

# Student Privacy Considerations and Distance Learning for All



The Oregon Department of Education is providing this FAQ in response to questions from school districts related to privacy concerns around distance learning environments. This document is meant to be a resource in combination with other guidance and resources on the ODE's [Ready Schools, Safe Learners](#) and [COVID 19 Resource](#) webpages.

## 1. How does the Family Educational Rights and Privacy Act (FERPA) apply to distance learning environments?

Though staff should generally strive to keep student information confidential, FERPA addresses educational records, not the instructional process itself. It is important for educators to understand FERPA. Understanding FERPA helps enable school officials to act quickly and with certainty when confronting challenges that affect the health (physical and emotional) or safety of students or other individuals.

FERPA is a Federal law that protects the privacy of student education records (20 U.S.C. § 1232g; 34 C.F.R. Part 99). ***This includes special education records as well as records related to 504 plans.*** FERPA prohibits educational agencies (e.g., school districts) and institutions (e.g., schools) from disclosing Personally Identifiable Information (PII) from student education records without the prior written consent of a parent or “eligible student,” unless an exception to FERPA’s general consent rule applies (20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31).

Additional detail is available in recent [guidance](#) issued by the U.S. Department of Education Student Privacy Policy Office (SPPO).

## 2. What specific student privacy considerations should districts and programs be aware of when holding live online meetings (i.e., meetings held through Zoom, Cisco Webex, Google Meet, Skype, Microsoft Teams, or similar) where multiple students and their families may see each other?

Family Education Rights and Privacy Act (FERPA) requirements apply to the information contained in student education records. FERPA does not specifically address instruction through virtual settings. There is nothing in FERPA that either specifically allows or specifically prohibits a parent from observing their child’s virtual classroom, even when other children or families are present. Districts frequently make decisions to allow families into in-person instructional settings. Access to virtual instructional settings is equally allowable.

Just as is expected during in-person instruction, teachers and those in an instructional or service provision role should exercise caution not to share PII from student education records during the course of instruction. FERPA generally permits the nonconsensual disclosure of properly designated “directory information” (e.g. name, address, phone number, grade level) when parents or eligible students have not opted out of such a disclosure. “Directory Information” is covered under OAR 581-021-0340(11) (Exceptions to Prior Consent).

# Student Privacy Considerations and Distance Learning for All



Teachers, service providers, and others in an instructional role at this time should be aware of FERPA but not consider it a barrier to providing tele-education or tele-health service to students in diverse distance learning environments.

### **3. May school districts utilize electronic/digital signatures for parent/guardian consent?**

Electronic signatures are allowed by FERPA provided certain conditions are met (see below). The FERPA regulations regarding electronic signatures can be found at [34 CFR 99.3\(d\)](#). That statute is referenced in the IDEA regulation pertaining to the requirements for parent consent/written notification ([34 CFR 300.154](#)). The statutes do not make reference to the platform to be utilized to obtain consent; that decision is up to district policy and security protocols.

Signed and dated written consent under this part may include a record and signature in electronic form that:

1. Identifies and authenticates a particular person as the source of the electronic consent; and
2. Indicates such person's approval of the information contained in the electronic consent.

### **4. Are there additional privacy concerns as it relates to the provision of special education in an online group setting (for example, an SLP providing group therapy as written into IEPs)?**

As long as PII is not being specifically discussed in this context, there is nothing in FERPA that prevents this type of activity. We acknowledge the challenges inherent in distance learning that now make educators guests in student and family homes. It remains best practice that non-students should be discouraged from viewing virtual classroom or service delivery in the event that PII is inadvertently discussed. Schools may wish to have specific instructions for students participating in virtual classrooms or services to not discuss PII or record these activities.

### **5. What is the distinction between the provision of distance learning versus the provision of telehealth?**

School districts may be providing a combination of both telehealth and distance learning opportunities. It can be difficult to differentiate between the two. The ODE has defined distance learning as instruction in which the student and instructor are in different locations. Telehealth is defined in multiple ways and each medical licensing board governs how a provider may provide health services via utilization of telehealth. The ODE recognizes telehealth as the use of electronic information and telecommunication technologies, by medically-licensed professionals, to remotely provide health care services.

The important distinction between virtual learning and telehealth services is the fact that telehealth is a health related service provided by a medically-licensed provider. While virtual learning is being provided via an electronic communication platform, a health service is not being transacted.

