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May 31, 2017

Sarah Royce, MD, MPH
Chief, Immunization Branch
California Department of Public Health
850 Marina Bay Parkway Building, P, 2nd Floor
Richmond, CA 94804

Dr. Royce,

I am in receipt of your letter dated April 5, 2017 entitled "2016-17 Selective Review of Kindergarten and 7th Grade Schools" (See Exhibit A – Selective Review Letter), wherein you write, "During these on-site visits, reviewers will evaluate the immunization records at each facility…"

I represent [redacted] a small private school in [redacted] California. My client received your Selective Review Letter on or about April 18, 2017, when your office, the California Department of Health Immunization Branch ("CDPH-IB"), advised by email, "Your school has been selected for a review of kindergarten immunization records during the next months. Your local health department will contact your soon to schedule the review at your school. Attached to this email is an announcement from the California Department of Public Health regarding the review."

Acting upon your Selective Review Letter, [redacted], of the Los Angeles County Public Health Department Immunization Program ("LACPHD-IP"), telephoned my client in an attempt to schedule an appointment to "evaluate the immunization records" at my client's school. Fortunately, my client contacted me and so no site visit or evaluation has yet taken place, or is scheduled.

Neither the CDPH-IB, nor the LACPHD-IP (collectively "State Parties"), have provided my client with any information whatsoever regarding parental privacy rights under Cal. Health & Safety Code section 120440 and also the Family Educational Rights and Privacy Act (FERPA).

I am concerned with the privacy intrusion proposed by your Department, which is currently being executed by local health departments, to gain access to the confidential medical & educational records of students.

I am therefore copying the U.S. Department of Education, Family Policy Compliance Office, so they can immediately begin investigating your probable violations of FERPA.

This letter respectfully requests that you immediately withdraw your Selective Review Letter because it violates both FERPA and California Medical Confidentiality Law.

Please advise as soon as possible if CDPH will formally withdraw the Selective Review Letter.

A. Family Educational Rights and Privacy Act (FERPA)

"At the elementary or secondary school level, students' immunization and other health records that are maintained by a school district or individual school, including a school-operated health clinic, that receives funds under any program administered by the U.S. Department of Education are 'education records' subject to FERPA." U.S. Dept. of Education, *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* (November 2008), p. 6.

And under FERPA, schools may only share medical records of students to meet "legitimate educational interests". See 20 U.S.C. §1232g (b)(1) and 34 C.F.R. § 99.31(a)(1)(i)(A).

The process described in the Selective Review Letter (e.g., "During these on-site visits, reviewers will evaluate the immunization records at each facility…") does not meet this standard, and it violates FERPA on two levels (1) notice requirements, and (2) substantive requirements.

1. FERPA Notice Requirements

To take advantage of FERPA's "legitimate educational interests" exception, the school must first give annual notice of its criteria for determining what is a "legitimate educational interest." 34 C.F.R. § 99.7(a)(3)(iii).

Here, the Selective Review Letter makes no immediate provision for schools to comply with that annual notice requirement. And even if it did, the Selective Review Letter would still violate FERPA's substantive requirements.

My client does not have a policy to release medical records or education records to third parties. My client's policy is to safeguard the privacy of all students.

My client engages in regular data reporting of Immunization Assessment Reports for purposes of Cal. Health & Safety Code section 120375 and 17 CCR 6075. These reports do not permit any release of **personally identifiable** information in a student's confidential education and health record.

That is why the Selective Review Letter is an unlawful intrusion into privacy.

2. FERPA Substantive Requirements

Under law, routine vaccine administration is not an "emergency", so the State Parties may not gather personally identifiable health information from student records. See for example U.S. Dept. of Educ. Family Compliance Policy Office, *Letter to Alabama Department of Education re: Disclosure of Immunization Records*, February 25, 2004, available at http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/alhippaa.html

In this letter, the U.S. Department of Education **rejects** the position of the Alabama Department of Public Health that tried to gain access to student immunization records:

