definition “individually identifiable health information” covered by FERPA as well as “student treatment records,” not otherwise protected by FERPA. HIPAA concerns may come into play with regard to records relating to students that are held by outside health care providers or by SUNY departments listed in Appendix B. For most faculty and staff at a campus, however, knowledge of HIPAA is not required in order to ascertain whether student information can be shared with others within the campus.

### C. **New York State Public Health Law:**

New York State Public Health Law §18 is the general provision in state law governing access to, and disclosure or release of, patient information held by licensed health care practitioners, such as doctors or mental health counselors. This law sets the standards for campus health care providers who treat students. In general, it allows for sharing of patient information with third parties only under the following circumstances, unless otherwise mandated or permitted by law:

1. to other practitioners as part of a consultation or referral during treatment;
2. to parents or guardians of an infant (person under the age of 18) unless the disclosure would cause substantial and identifiable harm to the patient (note that patients between the ages of 12 and 18 may object);
3. with the patient’s written authorization.

An important example of a permitted disclosure of patient information without patient authorization is a public health crisis on campus, as may occur with a communicable disease such as meningitis (see § III [B]).

### D. **The Law of Privilege:**

University officials need to be sensitive to the law of privilege. If any specific questions arise, officials may contact Counsel’s Office. However, it is useful to know that privilege is a requirement, created in state law, that certain information held by certain individuals be kept private except in specified circumstances. In New York, privilege must be accorded by explicit state law. Certain information created by, or shared with, individuals in the following professions may be privileged: physicians, psychologists, dentists, podiatrists, chiropractors and nurses. The privilege only exists when there is a professional relationship with the patient, the information is acquired while treating the patient in a professional capacity, the information is necessary to enable treatment, the patient did not waive the privilege and the communication was intended to be confidential. Privileges also protect confidential information shared with social workers, rape crisis counselors, clergy and attorneys. If not specified in this list, then information held by other professionals is not confidential under the New York law of privilege.

### III. **Specific Applications: Student Health Information:**

The previous sections have given an overview of the laws that apply to information sharing on a college campus. In this section, these laws are applied to specific types of records maintained by specific categories of SUNY officials.

Campuses possess some health information for every student. Information ranges from that received for basic health clearance (e.g., immunization records) to situations where a campus becomes a “provider” of health services to a student who, in turn, becomes a “patient.” It is important to distinguish between administrative records and treatment records because of the way the law classifies and treats the information contained in these records.

Campus personnel who seek and obtain a student’s health information from an outside entity should understand basic requirements under Federal and state laws. Outside entities or individuals who have health information related to a student may themselves be covered under HIPAA or New York State Public Health and/or Mental Hygiene Laws, and may require authorization from the student prior to releasing information to the campus. Additionally, special protections (see § III [B]; Appendix A) are afforded to certain types of information, such as HIV-related information, mental health clinical records, and substance abuse treatment records.

#### A. **Administrative Functions:**

When student health information is created, received, maintained, used or disclosed for administrative purposes only (e.g., immunization records received by Student Health Service; health information provided to campus to support academic adjustment request) and this information is not related to treatment of the student by the campus, it is considered administrative. FERPA governs this information since it is part of the student’s education record.

#### B. **Treatment Functions:**

When student health information is created, received, maintained, used or disclosed for the purpose of treating students by campus health staff (e.g., Student Health Service providing medical evaluation and care to an ill or injured student; Student Counseling Center providing counseling services to a student) the student becomes a “patient” of the campus. Once the campus and student form this treatment relationship, the information at issue is no longer part of the student’s education record and is no longer governed by FERPA. Instead, it is patient information and constitutes a treatment record. Since this information is most often not covered by HIPAA (because HIPAA is not triggered as described above), it falls under various New York laws.

To determine which laws apply to the student-patient’s health information, first determine whether your campus is a “HIPAA campus” (see Appendix B). If your campus department is not on the list contained in Appendix B, then HIPAA does not apply. If your campus department is on the list, and has elected to identify itself as a health care component within SUNY, HIPAA

applies. HIPAA departments should follow their campus HIPAA policy. In general, these policies require consent before patient information is released to a third party.

