



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT

March 27, 2019

Senator Tom Barrett
Michigan Senate
P.O. Box 30014
Lansing, Michigan 48909-7514

Dear Mr. Barrett:

This is in response to your August 24, 2017, letter to the Family Policy Compliance Office (FPCO), now known as the Student Privacy Policy Office (Office), in which you ask about the applicability of the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) to certain reporting requirements of State laws and regulations concerning the disclosure of the immunization status of students. This is also in response to your telephone conversation with FPCO on May 8, 2018, regarding this same issue, as well as subsequent email communications with your staff. We apologize for the amount of time it has taken us to respond to your letter. We are sending a copy of our response to the cosigners of your letter. As explained more fully below and based on the information that you have provided, we believe that FERPA requires that, at the elementary and secondary level, any disclosure of student immunization records that are maintained by educational agencies and institutions to the State or local health department pursuant to State law and regulations must be made with the prior written consent of parents or eligible students because nothing in your inquiry or State code indicates that the disclosure of such immunization information would satisfy the health or safety emergency exception or any other exception to the general requirement of prior written consent in FERPA.

Background on FERPA

FERPA is a Federal law that protects the privacy of students' education records and the personally identifiable information (PII) contained therein. The term "education records" means, with certain exceptions, those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 CFR § 99.3 "Education records." "PII" refers to information, such as a student's name or identification number, that can be used to distinguish or trace an individual's identity either directly or indirectly through linkages with other information. 34 CFR § 99.3 "Personally Identifiable Information." FERPA affords parents and eligible students the right to have access to their education records, the right to seek to have their education records amended, and the right to have some control over the disclosure of PII contained in their education records. 20 U.S.C. §§ 1232g(a)(1) and (2), (b), (d) (h), (i), and (j); 34 CFR Part 99, Subparts B, C, and D; 34 CFR § 99.5(a)(1). (An "eligible student" is a student who has turned 18 years of age or is attending an institution of postsecondary education at any age. 34 CFR § 99.3 "Eligible student.")

Under FERPA, an educational agency or institution is prohibited from disclosing student education records or the PII contained therein, without prior, written consent from the parent or eligible student, unless the disclosure meets an exception to FERPA’s general consent requirement. See 20 U.S.C. §§ 1232g(b), (h), (i), and (j); 34 CFR §§ 99.30 and 99.31. Exceptions to FERPA’s general consent requirement are set forth in 34 CFR § 99.31 and 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7), (h), (i), and (j). (A copy of FERPA’s implementing regulations may be found on our website at: <https://studentprivacy.ed.gov/resources/family-educational-rights-and-privacy-act-regulations-ferpa>).

Discussion

At the elementary and secondary level, student health records, including immunization records, maintained by educational agencies and institutions, or by parties acting for such agencies or institutions, that are subject to FERPA are generally considered “education records” under FERPA. We note that while the exception to the definition of education records for treatment records applies to students who are 18 years of age or older, it requires, among other conditions, that the records be made, maintained, or used only in connection with the provision of treatment to a student, and it does not appear that immunization records are used in connection with the provision of treatment to a student. We also note, as explained more fully in the joint guidance that we issued with the U.S. Department of Health and Human Services on FERPA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), that the HIPAA Privacy Rule excludes from its coverage as “protected health information” student education records that are protected by FERPA. A copy of the joint guidance is available at the following link: <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>). Accordingly, at the elementary and secondary level, student health records that are maintained by educational agencies and institutions may not be disclosed without the prior written consent of the parent or eligible student, unless an exception to FERPA’s general consent requirement applies.

Under one such exception, an educational agency or institution may nonconsensually disclose a student’s education records or PII contained therein “in connection with an emergency [to] appropriate persons if knowledge of such information is necessary to protect the health or safety of the student or other persons.” 20 U.S.C. § 1232g(b)(1)(I). In determining whether it may rely on the health or safety emergency exception, educational agencies and institutions:

...may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is *an articulable and significant threat* to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is *a rational basis for the determination*, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

34 CFR § 99.36(c) (emphasis added); *see also* 73 FR 74806, 74837 (Dec. 9, 2008) (explaining that the Department amended FERPA’s health or safety emergency exception to add subsection (c) in order to “provide[] greater flexibility and deference to school administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals.”). “[T]o be ‘in connection with an emergency’ means to be related to the threat of an *actual, impending, or imminent emergency*, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives *sufficient, cumulative warning signs* that lead an educational agency or institution to believe the student may harm himself or others at any moment.” *Id.* at 74838 (emphasis added). (Guidance on our website explains this and other exceptions typically related to emergencies: <https://studentprivacy.ed.gov/resources/addressing-emergencies-campus>. Further, in 2009, we issued guidance concerning the disclosure of PII from students’ education records to outside entities, including State and local health departments, when addressing the H1N1 flu outbreak; which is available at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-h1n1.pdf.)