> "Dr. Williamson [State Health Officer, Alabama Department of Public Health (DPH)] went on to state that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) applies to students' immunization records and that HIPAA permits schools to disclose these records to the DPH....
>
> **"[T]here is no exception to FERPA's prior consent rule that would permit a school subject to FERPA to disclose health or other immunization records to a State health agency such as DPH under the circumstances described in Dr. Williamson's April 22, 2003 memorandum**. A very limited exception to FERPA's prior consent rule allows educational agencies and institutions to disclose personally identifiable non-directory information to appropriate officials in connection with a health or safety emergency. Specifically, FERPA provides that education records may be disclosed without 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). However, the regulations implementing this provision at 34 C.F.R §§ 99.31(a)(10) and 99.36 indicate that **these conditions will be "strictly construed."**
>
> "The exception to FERPA's prior written consent requirement was created with the first FERPA amendments that were signed into law on December 13, 1974. The legislative history demonstrates that Congress intended to limit application of the "health or safety" exception to exceptional circumstances, as follows:
>
> > 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.)

"**This Office 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 attach 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. ...

"In summary, educational agencies and institutions subject to FERPA may disclose personally identifiable, non-directory information from education records under the "health or safety emergency" exception only if the agency or institution determines, 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." [emphasis added]

Accordingly, this legal opinion letter precedent from the U.S. Department of Education is directly on point to show that the State Parties cannot implement the Selective Review Letter as proposed, to access, review, or retain confidential student records.

See also U.S. Dept. of Educ. Family Compliance Policy Office, Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements, Nov. 29, 2004, available at www.ed.gov/policy/gen/guid/fpco/ferpa/library/baiseunmslc.html

> "**We cannot come to the same conclusion with respect to the 'routine' or non-emergency reporting that is required by regulation for other notifiable conditions, including the infectious diseases**, injuries, environmental exposures, sexually transmitted diseases, HIV/AIDS, cancer, and birth defects specified in 7NMAC 4.3.12 B, as well as reports to the New Mexico Tumor Registry required under 7 NMAC 4.3.10. **Indeed, in these cases, the State Department of Health has determined that the specified disease or condition *does not* constitute an imminent danger or threat or that emergency reporting or other action is necessary to address the concern. Consequently, the University may not disclose information from a student's education records to meet these "routine" health reporting requirements unless it has made a specific, case-by-case determination that a health or safety emergency exists**...." [emphasis added]

See also Exhibit B -- Federal Register, Vol. 73, No. 237, December 9, 2008 (regarding 34 CFR Part 99)

> **"Health or Safety Emergency (§ 99.36)...**
>
> "(a) Disclosure in Non-Emergency Situations
>
> "Comment: Some commenters suggested that we interpret § 99.36 to permit the sharing of information on reportable diseases to health officials in non-emergency situations. These commenters stated that the disclosure of routine immunization data should be subject to State, local, and regional public health laws and regulations and not FERPA. One of these commenters noted that the HIPAA Privacy Rule allows covered entities to disclose personally identifiable health data, without consent, to public health authorities.
>
> "Discussion: There is no authority in FERPA to exclude students' immunization records from the definition of education records in FERPA. Further, the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an "education record" under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no statutory exception to the written consent requirement in FERPA to permit this type of disclosure. **As explained in the preamble to the NPRM (73 FR 15589), the amendment to the health or safety emergency exception in § 99.36 does not allow disclosures on a routine, non-emergency basis, such as the routine sharing of student information with the local police department. Likewise, this exception does not cover routine, non-emergency disclosures of students' immunization data to public health authorities.** Consequently, there

is no statutory basis for the Department to revise the regulatory language as requested by the commenters." [emphasis added]

Based on clear precedents like these, there would be no rational legal basis for the State Parties to conduct a systematic violation of the privacy of my client's students. Indeed, based on these clear precedents, the intentions of the State Parties with regard to the Selective Review Letter could be scrutinized for a potential willful violation of FERPA.

B. California Medical Confidentiality Laws

1. The Confidentiality of Medical Information Act (CMIA)

The State Parties are attempting to require schools to provide individually identifiable health information about students.

California law prohibits the disclosure of such records that contain a student's medical information, unless the parent has first provided a detailed authorization for release of the information. CA Civil Code §56.11.

None of the listed exceptions to CA Civil Code §56.11 (i.e., emergency situation) would apply here to my client.