If your campus department is not on the list in Appendix B, look to New York State law. As set forth below, New York law applies to student health information, referred to as “patient information,” which the campus possesses as part of the treatment of a student with two exceptions:

1. personal notes and observations not incorporated into the patient record; or
2. information provided by other persons under the promise of confidentiality and not shared with the patient or anyone else.

Under New York law, patient information can be disclosed to the patient and to other “qualified persons” (generally a parent or guardian of an infant). However, disclosing patient information to third parties (other than “qualified persons”) raises complex issues involving confidentiality provisions, privileges created by statute and case law (see § II [D]) and Professional Misconduct rules governing the practice of the licensed professions. As a general rule of thumb, unless the purpose of the disclosure is for treatment of the student or is expressly required or permitted under a reporting law (e.g., child abuse), the student’s authorization will be required to disclose the information (note that the disclosure of HIV-related information must be in writing on a form expressly approved by the Department of Health).

Disclosure for Treatment: Health care service providers, both within the campus community and outside, may share student health information as long as the health care provider has received permission from the student/patient, at least once, to use and disclose this information for treatment purposes. Permission need not be in writing and should safely be presumed when coordinating care with outside providers who are known to have an ongoing treatment relationship with the student. When the student initiates treatment with the University, one time consent should be obtained, preferably in writing. This assures campus staff that they are authorized to freely share relevant information with other providers.

The scope of information shared among providers must be related to the scope of the treatment they are providing and be on an as-needed basis. This can be applied broadly, except with respect to HIV-related information, which must be more narrowly assessed. The information should be exchanged in a way that allows all treatment providers to access relevant information so that the student receives quality health care services by all involved.

Sharing of information within the campus community must be restricted to information shared among members of the treatment team unless the student has expressly authorized sharing with other campus staff. For example, if the student is receiving treatment at a Student Health Center for an illness, and the student’s faculty advisor requests information relating to the student’s condition and treatment for reasons relating to his or her advising duties, the treatment staff may only share this information if the student expressly authorizes it, and this authorization should be obtained in writing.

### Disclosure for other purposes:

1. Students may authorize disclosure of their patient information (note that the disclosure of HIV-related information must be in writing on a form expressly approved by the Department of Health). In general, patient authorization is required to share information.
2. Patient information may be disclosed when the law mandates reporting of health information (e.g., reporting certain diseases or wounds, child abuse, or pursuant to court order or legally valid subpoena).
3. If a student poses a health threat or raises public health concerns (e.g., a contagious illness such as tuberculosis, SARS, or meningitis), sharing health information requires the involvement of County Health officials. There is no duty to warn the public at large in New York State and, as such, even disclosure for health related concerns implicates legal protections. Note that a different duty applies in the field of mental health (see § III [C]).

### **C. Mental Health Records:**

Under New York law, there are additional legal requirements for handling a student who poses a danger to him or herself or others. Mental Health practitioners have a special relationship with students who they treat and, as such, have a legal duty to protect a student-patient who poses a danger to him or herself and may have a legal duty to protect others from a dangerous student. These legal duties allow a mental health practitioner to disclose the student's information without his or her authorization to the extent disclosure is necessary for safety. If a student poses a substantial specific danger to others, either an identified third person, or even the public or campus-at-large, the practitioner has a duty to warn and take steps to ensure safety of the student and others. Note that this unique duty only applies in the field of mental health and differs from public health threats and concerns (see § III [B]). For guidance regarding sharing information within and among Behavioral Assessment Committees, see § V.

## **IV. Specific Applications: Student Education Records:**

### **A. Faculty Sharing Information about At-Risk Students:**

One area of particular concern in relation to sharing information about at-risk students is the right of faculty members to communicate with others regarding such students. Frequently, it is the faculty member who will be the first or among the earliest points of contact with a troubled student due to classroom interactions. This was certainly the case at Virginia Tech.

