

The background of the document is a photograph of two young people sitting on a green, textured couch. On the left, a person wearing a blue and white striped long-sleeved shirt and tan pants is sitting. On the right, a person wearing a light blue button-down shirt over a white t-shirt and red pants is sitting. They are both looking down at a silver laptop that is open on the person's lap on the right. The laptop screen is blank and reflects some light. The overall lighting is soft and natural.

Lawfully Managing Student Records and Privacy

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LORMAN[®]

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Lawfully Managing Student Records and Privacy

I. ADA-PEP COUNSELORS AND PRIVACY

The Federal Government provides some funding for counselors whose primary role is to educate students about drug abuse, deter such abuse, and assist those at risk for such abuse in avoiding it. The statutes and regulations providing this funding mandate that the information obtained in such counseling be kept confidential, including the identity of those who participated, whether they had abused drugs, and related information. This information can be disclosed to third parties without student consent only in very specifically described circumstances.

a. Regulations Affecting ADA-PEP Counseling

The regulations that primarily affect ADA-PEP counselors is found at 42 C.F.R. § 2.1, et seq. These provisions mandate that any counseling that is funded in whole or in part by “any department or agency of the United States” must remain confidential, including any disclosures of drug usage, the identity of those receiving such counseling, and any other information obtained as a result of such a counseling relationship. 42 C.F.R. § 2.12. The regulations strongly prohibit any disclosure of such information to law enforcement agencies, for obvious reasons: few will come to receive assistance from such programs if they believe they will be subjected to criminal prosecution for whatever information they might reveal during the counseling. 42 U.S.C.S. § 290dd-2(c); 42 C.F.R. § 2.65.

The regulations permit disclosure of such information to third parties, only in narrow circumstances:

- In response to a subpoena that has been issued by a Judge, provided the Judge has specifically considered how such disclosure will affect the counselor-patient relationship and whether the need for the information outweighs such negative results;
- There is evidence that the student has threatened or is likely to cause serious physical injury to himself/herself or another;
- The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect;
- The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 C.F.R. § 2.63.

The penalties for inadvertent disclosure can be severe for any Federally funded program. The regulations authorize the Department providing the funds to make the offending program ineligible for such funds, following notice of the alleged offenses and the opportunity for a hearing, at which the accused party can defend itself. 42 U.S.C.S. § 290dd-1. Additionally, a violation of these regulations can result in criminal charges being proffered against the offending party not more than \$500 for the first offense and not more than \$5000 for each

subsequent offense if the individual is found guilty of having wrongfully divulged confidential material to third parties. 42 C.F.R. § 2.4.

II. STATE PROVISIONS PROTECTING VARIOUS HEALTH INFORMATION REGARDING STUDENTS

The several States have a number of statutory protections protecting a number of categories of student information from disclosure to third parties. In some states, even disclosure to parents is prohibited. These protections typically apply to information regarding HIV/AIDS and pregnancy. The following is a list of the protections provided by various states, as a sampling of such laws. You should be sure to check the statutes of your specific state in this regard.

a. HIV/AIDS

Several States protect student information that would identify those students who are infected with HIV/AIDS. These include Arizona, California, Colorado, Delaware, Georgia, Hawaii, Iowa, Indiana, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, and Washington.

b. Pregnancy/Abortion

A number of states have statutes in place that protect information concerning the pregnancy of students and/or whether such students have sought or obtain the services of an abortion clinic or physician. These statutes predominately prohibit the advisement of third parties, and in some cases even parents, of such information. Similar to the section on HIV/AIDS, a sampling of such states include

Arizona, California, Colorado, Delaware, Georgia, Hawaii, Iowa, Indiana, Louisiana, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, and Washington.

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