Nothing in your inquiry indicates that the disclosures of student health information under the aforementioned Michigan laws or regulations would satisfy the health or safety emergency exception to FERPA’s general consent requirement. Rather, these disclosures appear to encompass routine releases of students’ immunization records by educational agencies and institutions to local health departments. Congress has provided no exception to FERPA’s general consent requirement that permits such routine disclosures of immunization records, without parental or eligible student consent.

We address your specific questions below.

State Reporting Requirements

You explain that the following laws and regulations require disclosures by educational agencies and institutions in Michigan and ask specific questions about each of the provisions:

Section 333.9215 of the Michigan Compiled Laws (MCL), which provides that:

- A child is exempt from the requirements of this part as to a specific immunization for any period of time as to which a physician certifies that a specific immunization is or may be detrimental to the child’s health or is not appropriate.
- A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child’s school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization.

You specifically ask:

Is the immunization record and exemption statement part of the education record? Can these be shared with the health department without parental consent?

Response:

As noted above, at the elementary and secondary level, health records, including immunization records and exemption statements, are “education records” under FERPA if they are directly related to a student and maintained by an educational agency or institution subject to FERPA. Congress has provided no specific exception to FERPA’s general consent requirement that permits an educational agency or institution to routinely disclose PII from a student’s education records to a State or local health department. Rather, any disclosure of this information to a health department would have to fall under another exception to the general requirement of consent in FERPA, such as the health or safety emergency exception or the exception that permits a school to comply with a judicial order or lawfully issued subpoena.

Section 388.1767 of the MCL, which provides, in pertinent part, that:

(2) Each district or intermediate district shall report to the local health department in which it is located by November 1 of each fiscal year, in a manner prescribed by the department of community health, the immunization status of each pupil in grades K through 12 who enrolled in the district or intermediate district for the first time or, beginning in 2014-2015, who enrolled in grade 7 in the district or intermediate district for the first time, between January 1 and September 30 of the immediately preceding fiscal year. Not later than December 31 of each fiscal year, the department of community health shall notify the department by district or intermediate district of the percentage of entering pupils and, beginning in 2014-2015, of pupils who enrolled in grade 7 for the first time who do not have a completed, waived, or provisional immunization record in accordance with section 1177 of the revised school code, MCL 380.1177. If a district or intermediate district does not have a completed, waived, or provisional immunization record in accordance with section 1177 of the revised school code, MCL 380.1177, for at least 90% of the district's or intermediate district's entering pupils, as recorded in the November 1 reports required under this subsection, the district or intermediate district is subject to subsection (4) until the district or intermediate district has such an immunization record for at least 90% of its pupils who enrolled in the district or intermediate district for the first time.

(3) Each district or intermediate district shall again report to the local health department in which it is located by February 1 of each fiscal year, in a manner prescribed by the department of community health, the immunization status of each pupil in grades K through 12 who enrolled in the district or intermediate district for the first time or, beginning in 2014-2015, who enrolled in grade 7 in the district or intermediate district for the first time, between January 1 of the immediately preceding fiscal year and December 31 of the current fiscal year. Not later than March 31 of each fiscal year, the department of community health shall notify the department by district or intermediate district of the percentage of entering pupils and, beginning in 2014-2015, of pupils who enrolled in grade 7 for the first time who do not have a completed, waived, or provisional immunization record in accordance with section 1177 of the revised school code, MCL 380.1177. If a district or intermediate district does not have a completed, waived, or provisional immunization record in accordance with section 1177 of the revised school

code, MCL 380.1177, for at least 95% of the district's or intermediate district's entering pupils, as recorded in the February 1 reports required under this subsection, the district or intermediate district is subject to subsection (4) until the district or intermediate district has such an immunization record for at least 95% of its pupils who enrolled in the district or intermediate district for the first time. If the department of community health is not able to report to the department by March 31 because a district or intermediate district fails to submit a report as required in this subsection, or submits an incomplete, inaccurate, or late report, the district or intermediate district is subject to subsection (4) until the report is submitted in a complete and accurate form.

(4) If a district or intermediate district does not comply with this section, the department shall withhold 5% of the total funds due to the district or intermediate district under this act after the date the department of community health reports a district's or intermediate district's noncompliance with this section to the department until the district or intermediate district complies with this section. If the district or intermediate district does not comply with this section by the end of the fiscal year, the district or intermediate district forfeits the total amount withheld.

You specifically ask:

Is it a violation of FERPA to require schools [to] submit this information on each student to the local health department?

This presents a conundrum for schools as state law requires this reporting, or risk a 5% loss of state education dollars whereas violation FERPA risks a loss in federal dollars. How could this situation be remedied to both protect the privacy rights of students, and also not risk education funding at both a state and federal level?