The following rules govern sharing information created or possessed by faculty. First, FERPA does not cover personal observations of student behavior because they are not education records. Once a personal observation is recorded in written form, however, it becomes an education record subject to FERPA. This personal observation exclusion allows faculty members to speak, as appropriate, with other campus officials and parents about observed behavior.

Second, records possessed by faculty can be shared with administrators under the authorization for disclosure of education records to "school officials" with a "legitimate educational interest"

(see § II [A] [2] [d]). This allows referral of disruptive students to the judicial process, University Police, academic administrators, or Behavioral Assessment Committees.

Third, faculty, like other campus officials, may disclose information to parents in health or safety emergencies or if a student is a dependent for income tax purposes (see § II [A] [2] [a], [c]).

These general rules still leave a great deal of discretion in the hands of faculty members who have concerns about the behavior of specific students in their classroom or under their academic supervision. What action a faculty member takes likely will depend on the actions of the student and whether such actions are consistent with prior behavior or represent a change. The following points can be made about managing disruptive students in the classroom and when to refer these students to other officials or to law enforcement if necessary and appropriate. Faculty should read and become familiar with the campus student conduct code. With regard to in-class management of disruptive students, a first step is a clear statement of behavioral expectations in the syllabus and in initial lectures. Be consistent and firm in holding students accountable for inappropriate behavior. Periodic reminders of classroom standards are appropriate. If disruptive behavior occurs, faculty are first advised to issue warnings to misbehaving students (in private, if possible, and in writing). Note that this written document becomes an education record. A next step can include withdrawing a student from the class for repeated violations of behavioral expectations. Such action must be based on actual disruptive conduct which threatens the well-being of the class, not mere fear of disruptive behavior or perceived mental illness (see § IV [B]).

Behavior that immediately threatens the physical safety of an individual or the class should elicit immediate action such as removal from the classroom by University Police. Beyond the threat of imminent danger, there are no strict rules as to when faculty should refer disruptive or troubling behavior to campus or outside authorities. In the first instance, it is advisable to share information about disruptive students with other academic administrators, such as department chairs, if a student is likely to be withdrawn from a class (if, for no other reason than such a student would be entitled to pursue an academic or grade appeal of the withdrawal action). Referral of a student to discipline requires behavior that violates the student conduct code. Referral to law enforcement requires behavior that raises physical safety concerns. It is perhaps most difficult to determine when to refer a student to counseling. Some faculty members may see this as a way of helping a student and showing concern and, in fact, this may be true. In some instances, such a referral could alleviate behavioral problems in the classroom. On the other hand, faculty members are generally not mental health professionals and should not be making judgments about whether a student's behavior derives from mental illness or psychological problems. Ideally, faculty should base their actions regarding a student on explicit behavior or conduct that violates classroom standards or the conduct code. Faculty who are concerned that a student's behavior stems from psychological problems might consult with campus counseling staff to get verification of concerns or suggestions for other steps they might take. An informed consultation between faculty and a counselor or mental health professional could result in outreach to the student with an offer of assistance, if deemed appropriate.

Another possible route for faculty members who have identified at-risk students on the basis of classroom conduct or other academic activities (e.g., a disturbingly violent essay) would be referral to a campus Behavioral Assessment Committee. Campuses should develop protocols for

referral of students to these committees including whether direct referrals by faculty members are accepted or whether there should be an intermediate step or office to which faculty would go with concerns. The latter approach is probably preferred since it could allow coordination of information, as well as more informed and comprehensive decision making about which students are in need of review by such a committee.

Faculty should be aware that if a Federal or state law enforcement official seeks information from a student's education record, unless there is a health or safety emergency, the outside law enforcement agency must have a valid subpoena before information may be released. There is also a narrow exception for disclosure to Federal law enforcement for international students. If a faculty member receives a request for records pursuant to a subpoena the faculty member must contact Counsel's Office.

