

# Keeping Everyone Safe:

## What School-Based Prevention Programs Need to Know About State and Federal Confidentiality and Consent Laws

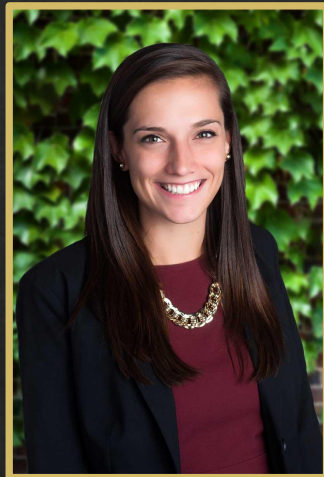
Presented at the NH Prevention Conference

**May 12, 2025**

# Introductions

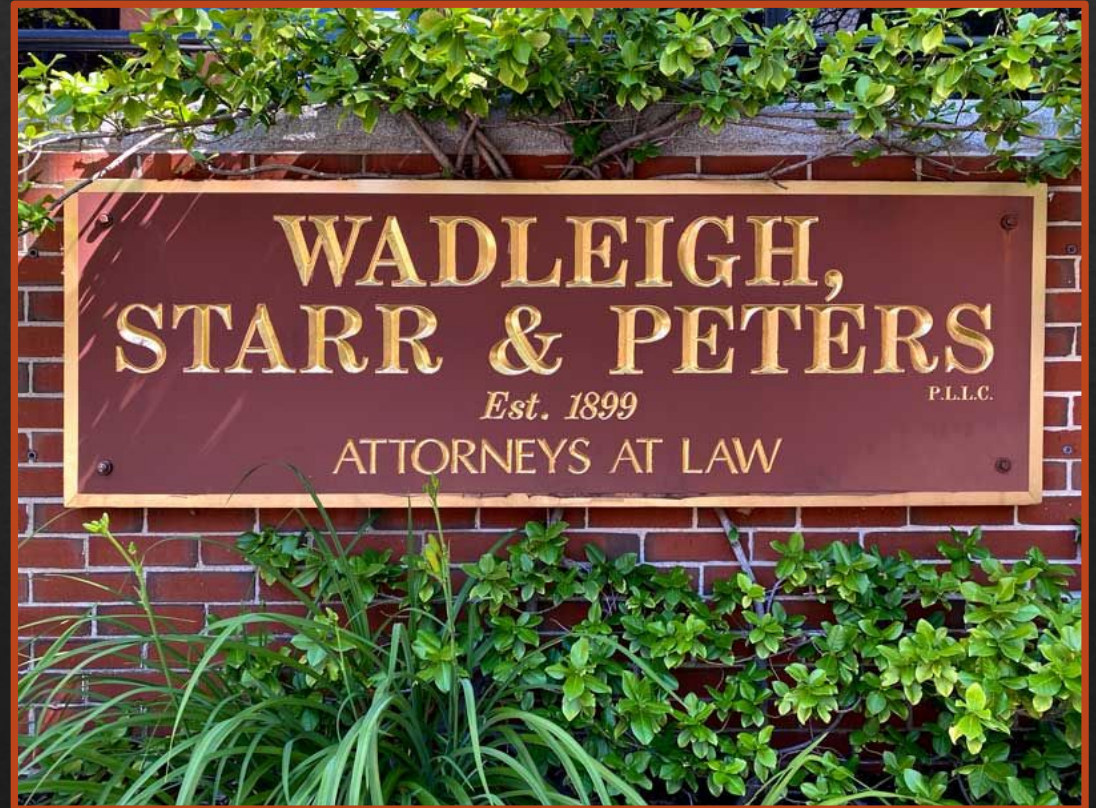


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No two cases are exactly alike. This material is designed to provide SAPs with a broad understanding of the **current** state and federal laws pertaining to consent and confidentiality applicable in the school setting. This material does not include every aspect of the law, and the law is subject to change. You are advised to consult with your attorney regarding specific cases.

