# Student Privacy Considerations and Remote/Online Education Platforms

The Oregon Department of Education is providing this FAQ in response to questions from school districts related to privacy concerns and virtual education platforms. This document is meant to be a resource in combination with other guidance and resources on ODE's Ready Schools and Safe Learners webpage.

1. **How does the Family Educational Rights and Privacy Act (FERPA) apply to the remote/online learning environment?**

   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 Section 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 remote/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 remote/online settings. There is nothing in FERPA that either specifically allows or specifically prohibits a parent/guardian from observing their child's remote/online classroom, even when other children or families are present. School districts frequently make decisions to allow families into in-person instructional settings. Access to remote 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).

3. **Are there additional privacy concerns as it relates to the provision of special education in an remote/online group setting?**

   As long as PII is not being specifically discussed in this context, there is nothing in FERPA that prevents the provision of special education in a remote/online group setting. However, school districts may wish to provide specific instructions for students participating in virtual classrooms or group special education instruction to not discuss PII or record these activities.

4. **What is the distinction between online/remote learning versus health service delivery via Telehealth?**

   School districts may be providing both Telehealth and remote/online learning. It can be difficult to differentiate between the two. The ODE has defined remote/online learning as instruction in which the student and instructor are in different locations. This may look different from school district to school district.

   Telehealth is an umbrella term used to describe the use of digital information and communication technology to provide health services remotely. Under this umbrella, medical licensing boards have distinct rules governing the provision of health services via Telehealth.

   The distinction between remote/online learning and Telehealth is the fact that with Telehealth, a health service is provided by, or under the supervision of, a medically-licensed professional. While remote/online learning may be provided via an electronic communication platform, a health service is not being transacted.

   - Example: A classroom teacher provides a lesson to students (remote/online learning)
   - Example: A teacher with special education licensure provides SDI (remote/online learning)
   - Example: A licensed Occupational Therapist provides a direct health related service (Telehealth)

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5. **Are records created by medically-licensed staff providing health related services to students pursuant to an IEP/IFSP or Section 504 plan 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 via Telehealth, are considered education records as defined by FERPA at 34 CFR § 99.2. However, in regards to Telehealth, there are HIPAA security implications because the health services are provided via an electronic platform. See next question for more information about HIPAA and the provision of Telehealth.

6. **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, 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/guardians 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.

   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. This change is expected to be temporary.

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**7. Can remote/online 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 remote/online 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 FERPA's FAQs.

**8. 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.

**9. Additional Resources**

- US Dept. of Education FERPA and Virtual Learning During Covid-19
- 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)

**10. Additional ODE Resources**

- Speech-Language Pathology and Audiology and Telehealth in Schools
- Physical Therapy and Telehealth in Schools
- Occupational Therapy and Telehealth in Schools
- School Nursing and Telehealth
- Telemental Health in Schools