**B. A Warning for Faculty Regarding the Americans with Disabilities Act:**

Students with disabilities are obligated to comply with student conduct codes. In fact, opinions issued under the Americans with Disabilities Act (ADA) permit colleges to take action based on the conduct of a disabled student who poses "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Known as the "direct threat exception," this risk must be clearly identified, current and actual (not speculative or remote), and based on objective medical standards. At some point, most faculty and staff interact in some manner with students who have a disability. That interaction could arise from a disability that is known to the faculty or staff (and requires accommodation), or arise when a student acts in a manner that could be attributed to a suspected condition or perceived disability.

Faculty and staff should be aware of a little-discussed element of the ADA which includes an individual who is protected under the statute if "regarded" as having a disability. Thus, an individual who is regarded as having a disability is protected under the ADA even though he or she would not otherwise meet the definition of disabled. The ADA defines disability as follows:

1. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
2. a record of such impairment; or
3. being regarded as having such an impairment.

The Americans with Disabilities Act and the 1973 Rehabilitation Act, another Federal law which protects disabled students, require campuses to provide an academic adjustment, assuring a reasonable opportunity to participate in their education (a concept similar to "reasonable accommodation"), to students who meet the definition of disabled. Those accommodations are generally provided by the Office of Student Affairs or Office of Disability Services upon request. Accommodations are never provided without a student's request.

The ADA requires that an individual with a disability self-identify and request accommodations. The purpose of this provision is to prevent employers or covered entities (the college/university in this case) from jumping to conclusions and presuming that an individual needs extra assistance. It was contemplated to cover the scenario where an individual with a disability may

not want or need reasonable accommodations. Each campus has established protocols for providing accommodations, and they should be followed.

The Disability Services Office may never advise faculty of the nature of the disability because the ADA requires that such information remain confidential and separate (the ADA has stricter confidentiality protections than FERPA). However, there are exceptions to confidentiality, including ones for emergency first aid and safety requirements.

When a student acts in a bizarre or unusual fashion or you notice significant changes in academic performance, different and uncharacteristic behavior in a student social situation, or if other students complain about certain behavior, we advise you to take the following steps:

1. Do not jump to conclusions or speculate about an alleged disability or perceived condition.
2. Take care not to base opinions on assumptions. Focus on the facts.
3. Focus on the student's conduct without speculating about the reason for the behavior or perceived condition.
4. Take care not to discuss an alleged disability or perceived condition as such.
5. Notify University Police if you believe circumstances present an imminent danger to health or safety.
6. Contact Student Affairs for advice if discipline may be appropriate.
7. Never offer an academic adjustment without consulting the Office of Disability Services.

### C. **Law Enforcement Officials:**

In its definition of protected education records, FERPA specifically does not include records created and maintained by University Police for law enforcement purposes. This means that FERPA is no barrier to sharing such records, when in the custody of University Police and created and maintained for law enforcement purposes. Any decision not to share the records is a matter of policy, not compliance with privacy law. For example, a University Police department may choose to share investigation records with other police forces, the media (for a missing student or criminal at large), or the parents of a student under investigation. In fact, in some cases, the New York State Freedom of Information Law may be used to gain access to records.

A different situation arises, however, for University Police records that are shared with other campus offices (for instance, Student Affairs). Those records, as possessed by the other campus office are covered by FERPA (although the originals possessed by University Police are not). Student Affairs may still only share the record with appropriate parties if it falls under one of the exceptions (see § II [A]), but University Police is not bound by those restrictions.

Conversely, if a record is shared in the other direction, that is, if a record is created by a campus office and shared with University Police (acting as a “school official” with a “legitimate educational interest”), that record is still covered by FERPA, no matter which office possesses it, and may only be shared pursuant to a FERPA exception.

#### **D. Intersection of the Clery Act and FERPA:**

According to FPCO opinions, FERPA does not preclude campuses from fully complying with the “timely warning provisions” of the Campus Security Policy and Campus Crime Statistics Act (commonly known as the Clery Act).

