

NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

March 15, 2005

Ms. Bridget Ahrens, MPH
Manager, Immunization Registry
Vermont Department of Health
108 Cherry Street
PO Box 70
Burlington, Vermont 05402

Dear Ms. Ahrens:

This responds to your undated letter that was received in this office on December 29, 2004, in which you asked for guidance about providing school nurses with access to the Vermont Immunization Registry (Registry) in accordance with the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. This Office administers FERPA and is responsible for providing technical assistance to ensure that educational agencies and institutions comply with the statute and regulations codified at 34 CFR Part 99.

Background. You explained that the Registry is a secure, centralized data repository that contains childhood immunization records for children from birth through age 18. Health care providers in Vermont are required by law to report immunization data for all children to the Vermont Department of Health (VDH) via the Registry. Children born in the State are entered automatically via their birth certificate data. Authorized users, currently limited to health care providers within the State, obtain access to the database through a user name and password and are required to sign a confidentiality agreement limiting data use.

According to your letter, VDH is considering two levels of access to the Registry for school nurses. The first level (read-only) would allow school nurses to view and print a copy of childhood immunization data for any child but would not allow them to enter any new information. The second level of access would allow school nurses to enter data into the Registry, such as updated addresses or new immunization data from an out-of-state provider. School nurses would for the most part look up children who are already in the system or update information on an existing registrant. However, school nurses would create new records for children who moved from another state. You indicated that allowing school nurses to perform these functions would assist greatly in keeping information current and potentially reduce data entry burdens for health care providers. You asked what steps VDH should take for each level of access to ensure compliance with FERPA.

Summary Response. As explained below, the Registry itself is not an educational agency or institution subject to FERPA and, therefore, FERPA has no bearing on whether school nurses may have first level (read-only) access except to the extent that information in the Registry was obtained from education records and may be redisclosed only in accordance with FERPA requirements. FERPA does have a bearing on whether school nurses may have second level (data-entry) access to the extent that the updated address and immunization information they submit to the Registry is obtained from students' education records. There is no provision in FERPA that would allow school nurses to disclose to the Registry immunization data obtained from a student's education records without the prior written consent of the student's parent except on an emergency basis.

Discussion. FERPA protects the privacy interests of parents and students in a student's "education records." It applies to an educational agency or institution that receives funds under programs administered by the U.S. Secretary of Education. 34 CFR § 99.1(a). This generally includes most public school districts that provide elementary and secondary education because they receive federal Education funds and otherwise meet the definitions in § 99.1(a) of the regulations. FERPA does not apply to information maintained by the VDH's Registry except to the extent that the information was obtained from education records subject to FERPA. Therefore, FERPA imposes no restrictions or conditions on who may have access to the Registry, for either read-only or data entry purposes except with respect to information in the Registry that was obtained from education records.

Educational agencies and institutions subject to FERPA may not have a policy or practice of disclosing personally identifiable information from education records without a parent's prior written consent except as provided by statute. 20 U.S.C. § 1232g(b)(1) and (b)(2); 34 CFR § 99.30. (Note that all FERPA rights transfer from parents to students who have reached 18 years of age or who attend a postsecondary institution. 20 U.S.C. § 1232g(d); 34 CFR § 99.3 ("Eligible student").) Under FERPA, "education records" are defined as records that are directly related to a student and are maintained by an educational agency or institution or by a party acting for an agency or institution. 34 CFR § 99.3 ("Education records"). A K-12 student's name, address, and immunization data maintained by a school nurse are "education records" under FERPA because they are 1) directly related to a student; 2) maintained by an educational agency or institution, or by a party acting for the agency or institution, and 3) not excluded from the definition. 20 U.S.C. § 1232g(a)(4)(B). See our Feb. 25, 2004, letter to the Alabama Dept. of Education at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/library/allhippaa.html>.

