



## UNITED STATES DEPARTMENT OF EDUCATION

### OFFICE OF MANAGEMENT

April 12, 2018

Ms. Monica D. Batanero  
Associate General Counsel  
School & College Legal Services of California  
5350 Skylane Boulevard  
Santa Rosa, California 95403

Dear Ms. Batanero:

This is in response to your November 7, 2017 letter 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 the reporting requirements of Section 120375(c) of the California Health and Safety Code relating to the disclosure of immunization records of students to the local health department. We apologize for the amount of time it has taken us to respond to your letter. As explained more fully below and based on the information that you have provided, we do not believe that California law conflicts with FERPA insofar as the California Education Code requires that disclosures be made in compliance with FERPA. That is, 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 local health department pursuant to California Health and Safety Code Section 120375(c) must be made with the prior written consent of parents or eligible students because nothing in your inquiry or California Health and Safety Code Section 120375(c) indicates that the disclosure of such immunization information would satisfy the health or safety emergency exception to the general requirement of consent in FERPA.

#### *State Reporting Requirement*

California Health and Safety Code Section 120375(c) states the following:

The governing authority shall file a written report on the immunization status of new entrants to the school or institution under their jurisdiction with the department and the local health department at times and on forms prescribed by the department. As provided in paragraph (4) of subdivision (a) of Section 49076 of the [California] Education Code, the local health department shall have access to the complete health information as it relates to immunization of each student in the schools or other institutions listed in [California Health and Safety Code] Section 120335 in order to determine immunization deficiencies.

Section 49076(a) of the California Education Code, referenced above, states the following:

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*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

A school district shall not permit access to pupil records to a person without written parental consent or under judicial order *except* as set forth in this section and *as permitted by Part 99 (commencing with Section 99.1) of Title 34 of the Code of Federal Regulations.*

(Emphasis added). “Pupil records” are defined to include “information directly related to a pupil that is maintained by the local educational agency.” California Education Code, Section 49073.1(d)(5)(A)(i). Further, Section 49076(a)(4) of the California Education Code, which is specifically referenced in California Health and Safety Code Section 120375(c), provides, in pertinent part, that:

[A] school district . . . may participate in an interagency data information system that permits access to a computerized database system within and between governmental agencies or school districts as to information or records that are nonprivileged, and where release is *authorized as to the requesting agency under state or federal law or regulation*, if each of the following requirements is met:

...

(E) An agency or school district shall not make public or otherwise release information on an individual contained in the database if the information is *protected from disclosure or release as to the requesting agency by state or federal law or regulation.*

(Emphasis added).

#### *Request for Technical Assistance*

In your letter, you ask whether FERPA permits a school district to disclose personally identifiable information (PII) from a student’s “health records, such as immunizations data,” to county or State health officials without parental consent, as you believe is required by State law. Specifically, you explain that “[t]he California Department of Public Health has advised a local school district that local health departments shall have access to the complete health information as it relates to the immunization of each student in the schools in order to determine immunization deficiencies.” You explain that it is your “understanding [ ] that immunization records are student health records, and therefore, protected from unauthorized disclosure under FERPA.” You ask for clarification on this issue, as you believe this to be an instance in which there appears to be a conflict between State and Federal law.

#### *Background on FERPA*

FERPA is a Federal law that protects the privacy of students’ education records and the 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(d); 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 subject to FERPA, are “education records” under FERPA. (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: [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/ferpa-hipaa-guidance.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/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 an outbreak of an epidemic. 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 this guidance concerning the disclosure of PII from students’ education records to outside entities, including State and county health departments, when addressing the H1N1 flu outbreak: [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/ferpa-h1n1.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa-h1n1.pdf).)

Nothing in your inquiry or California Health and Safety Code Section 120375(c) indicate that the disclosures of student health information under the aforementioned California law would satisfy the health or safety emergency exception to FERPA’s general consent requirement. Rather, these disclosures appear to encompass the routine release of 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.

That said, we do not believe that the aforementioned California law conflicts with FERPA. The reporting requirements set forth under California Health and Safety Code Section 120375(c) are subject to the restrictions under “paragraph (4) of subdivision (a) of Section 49076 of the [California] Education Code.” Section 49076(a) of the California Education Code limits nonconsensual disclosure of “pupil records” (that is, FERPA-covered education records maintained by school districts) to only those disclosures “permitted by Part 99 . . . of Title 34 of the Code of Federal Regulations,” which are the FERPA regulations. Further, Section 49076(a)(4) of the California Education Code states that disclosures of “pupil records” through interagency data information systems must be “authorized . . . under . . . federal law or regulation,” and school districts may not disclose “information on an individual contained in the database if the information is protected from disclosure or release . . . by . . . federal law or regulation.” That is, Section 49076(a)(4) of the California Education Code limits the information that school districts may disclose under Section 120375(c) of the California Health and Safety Code Section to only that information which the school districts may otherwise disclose under FERPA.

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

Sincerely,

/s/

Michael B. Hawes  
Director of Student Privacy Policy  
Office of the Chief Privacy Officer