#### **V. Specific Applications: Behavioral Assessment Committee Records:**

Another possible route for faculty who have identified at-risk students on the basis of classroom conduct or other academic activities (e.g., a disturbingly violent essay) would be referral to a campus Behavioral Assessment Committee. The Chancellor’s Task Force on Critical Incidents recommended that each SUNY campus establish such a multi-disciplinary committee to review students who may pose a risk to themselves or others. The committee should be chaired by a campus administrator and include a faculty member, representatives of Student Affairs, Counseling Center, University Police (knowledgeable with respect to investigations), other professionals who can enhance the assessment process, and an ad hoc member who knows the student at issue. The University Counsel’s Office serves as an advisor to these committees.

Campuses should develop protocols for referral of students to these committees including whether direct referrals by faculty members are accepted or whether there should be an intermediate step or office to which faculty would go with concerns. The latter approach is usually preferable because it allows better coordination of information, as well as more informed and comprehensive decision making about which students are in need of review by such a committee.

The members of such a committee may share information with each other under the FERPA provision for disclosure to school officials with a legitimate educational interest. In the event a committee member also is a mental health or health professional in a treatment relationship with the student in question, such person may not disclose the contents of medical or mental health records pertaining to that student, or even that they are currently in a treatment relationship, unless certain conditions exist (see § III). Absent these conditions (usually imminent danger to self or others), the medical or counseling professional is limited to general advice and suggestions about proper approaches.

The records of the Behavioral Assessment Committee itself would be considered education records under FERPA subject to those rules of disclosure (see II [A]). Thus, students may have access to records about themselves created by a Behavioral Assessment Committee.

#### **VI. Recommendations to Facilitate Compliance with FERPA:**

This section summarizes the specific recommendations contained in this guidance document, which will facilitate campus compliance with information privacy laws and help ensure campus safety. These recommendations, of course, are in addition to the need for ongoing education and training of faculty and staff on the basic requirements of FERPA and campus FERPA policy.

1. In order to make information readily available to school officials regarding which students are dependents for tax purposes and, thus, whose information may be shared with parents under that exception to FERPA, create an annual process to inquire of students whether they are dependents or not and retain this information in a database accessible to those faculty and staff with legitimate educational interests and who may receive requests from parents. See Appendix C.
2. Campuses should define school officials and legitimate educational interest as broadly as possible in their annual notice to students of FERPA policy. School officials should include contractors, consultants, and volunteers to whom the campus has outsourced institutional services or functions.
3. When a student seeks treatment, campus health care providers should obtain a one-time written authorization for disclosure of the student's patient information for treatment purposes to other providers as well as for any other purposes to which the student is willing to consent, such as disclosure to parents and other school officials.
4. Campuses should ensure that faculty and staff are aware of their department's status for HIPAA purposes and of any applicable HIPAA policies. See Appendix B.
5. Campuses should develop and make available to faculty protocols for management of disruptive students, including information on the code of conduct and disciplinary procedures.
6. Campuses should establish Behavioral Assessment Committees and protocols for referral of students to these committees. The protocols should identify a particular office that faculty would go to with concerns, in order to coordinate information about potentially at-risk students.
7. Faculty should receive training on the ADA and the need to make decisions about students based on academic performance or conduct.

## VII. **Conclusion:**

While confidentiality of student information and records is important, exceptions give campus officials flexibility to ensure that the most important goal, safeguarding our students and the campus community, can be achieved. If you have additional questions, please contact the State University Counsel's Office at 518-443-5400.