We note that final regulations promulgated under the 1996 Health Insurance Portability & Accountability Act (HIPAA), codified at 45 CFR Parts 160 and 164, provide that certain health care information that is maintained as an "education record" under FERPA is not subject to the HIPAA Privacy Rule precisely because it is protected under FERPA. See 45 CFR § 164.501, *Protected health information*. As a result, while in certain circumstances the HIPAA Privacy Rule may allow covered entities to release personally identifiable information, including immunization data, to public health entities without patient authorization, those provisions do not apply to education records subject to FERPA. Immunization and other data that is protected under FERPA as an "education record" may be released only in accordance with FERPA requirements.

Under FERPA, prior written consent is not required to disclose properly designated “directory information” from education records. 34 CFR §§ 99.31(a)(11) and 99.37. “Directory information” means information that would not generally be considered harmful or an invasion of privacy if disclosed, including the student’s name, address, telephone number, date of birth, and so forth. See 34 CFR § 99.3 (“Directory information”). A student’s immunization history may not be designated and disclosed as directory information under FERPA because this is the type of information that would generally be considered an invasion of privacy if disclosed without consent. This is consistent with the confidentiality requirements imposed on authorized users of the Registry, as noted in your letter.

Another FERPA provision allows an educational agency or institution to disclose personally identifiable information from education records, without prior written consent,

in connection with an emergency [to] appropriate persons if the 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); 34 CFR §§ 99.31(a)(10) 99.36.

Congress added this exception to the written consent requirement when FERPA was first amended, on December 13, 1974. The legislative history demonstrates Congress’ intent to limit application of the “health or safety” exception to exceptional circumstances --

Finally, under certain emergency situations it may become necessary for an educational agency or institution to release personal information to protect the health or safety of the student or other students. In the case of the outbreak of an epidemic, it is unrealistic to expect an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for “health or safety” could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary shall promulgate regulations to implement this subsection. It is expected that he will strictly limit the applicability of this exception.

Joint Statement in Explanation of Buckley/Pell Amendment, 120 Cong. Rec. S21489, Dec. 13, 1974. (These amendments were made retroactive to November 19, 1974, the date on which FERPA became effective.)

Section 99.31(a)(10) of the regulations provides that the disclosure must be “in connection with a health or safety emergency” under the following additional conditions:

An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

34 CFR § 99.36(a)(emphases added.) In accordance with Congressional direction, the regulations provide further that these requirements will be strictly construed. 34 CFR § 99.36(c).

The Department has consistently interpreted this provision narrowly by limiting its application to a *specific situation* that presents *imminent danger* to students or other members of the community, or that requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. While the exception is not limited to emergencies caused by terrorist attacks, the Department’s Guidance on “Recent Amendments to [FERPA] Relating to Anti-Terrorism Activities,” issued by this Office on April 12, 2002, provides a useful and relevant summary of our interpretation (emphasis added):

[T]he health or safety exception would apply to nonconsensual disclosures to appropriate persons in the case of a smallpox, anthrax or other bioterrorism attack. This exception also would apply to nonconsensual disclosures to appropriate persons in the case of another terrorist attack such as the September 11 attack. However, any release must be narrowly tailored considering the immediacy, magnitude, and specificity of information concerning the emergency. As the legislative history indicates, this exception is temporally limited to the period of the emergency and generally will not allow for a blanket release of personally identifiable information from a student’s education records.

Under the health and safety exception school officials may share relevant information with “appropriate parties,” that is, those parties whose knowledge of the information is necessary to provide immediate protection of the health and safety of the student or other individuals. (Citations omitted.) Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this FERPA exception....

The educational agency or institution has the responsibility to make the initial determination of whether a disclosure is necessary to protect the health or safety of the student or other individuals. ...

By way of example, in accordance with these principles we concluded in a 1994 letter that a student’s suicidal statements, coupled with unsafe conduct and threats against another student, constitute a “health or safety emergency” under FERPA. However, we also noted that this exception does not support a general or blanket exception in every case in which a student utters a threat. More recently, in 2002 we advised that a school district could disclose information from education records to the Pennsylvania Department of Health, without written consent, where six students had died of unknown causes within the previous five months. These facts indicated that the district faced a specific and grave emergency situation that required immediate intervention by the Department of Health to protect the health and safety of students and others in the school district.

