

Family Educational Rights and Privacy Act (FERPA) and H1N1

October 2009

Introduction

The purpose of this guidance is to answer questions that school officials may have concerning the disclosure of personally identifiable information from students' education records to outside entities when addressing an H1N1 flu outbreak. H1N1 has the potential to pose a serious risk to students, staff, and families throughout the 2009-2010 school year. Schools should work in collaboration with their State and local public health departments to address questions about sharing information between the school and these entities. Understanding how, what, and when information can be shared is a critical part of preparedness.

Summary

As explained in this guidance, the Family Educational Rights and Privacy Act (FERPA) prohibits schools from disclosing personally identifiable information from students' education records without the consent of a parent or eligible student, unless an exception to FERPA's general consent rule applies. In some situations, FERPA will permit schools to disclose to health agencies personally identifiable information on students without consent under the "health or safety emergency" exception to FERPA's general consent requirement, if knowledge of the information is necessary to protect the health or safety of students or other individuals. Nonconsensual disclosures may also be made in order to comply with a lawfully issued subpoena, should the local health agency issue one. For those situations where an exception does not apply, parents and eligible students must provide prior written consent. We have included a model consent form, as well as contact information if school officials have questions that are not covered.

Background

FERPA (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of Education ("Department"). In this guidance, when we refer to "school districts" or "schools," we mean "educational agencies and institutions" subject to FERPA. Private schools at the elementary and secondary levels generally do not receive funds from the Department and are, therefore, not subject to FERPA.

FERPA gives parents certain rights with respect to their children's education records at schools to which FERPA applies. These rights transfer to the student when he or she reaches the age of 18 or attends a postsecondary institution at any age ("eligible student"). Under FERPA, a parent or eligible student must provide a signed and dated written consent before a school discloses education records or personally identifiable information from education records. 34 CFR § 99.30. See 34 CFR § 99.3 for the definition of "personally identifiable information." Exceptions to the general consent requirement are set forth in § 99.31 of the FERPA regulations. The term "education records" is defined as 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. See 34 CFR § 99.3 for the definition of “education records.” Accordingly, immunization and other health records, as well as records on services provided to students under the Individuals with Disabilities Education Act (IDEA), that are directly related to a student and maintained by a school are “education records” under FERPA.

The questions and answers below provide guidance to school officials on how to work with public health officials on issues related to H1N1, while protecting the privacy of students’ education records. Before an outbreak of H1N1 occurs, educational policy makers should consider what types of information (e.g., the number and distribution of school-aged children in public schools in their district) would be most useful to partnering public health officials. If school officials and public health officials plan to track absences and report information on students in personally identifiable form before an emergency determination is made, school officials must obtain consent before releasing information. With written consent provided by a student’s parent or the eligible student permitting the sharing of personally identifiable information from the student’s education records, schools can both comply with FERPA and plan how best to use the information, such as to investigate why students may be absent from a particular class, grade, or school. The Department does not want FERPA to be an obstacle to keeping students safe in their school environment. Understanding FERPA enables school officials to act quickly and with certainty when confronting challenges that affect the health or safety of students.

Questions and Answers on the Applicability of FERPA to Disclosures Related to H1N1

1. Do parents and eligible students have to provide consent before a school discloses personally identifiable information from education records?

Generally, yes. A parent or eligible student must provide written consent before a school discloses personally identifiable information from the student’s education records, unless one of the exceptions to FERPA’s general consent rule applies. FERPA requires that a consent form be signed and dated by a parent or eligible student and (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. 34 CFR § 99.30(b). This guidance includes a sample FERPA consent form.

2. Are there exceptions to FERPA’s consent requirement that would permit a school to disclose personally identifiable information on affected students in the case of an H1N1 outbreak?