## **Appendix A: Links and References:**

### **FERPA (Family Educational Rights and Privacy Act):**

20 U.S.C. § 1232 [g]; 34 C.F.R. part 99

Home page for the Department of Education Family Policy Compliance Office:  
<http://www.ed.gov/policy/gen/guid/fpco/index.html>

Exception to HIPAA for records governed by FERPA: 45 C.F.R. § 160.103

SUNY Policy Number 6600 on Compliance with FERPA:  
[http://www.suny.edu/sunypp/documents.cfm?doc\\_id=540](http://www.suny.edu/sunypp/documents.cfm?doc_id=540)

### **HIPAA (Health Insurance Portability and Accountability Act):**

42 U.S.C. § 1320d (and related); 45 C.F.R. part 164

Accessible version of HIPAA Statute:  
<http://aspe.hhs.gov/admsimp/pl1104191.htm#1174>

United State Department of Health and Human Services Website on HIPAA:  
<http://www.hhs.gov/ocr/hipaa/>

### **Americans with Disabilities Act (ADA):**

42 U.S.C. § 12101 (and related)

United States Department of Labor Website on the Americans with Disabilities Act: <http://www.dol.gov/esa/regs/statutes/ofccp/ada.htm>

### **Rehabilitation Act § 504:**

29 U.S.C. § 794

United States Department of Health and Human Services Website on § 794 of the Rehabilitation Act: <http://www.hhs.gov/ocr/504.html>

### **Privileged Information:**

The following are the only applicable individuals with whom confidential information enjoys a privilege in New York State:

Medical Personnel: New York CPLR § 4505 [a]; 4507; Mental Health Law § 33.13 [c]; New York Public Health Law §§ 3372 & 3373;

Social Worker: New York CPLR § 4508 [a]

Clergy: New York CPLR § 4505

Attorney: CPLR § 4503 [a] [1]

Rape Crisis Counselor: New York CPLR § 4510 [b]

**Access to Patient Information:**

New York Public Health Law § 18.

**Freedom of Information Law (FOIL):**

New York Public Officers Law §§ 84-90. Accessible version of FOIL statute:  
<http://www.dos.state.ny.us/coog/foil2.htm>

**Campus Security Policy and Campus Crime Statistics Act (Clery Act):**

20 U.S.C. § 1292 [f]; 34 C.F.R. part 668

United States Department of Education Office of Postsecondary Education  
Campus Security: <http://www.ed.gov/admins/lead/safety/campus.html>

**SUNY Chancellor's Task Force on Critical Incident Management (PDF Format):**

<http://www.suny.edu/ChancellorsMsg/TaskForceRecommendations.pdf>

**Behavioral Assessment in School Settings:**

United States Secret Service and Department of Education, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*, May 2002:  
[http://www.secretservice.gov/ntac/ssi\\_guide.pdf](http://www.secretservice.gov/ntac/ssi_guide.pdf)

**Special protections for HIV:**

New York State Public Health Law Article 27-F

New York State Department of Health Website on special protections:  
[http://www.health.state.ny.us/diseases/aids/facts/helpful\\_resources/confidentiality\\_law.htm](http://www.health.state.ny.us/diseases/aids/facts/helpful_resources/confidentiality_law.htm)

**Special Protections for Mental Health Clinical Records:**

New York State Mental Hygiene Law § 33.13

New York State Office of Mental Health Website on special protections:  
[http://www.omh.state.ny.us/omhweb/hipaa/preemption\\_html/index.htm](http://www.omh.state.ny.us/omhweb/hipaa/preemption_html/index.htm)

**Special Protections for Substance Abuse Treatment Records:**

42 CFR Part 2

All statutes cited here can be accessed through LEXIS-NEXIS or Westlaw. Most can also be accessed at no cost through the Cornell Law School Legal Information Institute:  
<http://www.law.cornell.edu/>

## **Appendix B: List of HIPAA Departments (as of April 2008):**

Following is a list of the HIPAA covered components of State operated campuses. The list is current as of April 2008 and may be subject to change in the future.

Questions about what components of community colleges are covered entities and subject to HIPAA may be referred to the State University of New York Office of Hospital and Clinical Services (518-443-5826).