With regard to reports required under state law, in 2000 we advised a state senator about a potential conflict between FERPA and a state law that requires a school to notify the appropriate law enforcement agency immediately if it receives a request for the records of a child who has been reported missing, and then notify the requesting school that the child has been reported missing and is the subject of an ongoing law enforcement investigation. Once again noting that the “health and safety emergency” exception generally does not allow a blanket release of

personally identifiable, non-directory information from education records, we concluded that FERPA would allow school personnel to comply with this law

only if the school has made a case-by-case determination that there is a *present and imminent threat or danger* to the student or that information from education records is needed to avert or diffuse serious threats to the safety or health of a student...In the case of a missing child, we agree that law enforcement officials would constitute an appropriate party for the disclosure *assuming that the school has first determined that a threat or imminent danger to the child exists.*

May 8, 2000, letter to Pennsylvania State Senator Stewart J. Greenleaf (emphases added.)

In summary, an educational agency or institution may disclose personally identifiable, non-directory information from education records under the “health or safety emergency” exception only if it has determined, on a case-by-case basis, that a *specific situation* presents *imminent danger or threat* to students or other members of the community, or requires *an immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals. Any release must be *narrowly tailored* considering the immediacy and magnitude of the emergency and must be made only to parties who can address the specific emergency in question. This exception is temporally limited to the period of the emergency and generally does not allow a blanket release of personally identifiable information from a student’s education records to comply with general requirements under State law.

As we recognized in our letter to the Alabama Department of Education, cited above, an educational agency or institution may disclose personally identifiable information from a student’s education records to the Registry, without parental consent, under FERPA’s health or safety emergency exception if it has made a specific determination that the disclosure is required to prevent or control an outbreak or epidemic of measles, rubella, mumps, polio, or other serious infectious disease that may cause disability or death. We cannot come to the same conclusion with respect to routine reporting of basic immunization data from education records to the Registry outside of these emergency circumstances. A school nurse who wishes to update or provide the Registry with routine immunization data on a student must obtain the prior written consent of the student’s parent in accordance with § 99.30 of the FERPA regulations. An educational agency or institution whose school nurse discloses immunization information from students’ education records under the health or safety emergency exception must also comply with the recordkeeping requirements set forth in § 99.32 of the regulations. The record of disclosure, which must be maintained with the education records of the student as long as the records are maintained, must include the parties who have requested or received personally identifiable information from the education records and the legitimate interests the parties had in requesting or obtaining the information. 34 CFR § 99.32(a)(2) and (3). The recordkeeping requirement does not apply if the information was disclosed to a party with written consent from the parent for the disclosure. 34 CFR § 99.32(d)(3).

Finally, a school nurse who discloses a student’s immunization information from education records to the Registry under the health and safety emergency exception is required to notify the Registry that personally identifiable information about that student may not be redisclosed or

shared with any other party outside of the appropriate officials at the Registry unless the parent has provided prior written consent for the redisclosure. See 34 CFR § 99.33(a). See also 34 CFR § 99.33(e), which provides a penalty for third-party redisclosures of education records in violation of FERPA requirements. Officers, employees, and agents of the Registry may use the information but only for the purposes for which the disclosure was made. 34 CFR § 99.33(a)(2). The Registry may make further disclosures of the information on behalf of the educational agency or institution only if the redisclosure meets the requirements of § 99.31, such as for another health or safety emergency, and only if the educational agency or institution has complied with the recordation requirements in § 99.32(b). See 34 CFR § 99.33(b).

I trust that this is helpful in explaining the scope and limitations of FERPA as it pertains to your inquiry. Should you have any additional questions, please do not hesitate to contact this Office again.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office