"A licensed health professional who knowingly and intentionally obtains, uses or discloses confidential medical information will be fined on the first violation, a maximum of $2,500 per violation, for the second violation, a maximum of $10,000 per violation, and for the third violation, a maximum of $25,000 per violation…. In determining the penalty that should be imposed, several criteria should be examined, including whether a reasonable attempt was made to comply with the statute, the nature and seriousness of the offense, the harm to the patient, the number of violations, and intent of the defendant." Cal. Civ. Code §56.36

See also remedies under The Information Practices Act (IPA), which limits the collection, maintenance, and distribution of personal information by state agencies. Cal. Civ. Code. §§ 1798-1798.78. See also prohibitions on the disclosure of genetic information. Cal. Civ. Code § 56.17.

The blanket policy of the Selective Review Letter is directly at odds with the case-by-case protections that California law requires. Indeed, each individual's privacy is important and special.

2. Cal. Health & Safety Code section 120440

Cal. Health & Safety Code section 120440 states regarding student health records:

> "(e) **A patient or a patient's parent or guardian may refuse to permit recordsharing**... (4) The patient or client, or the parent or guardian of the patient or client, may refuse to allow this information to be shared in the manner described, or to receive immunization reminder notifications at any time, or both. **After refusal, the**

patient's or client's physician may maintain access to this information for the purposes of patient care or protecting the public health."

Indeed, without parental consent, the school is not even allowed to report the child as a statistic for purposes of Immunization Assessment Reports. Note that the statute specifies that it is the patient's physician who is entrusted with the duty of protecting public health in these cases for the patient in question.

The State Parties' attempt to usurp the licensed physician's role under California law, and to impliedly suggest a one-size-fits-all approach for patients is neither feasible nor lawful.

The physician must keep the patient's information confidential unless a specific and lawful order requires the information's release pursuant to one of the identified statutes. The State Parties have provided no such order to my client.

The medical privacy notice requirements of Cal. Health & Safety Code section 120440 et seq require schools to give parents notice and the opportunity to opt out of medical information sharing with the government:

> Cal. Health & Safety Code section 120440
> (e) A patient or a patient's parent or guardian may refuse to permit recordsharing. The health care provider administering immunization and any other agency possessing any patient or client information listed in subdivision (c), **if planning to provide patient or client information to an immunization system, as described in subdivision (b), shall inform the patient or client, or the parent or guardian of the patient or client**, of the following:
> (1) The information listed in subdivision (c) may be shared with local health departments and the State Department of Public Health. The health care provider or other agency shall provide the name and address of the State Department of Public Health or of the immunization registry with which the provider or other agency will share the information.
> (2) Any of the information shared with local health departments and the State Department of Public Health shall be treated as confidential medical information and shall be used only to share with each other, and, upon request, with health care providers, schools, child care facilities, family child care homes, WIC service providers, county welfare departments, foster care agencies, and health care plans. These providers, agencies, and institutions shall, in turn, treat the shared information as confidential, and shall use it only as described in subdivision (d).
> (3) The patient or client, or parent or guardian of the patient or client, has the right to examine any immunization-related information or tuberculosis screening results shared in this manner and to correct any errors in it.
> (4) **The patient or client, or the parent or guardian of the patient or client, may refuse to allow this information to be shared**

in the manner described, or to receive immunization reminder notifications at any time, or both. After refusal, the patient's or client's physician may maintain access to this information for the purposes of patient care or protecting the public health. After refusal, the local health department and the State Department of Public Health may maintain access to this information for the purpose of protecting the public health pursuant to Sections 100325, 120140, and 120175, as well as Sections 2500 to 2643.20, inclusive, of Title 17 of the California Code of Regulations.

This letter will confirm that, pursuant to Cal. Health & Safety Code section 120440(e)(4), no families have provided consent for my client to share their children's vaccination or exemption records.

3. Constitutional Rights

Under the 4th Amendment to the United States Constitution, and also under Article I, section 1 of the California constitution, the families at my client's school have fundamental privacy rights.

Conclusion

The Selective Review Letter is an attempt to intrude into the privacy of student health and education records. It violates FERPA, and California Medical Confidentiality law.