Yes. FERPA permits school officials to disclose, without consent, education records, or personally identifiable information from education records, to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of the student or other individuals. See 34 CFR §§ 99.31(a)(10), 99.32(a)(5), and 99.36. This exception to FERPA’s general consent requirement is temporally limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from the student’s education records. Typically, law enforcement officials, public

health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom information may be disclosed under this FERPA exception.

Under this health or safety emergency provision, an educational agency or institution is responsible for making a determination whether to make a disclosure of personally identifiable information on a case-by-case basis, taking into account the totality of the circumstances pertaining to the threat. If the school district or school determines that there is an articulable and significant threat to the health or safety of the student or other individuals and that certain parties need personally identifiable information from education records to protect the health or safety of the student or other individuals, it may disclose that information to such appropriate parties without consent. 34 CFR § 99.36. This is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency's or institution's decisions about the nature of the emergency and the appropriate parties to whom information should be disclosed. We note also that, within a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed. 34 CFR § 99.32(a)(5). Oftentimes, however, threats to health or safety can be fully addressed by sharing appropriate information regarding such threats with parents, the health department, or others in a manner that does not identify particular students.

Under FERPA, an emergency means a situation in which there is an articulable and significant threat to the health or safety of students or other individuals. Note that an emergency can exist without a public health authority designation of an emergency. However, if public health authorities determine that a pandemic, such as tuberculosis or H1N1 flu, is a significant threat to a particular community, a school in that community may determine that an emergency exists as well. As used in FERPA's health or safety emergency provision, an emergency does not include the threat of a *possible* or *eventual* emergency for which the likelihood of occurrence is unknown, such as would be addressed in general emergency preparedness activities. Accordingly, when disclosures are limited temporally to the period of the emergency, educational agencies or institutions may release information at any stage of such emergency so long as there is an articulable and significant threat in the community that may be addressed by the limited release of information to appropriate parties. This includes sharing information where necessary during the early stages of a pandemic.

3. Under FERPA, does the Public Health Emergency declared by the Secretary of Health and Human Services (HHS) on October 1, 2009, constitute a "health or safety emergency"?

The Department considers the declaration made by the HHS Secretary on October 1, 2009, that there is a public health emergency involving the H1N1 flu outbreak as serving as a rational basis for a school to determine that an emergency exists, so long as there is a *current outbreak* of H1N1 in the particular school or school district. We note that this declaration by the HHS

Secretary has to be renewed every 90 days. The Department's Web site will continue to include updated information on this subject. See <http://www.ed.gov>. However, before personally identifiable information regarding students may be disclosed without written consent, the school or school district would still need to determine that the recipient of such information needs the information to protect the health or safety of the student or other individuals.

4. May health records or other education records maintained by a school be shared, without consent, with the public health department in the absence of a declared Public Health Emergency if school officials believe that H1N1 poses a serious risk to the health or safety of an individual student?

Yes. If school officials, taking into account the totality of the circumstances, determine that an articulable and significant threat exists to the health or safety of a student or other individuals, they may disclose information to the appropriate officials, without consent, who need the information to protect the health or safety of the student or other individuals. Public health department officials may be considered "appropriate parties" under this exception, even in the absence of a formally declared health emergency. Typically public health officials and trained medical personnel are among the types of appropriate parties to whom information may be disclosed under FERPA's health or safety emergency provision.

5. If the school is tracking absences and reporting this information to the public health department, must parents consent to this sharing of information?

It depends on whether the information on students reported to the public health department is personally identifiable and whether the school has determined that there is a health or safety emergency. If a school discloses information about students in non-personally identifiable form (as discussed in the response to question six), then parents do not have to provide consent. For instance, if a school releases the fact that five students in the school are absent due to H1N1, this would generally not be considered personally identifiable to the absent students.