Response:

FERPA does not contain an exception to its general consent requirement that permits school districts to disclose the immunization status of each student from education records to the local health department. However, nothing in FERPA would prohibit an educational agency or institution from releasing information from student education records that has been properly de-identified. As explained above, under FERPA, an educational agency or institution is prohibited from disclosing PII from students' education records, without prior written consent, unless the disclosure meets an exception to FERPA's general consent requirement. The definition of PII in the FERPA regulations, 34 CFR § 99.3 ("Personally Identifiable Information"), states as follows:

[PII] includes, but is not limited to—

- (a) The student's name;
- (b) The name of the student's parent or other family members;
- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;

- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

FERPA does not prohibit the release of properly de-identified records. 34 CFR § 99.31(b)(1). Please note, however, that a student's identity may be personally identifiable, even after removal or redaction of nominally identifying information from student-level records. This may be the case, for example, in a situation in which there are a very small number of students in a class or a school. In these circumstances, FERPA does not allow disclosure of the record in any form without consent because the irreducible presence of personal characteristics or other information makes the student's identity personally identifiable. (For more information on data de-identification please review the following guidance:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/data_deidentification_tems_0.pdf.) Further, as discussed below, nothing in FERPA would prevent State law from requiring parents to produce immunization information and records that are not protected by FERPA to State or local health departments as a condition of attendance, although we do not opine on whether this would be permissible under other Federal laws.

Section 333.9209 of the MCL, which provides that:

- (1) Before November 1 of each year, the principal or administrator of each school shall deliver to the state and local health departments a list of the immunization status at the time of school entry of new entering kindergarten and first grade students.
- (2) The department shall prescribe minimum percentage levels of immunization for children in a school.
- (3) As a result of the information collected pursuant to subsection (1), the local health officer shall take appropriate action, including immunization clinics, to raise the immunization level of children entering school to the levels established pursuant to subsection (2).
- (4) Before the following February 1, the principal or administrator of each school shall update the list to show the additional immunizations received by each child since entering the school. The reports shall be made on forms provided or approved by the department. A child who enters school in September and who has not completed the immunizations required under section 9227 and has not filed an exemption under section 9215 before February 1 shall be excluded from school attendance. A child who enters school at any other time of the school year and who has not completed the immunizations required

under section 9227 and has not filed an exemption under section 9215 within 4 months after entrance shall be excluded from school attendance.

Regarding this provision, you also explain the following:

For at least 2 decades, state law, MCL 333.9209, and regulations [R325.176(14)]¹ ask that schools submit to the local health department each vaccine received for each child with dates, along with the exemption status of each child. This information is entered by the school into the state vaccine tracking system (MCIR: Michigan Care Improvement Registry) that is controlled by the Michigan Department of Health and Human Services (MDHHS). Another regulation [R325.176(16)]² directs schools to make the immunization information for each child available for audit by the local health department.

You specifically ask:

If the health department is requiring schools [to] submit the immunization information for each child and is sending a copy of the exemption statement to the local health department, without parental consent, is this a violation of FERPA?

Does this present a statewide violation of FERPA, thus putting schools at risk of losing federal funding by violation federal FERPA law?

And:

MDHHS Regulation R325.176(12), which provides that:

(12) When presented with a medical exemption, religious or other exemption, the administrator of a child's school or operator of a child's group program shall recognize the exemption status of the child. Each nonmedical exemption filed at the child's school or group program of a child entering a program after December 31, 2014 shall be certified by the local health department that the individual received education on the risks of not receiving the vaccines being waived and the benefits of vaccination to the individual and the community. All waivers shall be submitted using the waiver form prescribed by the department.

You state that this MDHHS regulation, which became effective on January 1, 2015, requires that parents “meet with an educator at the local public health department and have their exemption

¹ This regulation provides that: “(14) All of the following information shall be provided to fulfill the requirements of section 9209(1) of the code:

(a) A listing, by child, of the number of doses of each vaccine received.
(b) The date of each immunization for each vaccine received in the series.
(c) A listing, by type of exemption granted, of the children who have exemptions.”

² This regulation provides that: “(16) A principal of a school or operator of a group program shall make immunization records available for inspection by authorized representatives of the department or the appropriate local health department. The local health officer shall also make public clinic immunization records available to local schools or group programs for the purpose of verifying pupil immunizations.”

(waiver form) certified by this educator.” You explain that the regulation requires certain information be given to the educator, including: immunization history, child name, date of birth, reason for exemption, school name, parent name, and contact information. The parent would then need to submit this certified waiver to the school. The local health department also keeps a copy of the waiver, but also requires the school to submit a copy to the local health department when the school receives it. With regard to this requirement, you state that “[i]n both scenarios, it appears parents are required to share this information with the health department, without parental consent, in order to receive the paperwork. It appears that parents are obligated to provide this information to the health department, essentially giving up their FERPA rights, in order for the child to attend school.”