I respectfully request that you withdraw the Selective Review Letter.

Regards,

Greg Glaser

Greg Glaser
Attorney at Law

CC:

U.S. Department of Education, Family Policy Compliance Office
400 Maryland Avenue, SW, Washington, D.C. 20202-5920

Encl. -- Exhibits A and B

Exhibit A

State of California—Health and Human Services Agency
California Department of Public Health

KAREN L. SMITH, MD, MPH
Director and State Public Health Officer

EDMUND G. BROWN JR.
Governor

April 5, 2017

TO: County/District Superintendents
County/District School Nurses
School Principals

FROM: Sarah Royce, MD, MPH
Chief, Immunization Branch
Division of Communicable Disease Control
Center for Infectious Diseases

SUBJECT: 2016-17 Selective Review of Kindergarten and 7th Grade Schools

This spring, the California Department of Public Health (CDPH) along with your local health department (LHD) are conducting an on-site Selective Review in a sample of kindergarten and 7th grade schools. Your facility was selected for a follow-up assessment. During these on-site visits, reviewers will evaluate the immunization records at each facility and their compliance with California School Immunization Laws (California Health and Safety Code, Sections 120325-120375 and California Code of Regulations Title 17 Division 1, Chapter 4, Subchapter 8).

Additionally, LHD staff will administer a questionnaire to responsible facility staff to gauge knowledge about immunization law and requirements.

The provision of the Health Insurance Portability Accountability Act (HIPAA) Privacy Rule allows for disclosure of health information such as the blue California School Immunization Record (CSIR) card to public health officials during these site visits.

Before the Selective Review Process begins, please check that each child has either:

1. A complete and accurate California School Immunization Record (the blue CSIR card) in his or her cumulative file, **or**
2. A complete and accurate electronic record of his/her required vaccinations stored in a computerized system. If records are computerized, please have printed copies available. Reviewers will be available to answer any questions facility staff have regarding immunization requirements.

If you have any concerns, please contact your LHD Immunization Coordinator. We appreciate your participation and hope that this survey will help to further our common goal of protecting California's children from vaccine-preventable diseases.

cc: LHD Immunization Coordinators
Immunization Branch Field Representatives

Exhibit B

Federal Register

Tuesday,
December 9, 2008

Part II

Department of Education

34 CFR Part 99

Family Educational Rights and Privacy; Final Rule

for dealing with a situation in which all students in a particular subgroup scored at the same achievement level. One solution, referred to as ''masking'' the data, is to use the notation of >95% when all students in a subgroup score at the same achievement level.

See *www.ed.gov/programs/titleiparta/reportcardsguidance.doc* on page 3. Likewise, LEAs and SEAs must adopt a strategy for ensuring that they do not disclose personally identifiable information about low-performing students when they release information about their high-performing students.

In response to the comments that paragraphs (1) and (2) in § 99.31(b) are confusing, paragraph (1) establishes a standard for de-identifying education records that applies to disclosures made to any party for any purpose, including, for example, parents and other members of the general public who are interested in school accountability issues, as well as education policy makers and researchers. The release of de-identified information from education records under § 99.31(b)(1) is not limited to education research purposes because, by definition, the information does not contain any personally identifiable information.

Paragraph (2) of § 99.31(b) applies only to parties conducting education research; it allows an educational agency or institution, or a party that has received education records, such as a State educational authority, to attach a code to each record that may allow the researcher to match microdata received from the same educational source under the conditions specified. The purpose of paragraph (2) is to facilitate education research by authorizing the release of coded microdata. The requirements in paragraph (2) that apply to a record code preclude matching de-identified data from education records with data from another source. Therefore, by its terms, the release of coded microdata under paragraph (2) is limited to education research.