## A Word of Caution



CONFIDENTIALITY



STANDARD OF  
CARE

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# Overview

# Today's Roadmap

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Overview of Fed. & State laws

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SAP Referral

---

Screening

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

# Applicable Federal Laws

The Family  
Educ. Rights &  
Privacy Act  
(FERPA)

Individuals with  
Disabilities  
Educ. Act  
(IDEA)

Health  
Insurance  
Portability &  
Accountability  
Act (HIPAA)

42 C.F.R. Part 2  
(Part 2)

# FERPA

FERPA prohibits the unauthorized disclosure of personally-identifiable information from education records. 34 C.F.R. § 99.30(a).

- ◆ **“Education records”** means any recorded information that 1) **contains information directly related to a student**, and 2) **is maintained by an education agency, or by a party acting for the agency**. 34 C.F.R. § 99.3.
  - **FERPA applies to public schools**; however, an SAP operating within the public-school setting will likely be required to adhere to FERPA as part of its contract with the school district.
- ◆ “Education records” **excludes** information 1) kept solely by its author, 2) used only as a personal memory aid, and 3) not accessible or disclosed to any other person—except a temporary substitute for the record’s author. 34 C.F.R. § 99.3.

# IDEA

The IDEA includes additional protections for the education records of special education students.

- ◆ The IDEA and FERPA share the same definition of “education records.” 34 C.F.R. § 300.611(b).
- ◆ Please note the IDEA’s “**child-find requirement**”. This requires educational agencies to refer students for special-ed services or a Section 504 plan *if they suspect the child has a disability and requires supports*. 34 C.F.R. §§ 104.35, 300.111.

# HIPAA

HIPAA prohibits healthcare plans, providers, and clearinghouses from disclosing “protected health information” (PHI) without consent.

- ◆ **PHI excludes information covered by FERPA.** 45 C.F.R. § 160.103.
- ◆ Accordingly, HIPAA does not likely apply to SAPs employed by or acting for educational agencies, and this presentation will not focus on HIPAA.
  - But if an SAP coordinator sees a student as part of a private practice, the coordinator should seek legal advice regarding HIPAA’s applicability.

## Part 2

- ◆ Part 2 prohibits unauthorized **disclosure** and **use** of records related to the **diagnosis, treatment, and referral** of people who may have **substance-use disorders** (SUDs) by “**Part 2 programs.**”
- ◆ Part 2 prohibits use and disclosure of records absent an applicable exception.