<b><u>Campus</u></b>	<b><u>Health Care Component</u></b>
<b>University at Buffalo</b>	Center for Dental Studies School of (Dental Medicine) Center for the Study of Pain School of (Dental Medicine) Department of Oral and Maxillofacial Surgery (Dental Medicine) Department of Oral Biology (Dental Medicine) Department of Oral Diagnostic Sciences (Dental Medicine) Department of Orthodontics (Dental Medicine) Department of Pediatric and Community Dentist (Dental Medicine) Department of Periodontics and Endodontics (Dental Medicine) Department of Restorative Dentist (Dental Medicine) Industry/University Center for Biosurfaces (Dental Medicine) Infectious & Chronic Disease Center of Discovery (Dental Medicine) Laser Research Center (Dental Medicine) National Center for Fluoridation Policy and Research (Dental Medicine) School of Dental Medicine School of Dental Medicine Clinic (Dental Medicine) School of Dental Medicine Clinic Van (Dental Medicine) South Campus Instrumentation Center (Dental Medicine)
<b>Downstate Medical Center</b>	College of Medicine - Brooklyn Free Clinic Clinical Research /IRB/Privacy Board Deans Office DMC Administration Finance Graduate Medical Education Information Services Legal Counsel Office of Compliance & Audit Services Office of Contracts & Procurement Office of Institutional Advancement Office of Labor Relations Presidential Area Scientific Medical Instrumentation Center - SMIC Student/Employee Health Services University Hospital of Brooklyn (UHB) University Physicians of Brooklyn, Inc. (UPB)

<b>Fredonia</b>	Youngerman Center for Communication Disorders LoGrasso Student Health Center
<b>College of Optometry</b>	Clinical Research Clinical Services Security Optometric Center
<b>Plattsburgh</b>	Alzheimer's Disease Assistance Center Neuropsychology Clinic Speech and Hearing Center Traumatic Brain Injury Clinic Center for Student Health and Psychological Services Counseling Services Center Athletic Training Facilities
<b>Stony Brook University</b>	Counseling Center SBU Student Health Service Clinical Psychology Department Stony Brook University Hospital HSC (Excluding Sayville Project & Dental) HSC Sayville Project under the School of Social Welfare Long Island State Veterans Home Institution Review Board and Office of Research Compliance School of Dental Medicine
<b>Upstate Medical University</b>	College of Graduate Studies College of Health Professions College of Medicine College of Nursing Employee Relations Executive Council Information Management Technology Institution Compliance Office Office of Diversity and Affirmative Action Office of Internal Audit Office of Public & Media Relations Office of Public Safety University Hospital (excluding Student/Employee Health,) Human Subject Research SUNY Office of University Counsel

**Appendix C: Suggested Form to Determine Student Dependency:**

**Consent Form for Disclosure to Parents of Dependent Students**

To: Registrar, [CAMPUS]

From: \_\_\_\_\_  
Student's First Name Middle Initial Last Name  
\_\_\_\_\_  
Permanent Street Address City State ZIP Code

Under the Family Educational Rights and Privacy Act (FERPA), the [CAMPUS] is permitted to disclose information from your education records to your parents if your parents (or one of your parents) claim you as a dependent for Federal tax purposes. Please indicate whether your parents claim you as a tax dependent.

Please check the appropriate box:

- Yes. I certify that my parents claim me as a dependent for Federal income tax purposes.
- No. I certify that my parents do not claim me as a dependent for Federal income tax purposes.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

If you are not claimed as a dependent or you do not know whether you are claimed as a dependent for Federal income tax purposes, but you agree that [CAMPUS] may disclose information from your education records to your parents, please sign the following consent:

I consent to the disclosure of any personally identifiable information from my education records to my parent(s), for reasons determined by the [Postsecondary Institution] as appropriate. This authorization will remain in effect for the [2008-2009] school year.\*

