

## 9. Foster Parent Asks a School, a Pediatrician, and a Mental Health Provider to Share Information About a Child



An eight-year-old child who was found to have been physically abused by his biological parents was removed from their home and placed in foster care. The child's biological parents are contesting the removal.

The child's foster mother has called the child's school, pediatrician, and mental health provider to request access to the child's education, medical, and mental health records so that she can better understand and support the child. The child's biological parents have refused to sign consent forms that would enable the sharing of this information.

### Who has the information?

The school, the pediatrician, and the mental health provider.

### Who wants the information?

The foster parent.

### What information does the requester want?

The child's education, medical, and mental health records.

### What does the requester want to do with the information?

She wants to use the information to better understand and support the child.

### Which laws are relevant in this situation?

HIPAA governs the disclosure of the medical and mental health information. FERPA governs the disclosure of education records. In addition, there may be state laws that govern the disclosure of mental health records.

### What do the laws permit, and what do they prohibit?

FERPA permits a parent, guardian, or person standing *in loco parentis* to review a child's education record. In general, if a student is living in the day-to-day care of an individual who is not his or her natural parent or guardian (e.g., a family member or foster parent), that individual may be considered a "parent" under FERPA.

As such, this individual may have access to the student's education record and may provide consent for the disclosure of information from the student's education record.

The Uninterrupted Scholars Act (USA), which amended FERPA, allows a child welfare worker to obtain a student's education record. Under the USA-amended FERPA, the child welfare worker, who has the right to access a child's case plan under state law and whose agency has legal responsibility for the care of the child, may access the child's education record. A school can also release education records to any party listed on a court order issued in a child welfare case, such as a child welfare agency or caseworker, a caretaker, the child's attorney, or a court-appointed special advocate. Schools do not need to provide notice to parents prior to releasing records in accordance with the court order exception when the parents are parties to the child welfare case and, therefore, are already on notice that the child's school records will be shared.

HIPAA permits the disclosure of medical and mental health information with the consent of the minor's parent. (In the case of unemancipated minors, HIPAA states that if state law permits the minor to consent to his or her own mental health treatment, then he or she may consent to the release of that information.)

Under HIPAA, a consent form must be signed and dated by the child's parent and must contain the following:

- A specific description of the protected health information to be released
- Who is authorized to disclose the information
- Who is authorized to receive the information
- How long the consent is valid
- A statement of the right to revoke consent and the process to do so
- A statement of the purpose of the disclosure

In general, even for parents of children temporarily removed from their care, parents retain control over the disclosure of their child's medical and mental health information. Importantly, state law may also govern the disclosure of mental health information.

For children in the foster care system, nothing in HIPAA authorizes the child welfare agency or foster parent to control the release of health information. In practice, child welfare agencies must obtain the consent of the parent or obtain a court order to release protected health information to the child's caretakers. If consent cannot be obtained, HIPAA permits disclosure in response to a court order or subpoena. If the information is disclosed pursuant to a subpoena, the individual seeking the subpoena must demonstrate that he or she has made reasonable efforts to notify the parent of the request for disclosure or has obtained a protective order prohibiting the use of the information for any other purpose other than the litigation for which it is being requested.

## How can the foster parent proceed legally in this situation?

As the person standing *in loco parentis*, the foster parent may contact the school and obtain the child's education information. If the school refuses to provide the education record, the child welfare agency may

contact the school and cite the USA to obtain the record; the child welfare agency can then provide a copy to the foster parent.

The foster parent may not, however, obtain medical or mental health information without parental consent or a court order. The foster parent may ask the court at the next hearing to order the disclosure of the child's medical and mental health information. The child welfare agency may also obtain consent or a court order and then delegate the consent to obtain medical and mental health information to the foster parent as the caretaker of the child.