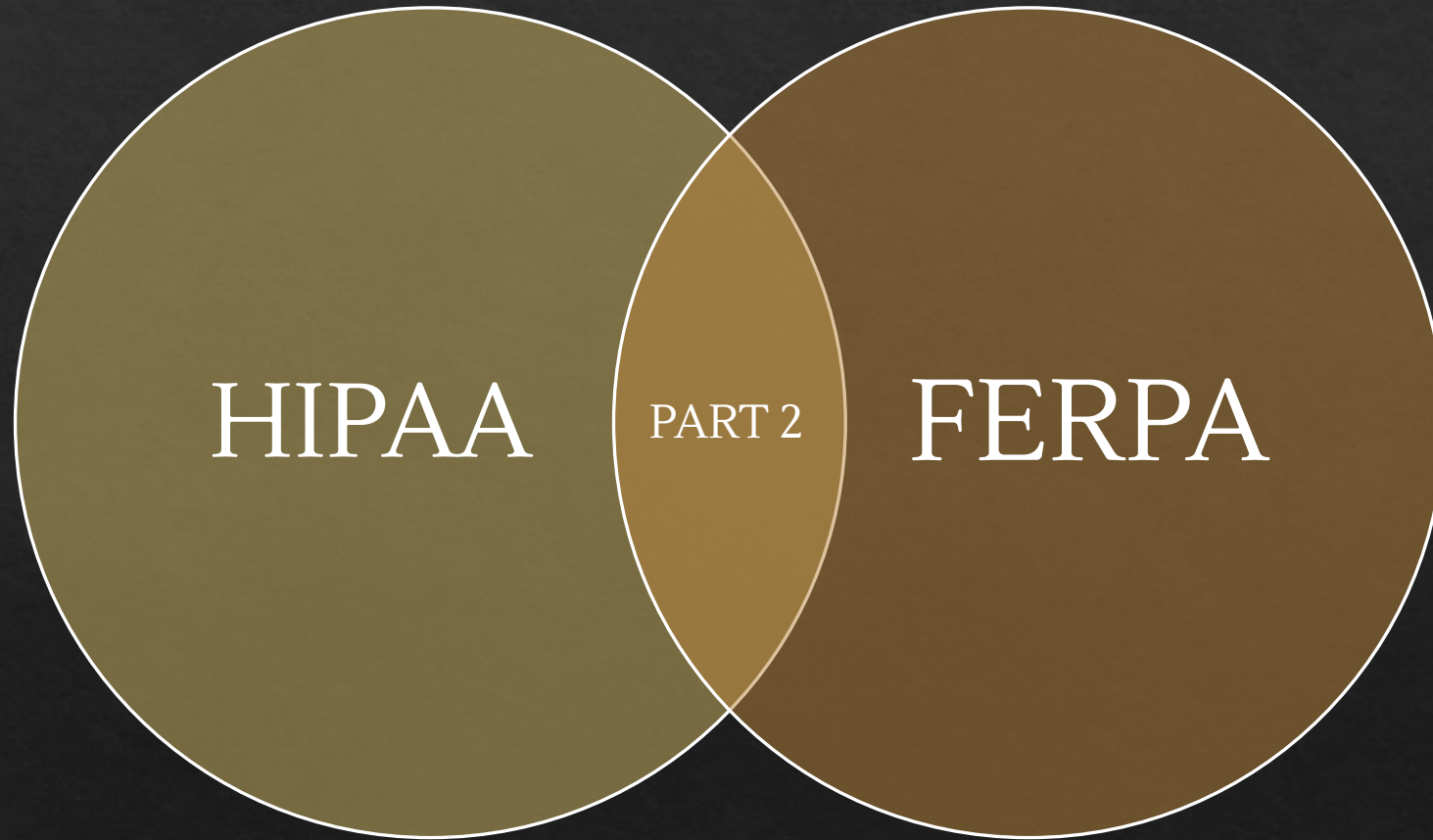
# Part 2

- ◆ An individual or entity will be considered a **Part 2 program** if they provide or make referrals for SUD services, and do anything that would lead someone to reasonably think they provide SUD diagnosis, treatment, or referral for treatment.
  - ◆ Specifically, a Part 2 program means:
    - A person (other than a general medical facility) that holds itself out as providing, and provides, SUD diagnosis, treatment, or referral for treatment; or
    - An identified unit within a general medical facility that holds itself out as providing, and provides, SUD diagnosis, treatment, or referral for treatment; or
    - Medical personnel or other staff in a general medical facility whose primary function is the provision of SUD diagnosis, treatment, or referral for treatment and who are identified as such providers.
- See 42 C.F.R. § 2.11.
- ◆ “Person” is defined to include a natural person (meaning a human being who is born alive), trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private. 42 C.F.R. § 2.11; 45 C.F.R. § 160.103.
  - ◆ **An SAP would likely be covered by Part 2 because they can refer students for treatment for an SUD.**

## Part 2

**Records** are broadly defined as “any information, whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (e.g., diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts), **and including patient identifying information**...” 42 C.F.R. § 2.11.

# Relationship Between Federal Laws Pertaining to Confidentiality of Records



SAPs covered by Part 2 are required to comply with both state and federal law to the extent possible. In analyzing their obligations under Part 2 and other laws, SAPs should always err on the side of caution and comply with the law which is more protective of student privacy rights.