However, for personally identifiable information from education records to be disclosed to a public health department in a non-emergency situation, unless there is another exception to the consent requirement, FERPA requires that parents and eligible students provide written consent. The consent requirement in FERPA also applies if the school is trying to determine *whether* an emergency exists. This is because under FERPA the term "in connection with an emergency" means that the school must be able to articulate and record that there is a significant threat to the health or safety of students or other individuals. As explained in the response to question two, it does not mean a threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities. It is therefore advisable for school officials to obtain consent from parents and eligible students if they plan to track absences and report the information to public health officials in a personally identifiable form before school officials determine that a health or safety emergency exists.

6. What if a parent refuses to provide written consent for the release of information on their child to the health department?

FERPA permits schools to release records or information from education records without consent after the removal of all personally identifiable information, provided that the school has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. 34 CFR § 99.31(b)(1). Thus, it would be problematic to disclose that every student in a particular class or grade level is absent if there is, for instance, a directory with the names of every student in that class or grade. Therefore, it is prudent that schools obtain consent for disclosure of tracking information. If the parent does not provide consent for the disclosure of the information, then the school may not make the disclosure unless it has determined that a health or safety emergency exists and the information is disclosed to a person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. Another exception to FERPA's general consent requirement would permit the disclosure of personally identifiable information from students' education records to the health department in order to comply with a lawfully issued subpoena, if the school makes a reasonable effort to notify the parents or eligible students before complying with it. 34 CFR § 99.31(a)(9).

7. May schools disclose without consent the names, addresses, and phone numbers of absent students to the health department so that the health department may contact their parents in order to assess the students' illnesses?

FERPA only permits the nonconsensual disclosure of contact information of absent students to the public health department in specific circumstances, such as in connection with a health or safety emergency (34 CFR § 99.31(a)(10)) or in connection with a subpoena if the school makes a reasonable effort to notify the parents or eligible students of the subpoena before complying with it (34 CFR § 99.31(a)(9)).

While FERPA generally permits the nonconsensual disclosure of properly designated "directory information" (name, address, phone number, grade level, etc.) on those students whose parents have not opted out, it does not permit a school to disclose "directory information" on students that is linked to non-directory information. For instance, a school may not disclose "directory information" on all students who are receiving special education services or those who have been absent from school.

Therefore, schools should prepare consent forms for parents and eligible students to sign to allow the potential sharing of this type of information if they create, or intend to create, a tracking or monitoring system to identify an outbreak before an emergency is recognized.

8. If the school determines that a health or safety emergency exists, may it disclose without consent personally identifiable information on students to the media?

No. As explained previously, FERPA only permits disclosures of personally identifiable information from students' education records under the health or safety emergency provision to "appropriate parties" (such as public health officials) whose knowledge of the information is necessary to protect the health or safety of students or other individuals in the school community. While the media may have a role in alerting the community of an outbreak, they are not "appropriate parties" under FERPA's health or safety emergency provision because they generally do not have a role in protecting individual students or other individuals at the school. "Appropriate parties" in this context are normally parties that could provide specific medical or safety attention, such as public health and law enforcement officials.

9. Does an interagency agreement with partners such as the State or local health department enable a school to nonconsensually disclose education records?

No. Interagency agreements do not supersede the consent requirements under FERPA. Although an interagency agreement would be a helpful tool for planning purposes, schools must comply with FERPA's requirements regarding the disclosure of personally identifiable information from students' education records.

10. May the school identify a particular child as having the H1N1 flu virus to parents of other students in the school?

In most cases, it is sufficient to report the fact that a child in the school (or class) has been determined to have the H1N1 flu virus, rather than specifically identify the student who is infected. Classroom notification is an effective method of informing parents of an illness in the classroom. For settings in which parents are primarily doing drop-offs and pick-ups, posting signs on the doors may be effective. In other settings, sending home or e-mailing a notification may also be effective. These methods serve to notify parents of a potential risk, which may be particularly important for children who are vulnerable to infection, and to alert parents to look for symptoms in their own children.