# Student Privacy Considerations and Distance Learning for All

- Example: A classroom teacher provides a lesson to students (distance learning)
- Example: A teacher with special education licensure provides SDI (distance learning)
- Example: A licensed SLP provides a direct health related service (telehealth)
- Example: A licensed SLP provides SDI that is not speech related (distance learning)

## 6. Are records created by medically-licensed staff providing health related services to students as per FAPE considered education records and thus, subject to FERPA privacy protections? Is this any different with telehealth?

Records created during the provision of school health services, whether provided in-person or through telehealth, are still considered education records as defined by FERPA at 34 CFR § 99.2. However, in regards to telehealth, there are HIPAA security implications because services are provided via an electronic platform. See next question for more information about HIPAA and the provision of telehealth.

## 7. Can school districts use Skype, Zoom, or Google to provide telehealth services?

**It depends.** There are multiple factors to consider when using telehealth technology. The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) is responsible for enforcing certain regulations issued under the Health Insurance Portability and Accountability Act (HIPAA). Telehealth services are subject to HIPAA requirements for security, transmission, and confidentiality. Compliance with HIPAA requires that covered entities have appropriate administrative, physical, and technical safeguards in place and that they have reasonably implemented those safeguards. See the [HIPAA Security Series 101](#) for more information.

However, during the COVID-19 national emergency, which also constitutes a nationwide public health emergency, OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth. Covered entities seeking to use audio or video communication technology to reach patients where they live can use any non-public facing remote communication product that is available to communicate with patients.

To that end, OCR will temporarily allow providers to use applications such as Apple FaceTime, Facebook Messenger video chat, Google Hangouts video or Skype. The agency also specified that Facebook Live, Twitch, TikTok, and other public-facing video communication should not be used in the provision of telehealth.

Despite this temporary relaxation of rules, OCR does note that healthcare providers should notify parents that such third-party apps may pose a privacy risk. In addition, providers should enable all available encryption and privacy modes when using such applications.

# Student Privacy Considerations and Distance Learning for All

See [Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency](#) for the complete release. OCR has also published an [FAQ](#) related to this change.

Important note: This change does not have an end date at this time but is considered temporary.

## 8. Are there FERPA and HIPAA privacy issues that school officials should consider when working with health departments and other agencies?

FERPA, at [34 CFR §§ 99.31\(a\)\(10\) and 99.36](#), permits an educational agency or institution to disclose personally identifiable information from an educational record to law enforcement, student protective services, and health care professionals and other appropriate parties in connection with a health and safety emergency if the knowledge of the information is necessary to protect the health and safety of the student or other individuals. This exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student's education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease. See the U.S. Department of Education's [FERPA and COVID-19 FAQ](#) for additional information.

## 9. Can instructional sessions be recorded?

A photo or recording of a student is subject to FERPA restrictions when the photo or recording is directly related to a student and maintained by an educational agency or institution. This generally occurs in a disciplinary context, such as when surveillance footage is used to investigate fights, thefts, etc. Recordings of instructional activities are generally not directly related to individual students, but rather incidentally related.

Students cannot use a directory information objection to prevent disclosure of a student's name, email address, etc. in a class for which the student is enrolled. 34 CFR §99.37(c)(1) For additional information, please refer to the U.S. Department of Education's [FAQs on Photos and Videos Under FERPA](#).

## 10. Should districts record such meetings to document that services are being provided?

This is a local decision. It is worth noting that any such recordings directly related to an individual student and maintained by an educational agency or institution would be considered education records and therefore subject to [FERPA's requirements](#).

## 11. Additional Resources

- [U.S. Dept. of Education FERPA and Virtual Learning During Covid-19](#)

# Student Privacy Considerations and Distance Learning for All



- [US Dept. of Education FERPA and Virtual Learning \(1 page resources\)](#)
- [US Dept. of Education FERPA and Virtual Learning Webinar](#) and [recording](#).
- [Joint Guidance on the Application of the Family Educational Rights and Privacy Act \(FERPA\) and the Health Insurance Portability Act of 1996 \(HIPAA\) To Student Records \(December 2019 Update\)](#)
- Student Data Privacy Consortium, [Student Privacy and Covid-19](#)
- The Education Privacy Resource Center, [Ferpa/Sherpa](#)
- [Video Conferencing Tools in the Age of Remote Learning: Privacy Considerations for New Technologies](#), CoSN