## Practice Pointer

# Examples of Potentially Applicable NH Laws

- ♦ RSA 189:66–67 protects **student records and data** and allows parents to request personally-identifiable data about their children.
- ♦ RSA 186:11, IX-d, prohibits **non-academic surveys and questionnaires** without parental consent.
- ♦ RSA 193-J:2 obligates schools to implement **suicide prevention and risk-assessment** plans.
- ♦ Requirements for **specific licensed or credentialed individuals**.
  - Examples: RSA 330-A (mental-health providers), RSA 329-B (psychologists), RSA 326-B (nurses), RSA 328-F (allied health professionals), and RSA 330-C (certified or licensed SUD professionals).

# Today's Roadmap

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Overview of Fed. & State laws

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SAP Referral 

---

Screening

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

An SAPs' involvement with a student may begin with a referral (from the student, parent, teacher, staff, or other).

**Crucial questions for SAPs during the referral process:**

1. When must an SAP obtain parental consent before working with a student?
2. How should an SAP reconcile their confidentiality obligations with obtaining parental consent?
3. To what extent can the school share student information with the SAP?

## Referral Process

# 1. When must an SAP obtain parental consent before working with a student?

- ◆ **If the SAP is run by the school and staffed by its employees**, the SAP is permitted to listen to student concerns without parental consent, particularly where those concerns are impacting the student while in school.
  - School stands in loco parentis for students while they are in school, meaning the school has a duty to supervise the students. See Marquay v. Eno, 139 N.H. 708 (1995).

# 1. When must an SAP obtain parental consent before working with a student?

- ◆ **If the school district contracts with an outside entity as their SAP**, best practice is to obtain parental consent prior to working with a student.
- ◆ However, obtaining such consent requires care, especially when the student is seeking support for a potential SUD.
  - Unfortunately, many times, an SAP will not know the types of services a student will require until after they start working with them.

# Special Considerations for minor students with potential SUD concerns

- ◆ Under Part 2, if state law permits a minor to obtain SUD treatment on their own, **the minor is the only person who can provide written consent.** 42 C.F.R. § 2.14(a).
  - In NH, minors **12 years or older** can consent to treatment of “any problem related to the use of drugs.” RSA 318-B:12-a.
    - ◆ Thus, students 12 years or older can consent to the disclosure of patient-identifying information to any other person or entity, including to their parents.
    - ◆ For students 11 and younger, an SAP must have written consent from **both the student and the parent**. See 42 C.F.R. § 2.14(b).
- ◆ Part 2 has specific provisions for circumstances where a minor applies for treatment of a SUD on their own, but parental consent is required by law. See 42 C.F.R. § 2.14(b)(2).

## 2. How should an SAP reconcile confidentiality obligations with obtaining parental consent?

### PLAN AHEAD!

- ◆ Because an SAP may not know the types of services a student may need prior to working with them, best practice is to address the conflict before it arises.
- ◆ How to do that?
  - ▣ **SAPs should collaborate with the school district administration to craft a form for parents and guardians to sign at the beginning of every year.**
    - ◆ This form would explain the types of services the SAP provides in the school and ask parents to provide their consent in the event their student seeks assistance.
    - ◆ This form should also describe the types of services the SAP does **not** provide, such as diagnosis and treatment.
- ◆ Best practice would also include the school district posting the description of the SAP in their student handbook, as well as on their website.

### 3. To what extent can the school share student information with the SAP?

- ◆ **If the SAP is run by the school and staffed by its employees**, the SAP can obtain student information that would be relevant and necessary to their role in working with the student.
  - FERPA exception for “**school officials**” with a “**legitimate educational interest**” in the information. See 34 C.F.R. § 99.31(a)(1).
- ◆ **If the school district contracts with an outside entity as their SAP**, the answer will depend on the terms of the parties’ contract.

# Can the School District Share Information with the Outside SAP?

- ◆ Under FERPA, school districts can share information with a non-employed contractor when the contractor “**performs an institutional service or function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of [personally identifiable information] from education records...**” See U.S. Department of Education’s FERPA Model Notification of Rights.
  - Since public schools are charged with supporting students’ well-being, the SAPs they contract with likely fit under FERPA’s exception if the SAP is under the “direct control” of the school with respect to information disclosed.