Absent a health or safety emergency, school officials may not disclose to parents of other students information about a particular student without first securing consent. There may be situations during a health or safety emergency, however, in which schools may determine that parents of students are appropriate parties to whom to disclose the identity of a student infected with H1N1. For example, school officials may determine that it is appropriate to disclose the identity of a student with H1N1 to parents of other students if parents need to know this information to take appropriate action to protect the health or safety of their children. See <http://www.cdc.gov/h1n1flu/sick.htm>. In this situation, parents may need to have this information in order to take appropriate actions to ensure the health or safety of their child, especially parents who have children who are at high risk of developing H1N1 complications or with health challenges. School officials should make the determination whether a disclosure of the student's name is necessary to protect the health or safety of the student or other individuals or whether a general notice is sufficient. Please note that nothing in FERPA prevents schools from telling parents and students that a specific teacher or other school official has H1N1

because FERPA protects the privacy of students' education records, not records on school officials.

Questions & Answers Concerning Vaccination Programs

Vaccine campaigns are, at best, logistically complicated. In this case, health officials seek to immunize as many people as possible in a fairly short window of time. Schools are not only where students spend many of their hours, they are often some of the larger facilities in smaller communities. As such, health officials may seek to administer vaccines at schools. The U.S. government considers participation in a vaccine campaign to be *strictly voluntary*. In the event that vaccines are administered at a school site, possibly by school personnel or by health department personnel, schools must ensure that they adhere to FERPA requirements. Schools, in collaboration with their health departments and local health providers, must carefully consider how to obtain consent from parents, not only for potential information sharing, but also to ensure that parents understand the possible risks of vaccines. Materials to assist with planning and conducting a school-located 2009 H1N1 influenza vaccination clinic are available here: www.ed.gov/h1n1flu/vaccination/slv/. This may require multiple consent forms, so schools should plan early and collaborate with partners to identify and address these issues ahead of time. In addition, in cases in which the vaccinations are performed by a health department (at the school site or otherwise) or local health care providers that are covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), any sharing of individually identifiable immunization information by these covered entities with schools or other persons may be done only as permitted by the HIPAA Privacy Rule.

11. If public health department officials provide vaccines at the school site to students, are any records generated by the vaccine campaign subject to FERPA or to the HIPAA Privacy Rule?

If health officials, such as individuals from the local health department, come on campus and oversee the vaccine administration, any records that the health officials create and maintain would not be subject to FERPA. However, any records or recorded information (or copies of records) provided by health officials to school officials that directly relate to a student and are maintained by the school would be "education records" subject to FERPA.

In November 2008, the Department, along with HHS, issued guidance on the applicability of FERPA and the HIPAA to student health records, the "Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records." See <http://www.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf>. That guidance explained that the HIPAA Privacy Rule does not apply to education records that are protected by FERPA. Student health records that are maintained by schools are "education records" subject to FERPA, and school officials must follow the requirements of FERPA in making any disclosures of these records.

With respect to the records created and maintained by the health department, that entity may or may not be a covered entity subject to HIPAA. If the health department is a HIPAA-covered entity, then it generally would need the authorization of the parent in order to disclose immunization results to the school.

12. If a school nurse (employed by the school) participates in the administration of vaccines along with other individuals from the health department, are the vaccination records covered by FERPA or the HIPAA Privacy Rule?

Any records that the school nurse maintains that are directly related to a student are considered “education records” subject to FERPA. Any records that the health department creates and maintains as a result of the vaccine campaign are not subject to FERPA and may or may not be subject to the HIPAA Privacy Rule.

13. If the school or school district leads the vaccination campaign independent of public health officials, with school nurses or contract nurses hired by the school or school district administering the vaccine, does FERPA permit the school to report the vaccination to the public health department?