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

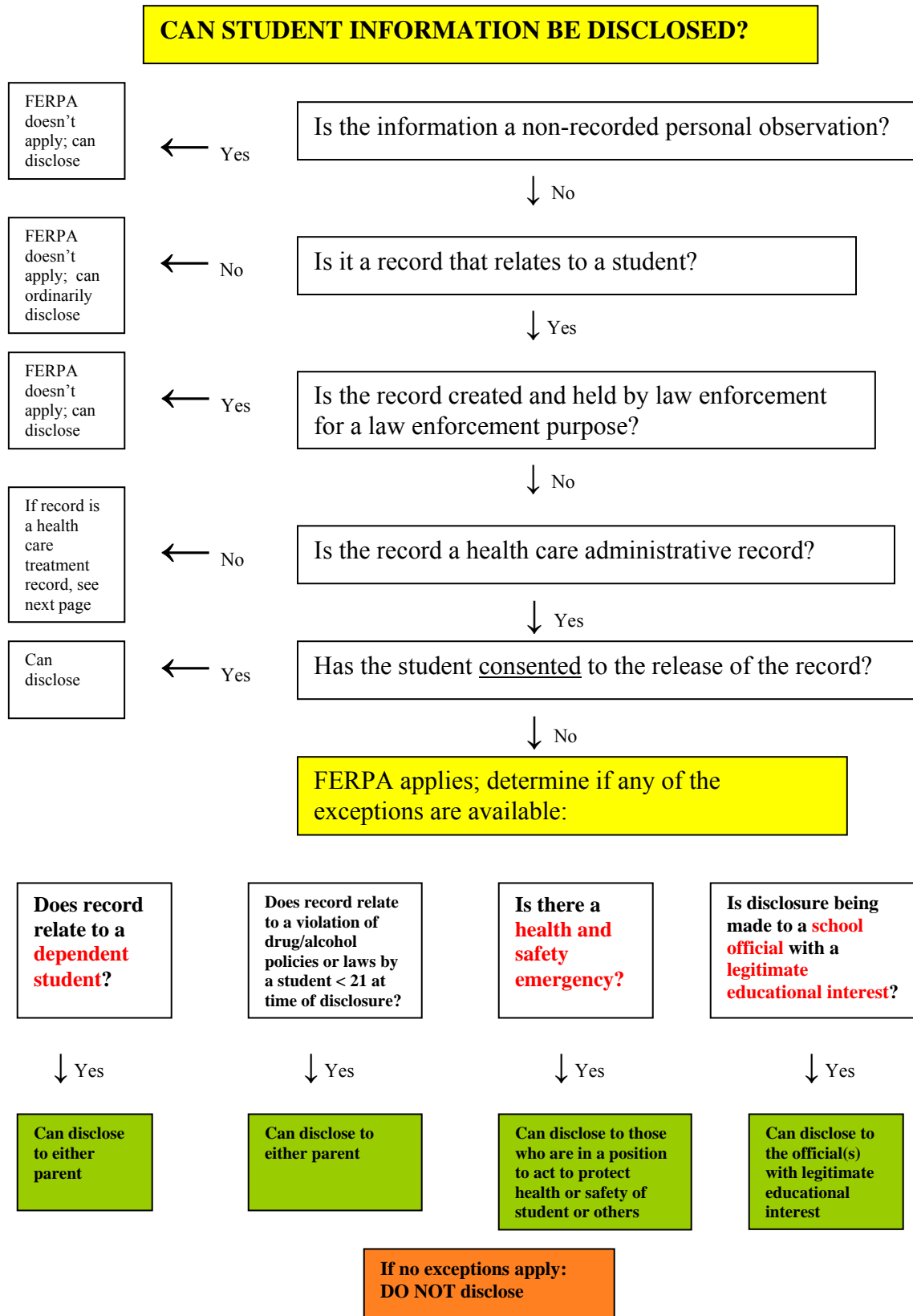
If parents live at the same address, please list both in # 1.

1- \_\_\_\_\_  
Parent First Name Middle Initial Last Name  
\_\_\_\_\_  
Permanent Street Address City State ZIP Code

2- \_\_\_\_\_  
Parent First Name Middle Initial Last Name  
\_\_\_\_\_  
Permanent Street Address City State ZIP Code

\* Students cannot be denied any educational services from [CAMPUS] for refusal to consent.

**Appendix D: Flow Chart on Disclosure of Student Information:**



**IS THE RECORD A HEALTH CARE TREATMENT RECORD?**