Best practice would be to clearly **define the SAP's relationship with the school district**, as well as **the requirements pertaining to the SAP's use and maintenance of student information**, **in the parties' contract**.

In addition, the school district should include the SAP within its **annual FERPA notice** of who constitutes a “**school official**.”

*The purpose of this is to ensure that it is clear the SAP is within the district's “direct control” as to the information disclosed, so that the district can lawfully share information with the SAP.*

## Practice Pointer

# Today's Roadmap

---

Overview of Fed. & State laws

---

SAP Referral

---

Screening 

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

- ◆ After the student is referred, **the next step is determining what types of support the student needs**.
- ◆ It is important for SAPs to understand the various laws that **mandate** and/or **prohibit** screening in order to effectively and lawfully assist students.
  - Part of this is understanding what does and does not constitute “screening.”

# Screening

# Screening

## What is screening?

- GAIN-SS
- CDC'S Youth Risk Behavior Survey
- Safety-oriented screening for suicidal ideation under a district's suicide prevention protocol. See RSA 193-J:2

## What isn't screening?

- Diagnosis and/or treatment of a condition
- More formal, in-depth evaluations of a student which require parental consent

# New Hampshire's Prohibition Against “Non-Academic Surveys or Questionnaires” in Schools

- ◆ In 2015, NH passed a law requiring school districts to obtain prior written consent from parents before administering “**non-academic surveys or questionnaires**”. See RSA 186:11, IX-d; NH DOE Guidance.
  - “Non-academic surveys or questionnaires” are defined as “**surveys, questionnaires, or other documents** designed to elicit information about a student’s social behavior, family life, religion, politics, sexual orientation, sexual activity, drug use, **or any other information not related to a student’s academics.**”
    - ◆ **Note:** the definition is limited to documents; therefore, this would not impact an SAP having a discussion with a student on these topics.
  - Parents must “opt in” to the survey or questionnaire.
  - **Exception:** Schools may administer the CDC’s youth risk behavior survey **unless** the parents opt-out.
  - **Administration of the GAIN-SS would likely fall under this provision in the school setting; therefore, prior written parental consent would be required.**

NH law obligates educational agencies to plan for preventing, **assessing the risk of**, intervening in, and responding to suicide. See RSA 193-J:2.

This plan must include **training for school faculty** and staff, including contracted personnel, “in youth suicide risk factors, warning signs, protective factors, response procedures, referrals, post-intervention, and resources available within the school and community...”

SAPs working in the school setting should be familiar with the district’s suicide prevention protocol.

**Nothing in this presentation should be interpreted to prevent SAPs from assessing a student for suicide risk factors and/or warning signs.**

School employees and contractors are immune from civil liability for conduct related to implementing the above law. See RSA 193-J:3.

# Practice Pointer

# Screening

**Note: identification is not diagnosis.**

- ♦ The goal is to **identify** students with **possible** behavioral health issues **and then provide options for further assessment/treatment**.
- ♦ Screeners do not provide sufficient info to diagnose someone. Only medical professionals can diagnose.

# Today's Roadmap

---

Overview of Fed. & State laws

---

SAP Referral

---

Screening

---

Sharing Student Info 

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

SAPs may be part of an education agency's behavioral health team, and it may be necessary to share student information with school personnel.

**When may an SAP share student information with the school or its employees without parental consent??**

## Sharing Student Info

# SAPs Sharing Student Info With School Team

- ◆ **If the school runs and staffs the SAP:**  
the SAP may share student info, including SUD info, with other school employees.
  - Recall that FERPA permits disclosing student information to “**school officials**” who have a “**legitimate educational interest**” in reviewing the records.
  - Likewise, Part 2 permits disclosure of SUD info **within a Part 2 program** if the disclosure is between personnel **who need the information in connection with their duties** to diagnose, treat, or refer SUD patients. See 42 C.F.R. § 2.12(c)(3).
    - ◆ Therefore, disclosure must be limited to what is necessary for the SAP and recipient to fulfill their duties.