As explained in the joint guidance on FERPA and HIPAA, if a person or entity is acting on behalf of a school subject to FERPA, such as a school nurse who provides services to students under contract with or otherwise under the direct control of the school, and maintains student health records, these records are “education records” subject to FERPA. This is the case regardless of whether the health care is provided to students on school grounds or off-site. Accordingly, FERPA permits the school to disclose information on the vaccinations, in personally identifiable form, to the health department without parental consent, if an exception to the general consent rule in FERPA applies. Two such exceptions are disclosures that are:

- in connection with a health or safety emergency; or
- in compliance with a subpoena, if the school makes a reasonable effort to notify the parents or eligible students of the subpoena before complying with it.

14. If a student is immunized by a personal physician and brings the immunization record to the school, does that become part of the student’s education records and, if so, can that record be shared with the health department to allow the student to be counted as “vaccinated”?

If the parent (or the physician) provides the information to the school, and it is maintained by the school, it is an “education record” under FERPA. As such, it can only be shared with the health department either with consent or under one of the exceptions to the general consent requirement in FERPA, such as under the health or safety emergency exception.

15. Is the school required to record disclosures of information submitted to the public health department or other outside parties, even in connection with a health or safety emergency?

Yes. FERPA generally requires that schools maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. 34 CFR § 99.32(a)(1). Moreover, when making a disclosure under the health or safety emergency provision in FERPA, schools are specifically required to record the articulable and significant threat to the health or safety of a student or other individuals that formed the basis for the disclosure and the parties to whom the school disclosed the information. 34 CFR § 99.32(a)(5). The record must be maintained with the education records of each student as long as the records are maintained. 34 CFR § 99.32(a)(2). This requirement enables parents and eligible students who do not provide consent for disclosure of education records to see the circumstances under which and the parties to whom their information was disclosed. However, schools are not required to record disclosures that are made for which the parent or eligible student has provided consent. 34 CFR § 99.32(d)(3).

The Department's Family Policy Compliance Office, the office that administers FERPA, is available to respond to any questions school officials may have about FERPA. For quick responses to routine questions about FERPA, school officials may e-mail the Department at FERPA@ed.gov. You may also call us at (202) 260-3887. Additional information and guidance on FERPA is available on the Department's Web site at: <http://www.ed.gov/policy/gen/guid/fpco/index.html>.

For additional questions about pandemic planning, please e-mail the Department's dedicated mailbox at flu@ed.gov. For additional information, visit: <http://www.flu.gov/professional/school/index.html>.

For more information on the HIPAA Privacy Rule, please visit HHS' HIPAA Privacy Rule Web site at: <http://www.hhs.gov/ocr/privacy/>. The Web site offers a wide range of helpful information about the HIPAA Privacy Rule, including over 200 frequently asked questions.

[Sample consent form follows.]

Sample Consent Form for Disclosures by [name of School District] to [name of Health Department]

The [SCHOOL DISTRICT] will seek to keep students healthy and safe this fall and through the school year. As part of this effort, we will be collaborating with the [LOCAL] Health Department to help track student absences. This effort will enable us to identify unusual clusters of disease and provide information to the school community, and particularly students at high risk, about illnesses. These efforts will also help the health community assess the spread of disease and potentially allocate scarce medical resources.

Pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, parental consent is required before personally identifiable information from your child’s education records may be disclosed to [the health department], absent a health or safety emergency or another exception to the requirement of consent. If your child is age 18 or over, he or she is an “eligible student” and has to provide consent for disclosures of information from his or her education records.

Please note that information about your child may be shared with the Health Department without your consent *if* school officials determine that there is a significant and articulable threat to the health or safety of your child or other individuals and that the Health Department needs to know the information to protect the health or safety of your child or other individuals.

I, _____, hereby agree to allow [SCHOOL DISTRICT NAME] to disclose [specify records] on _____ [Student Name] to _____ [name of Health Department] for the purpose of [state purpose of disclosure].

You may withdraw your consent to share this information at any time. This request should be submitted in writing and signed.

Signature of Parent, Guardian, or Eligible Student

Date: _____