We agree with the commenter who stated that the reference in § 99.31(b)(1) to ''unique patterns of information about a student'' is confusing in relation to the definition of *personally identifiable information* and believe that it essentially restated the requirements in paragraph (f) of the definition. Therefore, we have removed this phrase from the regulations. We disagree that the definition of *personally identifiable information* and the requirements in § 99.31(b) impose an unnecessary burden on the entity receiving a request for de-identified information from education records and that the requirements in paragraph (f) in the definition are sufficient. As explained above, paragraph (f) does not address the problem of targeted requests. It also does not address the re-identification risk associated with multiple data releases and other reasonably available information, or allow for the coding of de-identified micro data for educational research purposes. Section 99.31(b) provides the additional standards needed to help ensure that educational agencies and institutions and other parties do not identify students when they release redacted records or statistical data from education records.

Changes: We have removed the reference to ''unique patterns of information'' in § 99.31(b).

Notification of Subpoena (§ 99.33(b)(2))

Comment: We received a few comments on our proposal in § 99.33(b)(2) to require a party that has received personally identifiable information from education records from an educational agency or institution to provide the notice to parents and eligible students under § 99.31(a)(9) before it discloses that information on behalf of an educational agency or institution in compliance with a judicial order or lawfully issued subpoena. One national education association supported the proposed amendment.

One commenter asked the Department to clarify the intent of the proposed language. This commenter said that, when an educational agency or institution requests that a third party make the disclosure to comply with a lawfully issued subpoena or court order, it is reasonable to expect the educational agency or institution to send the required notice to the student(s). The commenter also said that it was not clear from the proposed change whether it is sufficient for the educational agency or institution to send the notice or whether it must come from the third party.

Discussion: The Secretary agrees that there needs to be clarification about which party is responsible for notifying parents and eligible students before an SEA or other third party outside of the educational agency or institution discloses education records to comply with a lawfully issued subpoena or court order. We have revised the regulation to provide that the burden to notify a parent or eligible student rests with the recipient of the subpoena or court order. While a third party, such as an SEA, that is the recipient of a subpoena or court order is responsible for notifying the parents and eligible students before complying with the order or subpoena, the educational agency or institution could assist the third party in the notification requirement, by providing it with contact information so that it could provide the notice.

In order to ensure that this new requirement is enforceable, we have also revised § 99.33(e) so that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

Changes: We have amended § 99.33(b)(2) to clarify that the third party that receives the subpoena or court order is responsible for meeting the notification requirements under § 99.31(a)(9). We also have revised § 99.33(e) to provide that if the Department determines that a third party, such as an SEA, did not provide the notification required under § 99.31(a)(9)(ii), the educational agency or institution may not allow that third party access to education records for at least five years.

Health or Safety Emergency (§ 99.36)

Comment: We received many comments in support of our proposal to amend § 99.36 regarding disclosures of personally identifiable information without consent in a health or safety emergency. Most of the parties that commented stated that the proposed changes demonstrated the right balance between student privacy and campus safety. A number of commenters specifically supported the clarification regarding the disclosure of information from an eligible student's education records to that student's parents when a health or safety emergency occurs. One commenter said that the proposed amendment would provide appropriate protection for sensitive and otherwise protected information while clarifying that educational agencies and institutions may notify parents and other appropriate individuals in an emergency so that they may intervene to help protect the health and safety of those involved.

Discussion: We appreciate the commenters' support for the amendments to the ''health or safety emergency'' exception in § 99.36(b). Educational agencies and institutions are permitted to disclose personally identifiable information from students' education records, without consent, under § 99.31(a)(10) in connection with a health or safety emergency. Disclosures under § 99.31(a)(10) must meet the conditions described in § 99.36. We address specific comments

about the proposed amendments to this exception in the following paragraphs.

Changes: None.

(a) Disclosure in Non-Emergency Situations

Comment: Some commenters suggested that we interpret § 99.36 to permit the sharing of information on reportable diseases to health officials in non-emergency situations. These commenters stated that the disclosure of routine immunization data should be subject to State, local, and regional public health laws and regulations and not FERPA. One of these commenters noted that the HIPAA Privacy Rule allows covered entities to disclose personally identifiable health data, without consent, to public health authorities.

Discussion: There is no authority in FERPA to exclude students' immunization records from the definition of *education records* in FERPA. Further, the HIPAA Privacy Rule specifically excludes from coverage health care information that is maintained as an ''education record'' under FERPA. 45 CFR 160.103, Protected health information. We understand that the HIPAA Privacy Rule allows covered entities to disclose identifiable health data without written consent to public health authorities. However, there is no statutory exception to the written consent requirement in FERPA to permit this type of disclosure.