# SAPs Sharing Student Info With School Team

- ◆ **If the SAP is an outside contractor**, it comes down to the parties' contract.
- ◆ Part 2 permits a third-party SAP to share SUD info with the education agency **if** the agency has **“direct administrative control”** over the SAP. See 42 C.F.R. § 2.12(c)(3).
  - **But** this disclosure must be between personnel **who need the information in connection with their duties to diagnose, treat, or refer SUD patients**.
- ◆ SAPs should also keep in mind FERPA's provisions related to allowing the disclosure of records to “school officials”, namely, for an outside contractor to qualify, the contractor must:
  - Perform an institutional function for which the school would otherwise use its own employees, and
  - Be under the “direct control” of the school with respect to the info disclosed.

Best practice is for records created by the SAP indicating a student has been **referred for, diagnosed with, or is receiving treatment for SUD** be maintained in a location **separate from the rest of the student's records**.

## Practice Pointer

# Other Considerations for SAPs Sharing Student Info

- ◆ Under Part 2 and NH law, students 12 years or older must consent to the disclosure or use of identifying SUD information to any other person or entity, including their parents.
  - In practice, SAPs should try get **both parent and student consent** where students are 12 years old or older. See “How should an SAP reconcile confidentiality obligations with obtaining parental consent?”
- ◆ There may be additional restrictions on disclosure from an SAP’s **individual license/credential** and any applicable **code of conduct**.
  - Individuals should consult their licensing/credentialing organization for more information about how specific confidentiality requirements could affect disclosure.
- ◆ Many times, parties may address these issues within their contract or through prior written consent.

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Overview of Fed. & State laws

---

SAP Referral

---

Screening

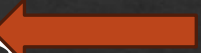
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Sharing Student Info

---

School & Outside Referrals

---



Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

- ◊ Once the SAP assesses a student, it has a duty to:
  - Determine what services and supports the student needs, and
  - Connect them to such in a timely manner.
- ◊ ***But*** the SAP should be **careful not to assume additional duties**, including therapeutic duties, while working with students.

## Referrals

# Dangers of Assuming Additional Duties

- ◆ If an SAP assumes additional duties, it may **expose the SAP and the education agency to additional liabilities if the SAP puts a student in a worse position** through its actions/inactions.
- ◆ In NH, while an individual or entity generally has no duty to aid or protect another, schools have been found to share a “special relationship” with students giving rise to a duty of reasonable supervision. See Marquay v. Eno, 139 N.H. 708 (1995).
- ◆ The NH Supreme Court’s dicta in Mikell v. SAU # 33, 158 N.H. 723 (2009) further opined that a school could *voluntarily* assume additional duties where:
  - Its conduct increases the actual danger to a student, or
  - The student has been induced to forego other opportunities of obtaining assistance.

# What can “assuming duties” look like for an SAP?

## Example 1

- SAP staff with no mental-health training advises a student contrary to what a professional would say.
- If the student decides not to seek professional help because of the SAP staff's advice, the SAP and school could be liable for the student's later actions.
- Likewise, if a school normally offers students with trauma therapeutic interventions—but fails to do so for one student—a court may determine the school 1) assumed a duty to offer adequate therapeutic interventions to students, and 2) fell short of that duty for the one student.

## Example 2

- SAP staff directly counsels a student for their SUD over the school year. The student relies on this counseling to be sober, and the SAP never refers the student to an outside provider.
- If the student never seeks a provider during the summer (when school is out), the SAP and school could be liable for any relapse.

# Referrals

- ◆ Instead of trying to treat the student, SAPs should **refer them to appropriate resources**.
- ◆ Resources can often be within the school (like school counselors, special education referrals).
  - *SAPs must also be aware of **referral obligations** arising under the IDEA and Section 504, as well as its **reporting obligations** for abuse/neglect under RSA 169-C, acts of theft, destruction, or violence under the Safe School Zones Act, suspected bullying under RSA 193-F, sexual harassment under state and federal law, etc.*
- ◆ Resources may require a referral to an outside provider or service, such as a SUD counselor, psychiatrist, psychologist, physician, etc.
  - **REMEMBER: SAPs must obtain appropriate prior written consent—per school policy and the applicable laws—before releasing any info about the student.**
  - **Note:** the form of a release will depend on the type of records to be released. For example, the release of SUD records has more requirements than FERPA.