You specifically ask:

Is it a FERPA violation to have this part of the education record “certified” by the local health department, before they can submit to the school?

Is it a FERPA violation to require parents to provide personally identifiable information about the student in order to obtain this part of the education record?

With regard to this Michigan regulation, you also explain that for the last two years, MDHHS has published reports disclosing the immunization status of each student within the checkpoint years (kindergarten, 7th grade, new to district). You state that “[i]t appears MDHHS is releasing this information on their website, and to various media outlets. These reports are using personally identifiable student information obtained from the educational record, without parental consent. These reports include granularity down to the classroom level, which reveals personal healthcare information about children in the classroom, information that is part of the education records, without parental consent.”

You specifically ask:

It is my understanding that schools are responsible for the actions of any third party that information is released to. Is the release of this information publicly, by the health department, a violation of FERPA?

Does this present a statewide violation of FERPA, thus putting schools at risk of losing federal funding by violation federal ERPA law?

Response:

It would not violate FERPA if Michigan requires parents to share information about their children or to share their children’s immunization records with their local health department as long as FERPA does not apply to such records or information. FERPA only applies to education records and PII contained in education records that are maintained by educational agencies and institutions or by a party acting for the agency or institution. Michigan educational agencies and institutions, however, would violate FERPA to the extent that they have a policy or practice of disclosing student’s education records or PII from students’ education records to a State or local

health department without the prior written consent of the student's parent or the eligible student, or unless an appropriate exception applies, as previously discussed or if they require parents or eligible students to provide such consent as a condition of attendance or the receipt of educational services.

In our telephone discussion on May 8, we discussed whether attendance at a school can be conditioned on forced disclosure of immunization records to the State or local health department, even if the disclosure that is compelled is that of the parent providing another entity, such as a State or local health department, information or records about the student, instead of the local school. We do not believe that FERPA would prohibit a State from requiring parents to provide information or records about the student to the health department that is not protected by FERPA, although we do not opine on whether this would be permissible under other Federal laws. Under this scenario, the health department could then provide any collected information or records necessary to local school districts relative to a student's immunization. However, if the school district maintains the student's immunization records received from the health department or the parent, then it could not, in turn, disclose such records or the PII contained therein, without the prior written consent of the parent or eligible student or under an appropriate exception to FERPA's consent requirement. This is because records that are both directly related to a student and maintained by a school district are "education records" subject to FERPA, provided they do not fall within an exception to the definition of "education records."

We also discussed your concern that the Michigan Department of Health and Human Services (MDHHS) has been posting information concerning students and immunizations on their website that, in some cases, is personally identifiable to students. Aggregate data may still contain personally identifiable information. The aggregation of student-level data into school-level (or higher) reports removes much of the risk of disclosure, since no direct identifiers (such as a name, Social Security Number, or student ID) are present in the aggregated tables. Some risk of disclosure does remain, however, in circumstances where one or more students possess a unique or uncommon characteristic (or a combination of characteristics) that would allow them to be identified in the data table. This commonly occurs with small ethnic subgroup populations, or where some easily observable characteristic corresponds to an unrelated category in the data table (e.g., if the Health Department reports that 0% of white males in grade 11 were vaccinated). In these cases, some level of disclosure avoidance is necessary to prevent disclosure in the aggregate data table. For more information on protecting privacy in publicly released data, please consult PTAC's [FAQs on Disclosure Avoidance](#).

Lastly, please be aware that the Department has reviewed the Michigan Care Improvement Registry (MCIR) Release Highlights (July 2018 Special Edition) article outlining new procedures in response to Michigan's Attorney General's guidance stating that "school entered information should not be viewed by MDHHS and local health departments unless permission has been granted by the legal parent or guardian." The guidance introduced a "FERPA No Consent" check box in the MCIR School Immunization Reporting System (SIRS) which parents may select should they do not want PII attached to the aggregate disclosure of information from their student's education record shared on the MCIR SIRS system. FERPA requires that a consent for disclosure of education records must be signed and dated and must specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class

of parties to whom the disclosure may be made. 34 CFR § 99.30. Therefore, a “FERPA No Consent” checkbox as a means of obtaining consent to disclose PII from a student’s education record to a third party is not in compliance with FERPA’s consent requirement.

We trust this adequately addresses your inquiry and explains the interplay between the above-referenced reporting requirements set forth under Michigan law and FERPA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael B. Hawes", with a stylized flourish at the end.

Michael B. Hawes
Director
Student Privacy Policy Office

cc: Sheila Alles
Interim State Superintendent