# Today's Roadmap

---

Overview of Fed. & State laws

---

SAP Referral

---

Screening

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring 

---

Health & Safety Emergencies

---

Best Practices for Contracting

---

After the SAP assesses a student and refers them to appropriate resources, the SAP should:

1. **Follow up to confirm the student accessed the suggested resources.**
2. **Find out if the resources were helpful.**
  - *If not, the SAP should discuss different options with the student.*
3. **Periodically check on the student** to determine whether they need different resources or resources over school breaks.

Doing the above ensures the SAP acts reasonably with the information received from student and does not increase its risk through inaction.

# Monitoring

# Today's Roadmap

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Overview of Fed. & State laws

---

SAP Referral

---

Screening

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencie

---

Best Practices for Contracting

In some cases, an SAP hears something from a student which requires disclosure to **prevent harm to that student or others**.

While every case is different, **confidentiality should never come before student safety**.

- ◆ Depending on the circumstances and applicable laws, it may be appropriate for an SAP to contact a student's parents, report to law enforcement, or speak with emergency medical professionals.

## Health & Safety Emergencies

# Examples

## Example 1

- SAP staff works with a student with severe mental-health concerns. The student expresses anger toward another student and a plan to harm them. The SAP believes the student intends to act on this threat.

## Example 2

- SAP staff is aware a student takes specific drugs, and the student has a medical emergency at school. Knowledge of the drugs likely in the student's system could be vital in addressing their medical needs.

# Health & Safety Emergencies Under FERPA

- ◆ **FERPA** permits disclosure of info to “appropriate parties, including parents of an eligible student” in connection with a “**health or safety emergency**” *if* knowledge of the information is “**necessary to protect the health or safety of the student or other individuals**.” See 34 C.F.R. § 99.36.
  - Disclosure may be made to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”
  - A “**health or safety emergency**” exists if the district determines, based on the totality of the circumstances, there is an “**articulable and significant threat** to the health or safety of a student or other individuals.”

# Health & Safety Emergencies Under Part 2

- ◆ Part 2 permits disclosure of SUD information to **medical personnel** to the extent necessary to meet “**a bona fide medical emergency**” in which:
    - The patient’s prior consent cannot be obtained; or
    - Part 2 program is closed and unable to provide services or obtain prior written consent of the patient, during a temporary state of emergency declared by a state or federal authority as the result of a natural or major disaster, until such time that the part 2 program resumes.
- See 42 C.F.R. § 2.51.
- ◆ **Note:** *After a disclosure due to a bona fide medical emergency, the Part 2 program must **document** the disclosure according to 42 C.F.R. § 2.51(c).*

**Part 2's exception is narrower than FERPA's exception** because an emergency disclosure under Part 2 can only be made to **“medical personnel”**, as opposed to FERPA's, where disclosure may be made to **“any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals...”**

Practice Pointer

When in doubt, during a medical emergency, **an SAP should always err on the side of disclosure to a medical professional as the path of least risk.**

Practice Pointer

# Duty to Warn

- ◆ Schools must take threats to student and staff safety very seriously. **Therefore, there may be circumstances where an SAP must decide whether to disclose student information to prevent harm to that student or others.**
  - ◆ When this arises, the same legal provisions apply, except:
    - SAMHSA, the federal agency that has typically enforced Part 2, has clarified that **Part 2 programs may report information about an immediate threat to the health or safety of an individual or the public info to law enforcement (even in nonmedical emergencies) so long as no patient-identifying info is shared.**
- See  
<https://www.samhsa.gov/about-us/who-we-are/lawsregulations/confidentiality-regulations-faqs> (last accessed May 4, 2025).
- Practically, this means an SAP could warn of a threat but cannot share info related to the identity of the student(s) involved.

Best practice when faced with an **immediate threat to the safety of someone other than the student** will always be a report to **law enforcement**.

**Where the threat is to the student themselves**, if there are no substance use issues involved (or the disclosure does not otherwise implicate Part 2), disclosures can be properly made to the **student's parent**.

Similarly, if Part 2 is not implicated and **the threat to another student is not immediate**, the SAP can contact **the student's parent** so that support may be consistent throughout the student's day, both at home and at school.

# Practice Pointer

# Additional Consideration S

There may be additional **duties to warn** from an SAP member's **individual license/credentialing** and any applicable **code of conduct**.

- ◆ Example: RSA 330-C:25 explains an SUD professional's duty to warn of, or take reasonable steps to provide protection from, a client's violent behavior when the client communicates to the professional a serious threat of violence against clearly defined or reasonably identifiable victim(s), or substantial damage to real property.

# Today's Roadmap

---

Overview of Fed. & State laws

---

SAP Referral

---

Screening

---

Sharing Student Info

---

School & Outside Referrals

---

Monitoring

---

Health & Safety Emergencies

---

Best Practices for Contracting

---



For contracts between education agencies and third-party SAPs, **both parties should seek professional, legal advice.**

- ◆ Doing so will help clearly define the parties' relationship and expectations.

Here are some general best-practice tips for SAPs contracting with school districts.

## Best Practices for Contracting

# Best Practices for Contracting

**Contracts should include basic information pertaining to the parties and their agreement.**

- ◆ Basic information includes the correct names of the parties, the length of the contract, the compensation, requirements for early termination, requirements for modifying the contract, etc.
- ◆ More detail and clear language in a contract = lower chance of future disputes.

# Best Practices for Contracting

## The contract defines the parties' relationship.

- ◆ If the school and third-party SAP want to communicate freely with each other about the students they serve, it is important their contracts reflect that the SAP is under the **direct administrative control** of the school district and that the district has **direct control** over the student information it receives from the SAP and the student information the SAP receives from the district.
  - If this is unclear in the contract, prior written consent may be required before the SAP and school can share information.
  - If the SAP receives information from the school, **the contract should clearly state the SAP has an obligation to know of and comply with FERPA, as well as the school's data governance policies.**

# Best Practices for Contracting

**Any preferred credentials or licenses should be clearly stated in the contract.**

- ◆ Individuals' credentials could require specific reporting or confidentiality duties, as well as adherence to a code of conduct. The parties should know this up front.
- ◆ Clearly defining the SAP's role and expected services in the contract can avoid unintended assumption of duties and roles.

# Best Practices for Contracting

The contract may include liability or indemnification language.

- ◆ Indemnity refers to a “duty to make good any loss, damage, or liability incurred by another.”
- ◆ If an SAP agrees to indemnify a school for a certain type of loss—and that loss occurs—then the SAP will be financially responsible.

# Best Practices for Contracting

**The contract should name the policies and procedures the SAP will be subject to.**

- ◆ Examples of policies include: FERPA, nondiscrimination, data-privacy, anti-bullying, Title IX, Safe School Zones Act, restraint and seclusion, student conduct code, DCYF-reporting, and suicide-prevention.
- ◆ Likewise, if SAP members need to undergo training or criminal-background checks, the contract should say so.

# Best Practices for Contracting

**SAPs can expect schools to contract for data-privacy protections.**

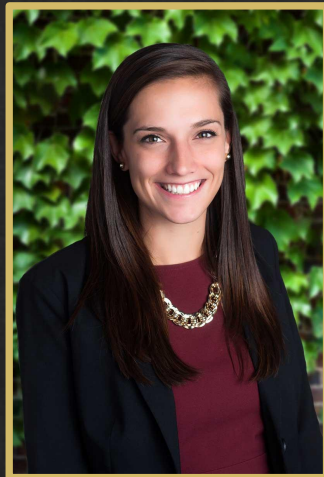
In this age of digital records, SAPs can expect district to ask the SAP to demonstrate how it will preserve the sanctity of education records.

Questions?

# Thank you for your time.



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