As explained in the preamble to the NPRM (73 FR 15589), the amendment to the health or safety emergency exception in § 99.36 does not allow disclosures on a routine, non-emergency basis, such as the routine sharing of student information with the local police department. Likewise, this exception does not cover routine, non-emergency disclosures of students' immunization data to public health authorities. Consequently, there is no statutory basis for the Department to revise the regulatory language as requested by the commenters.

Changes: None.

(b) Strict Construction Standard

Comment: Several commenters expressed concern that removing the language from current § 99.36 requiring strict construction of the ''health and safety emergency'' exception and substituting the language providing for a ''rational basis'' standard would not require schools to make an individual assessment to determine if there is an emergency that warrants a disclosure. One commenter stated that removal of the ''strict construction'' requirement would severely weaken the Department's enforcement capabilities and that schools may see this change as an excuse to disclose sensitive student information when there is not a real emergency.

A commenter stated that the removal of the ''strict construction'' requirement would mean that the Department would eliminate altogether its review of actions taken by schools under the health and safety emergency exception. Another commenter stated that removing the requirement that this exception be strictly construed could erode the privacy rights of individuals. The commenter noted that because parents and eligible students cannot bring suit in court to enforce FERPA, schools face virtually no liability if they violate FERPA requirements.

A commenter asked that the Department clarify what is meant by an ''emergency'' and how severe a concern must be to qualify as an emergency.

Discussion: Section 99.36(c) eliminates the previous requirement that paragraphs (a) and (b) of this section be ''strictly construed'' and provides instead that, in making a determination whether a disclosure may be made under the ''health or safety emergency'' exception, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. The new provision states that if there is an articulable and significant threat to the health or safety of the student or other individuals, an educational agency or institution may disclose information to appropriate parties.

As we indicated in the preamble to the NPRM, we believe paragraph (c) provides 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. 73 FR 15574, 15589. In that regard, paragraph (c) provides that the Department will not substitute its judgment for that of the agency or institution if, based on the information available at the time of the determination there is a rational basis for the agency's or institution's determination that a health or safety emergency exists and that the disclosure was made to appropriate parties.

We do not agree that removal of the ''strict construction'' standard weakens FERPA or erodes privacy protections. Rather, the changes appropriately balance the important interests of safety and privacy by providing school officials with the flexibility to act quickly and decisively when emergencies arise. Schools should not view FERPA's ''health or safety emergency'' exception as a blanket exception for routine disclosures of student information but as limited to disclosures necessary to protect the health or safety of a student or another individual in connection with an emergency.

After consideration of the comments, we have determined that educational agencies and institutions should be required to record the ''articulable and significant threat to the health or safety of a student or other individuals'' so that they can demonstrate (to parents, students, and to the Department) what circumstances led them to determine that a health or safety emergency existed and how they justified the disclosure. Currently, educational agencies and institutions are required under § 99.32(a) to record any disclosure of personally identifiable information from education records made under § 99.31(a)(10) and § 99.36. We are revising the recordation requirements in § 99.32(a)(5) to require an agency or institution to record the articulable and significant threat that formed the basis for the disclosure. The school must maintain this record with the education records of the student for as long as the student's education records are maintained (§ 99.32(a)(2)).

We do not specify in the regulations a time period in which an educational agency or institution must record a disclosure of personally identifiable information from education records under § 99.32(a). We interpret this to mean that an agency or institution must record a disclosure within a reasonable period of time after the disclosure has been made, and not just at the time, if any, when a parent or student asks to inspect the student's record of disclosures. We will treat the requirement to record the significant and articulable threat that forms the basis for a disclosure under the health or safety emergency exception no differently than the recordation of other disclosures. In determining whether a period of time for recordation is reasonable, we would examine the relevant facts surrounding the disclosure and anticipate that an agency or institution would address the health or safety emergency itself before turning to recordation of any disclosures and other administrative matters.

In response to concerns about the Department's enforcement of the provisions of § 99.36, the ''rational basis'' test does not eliminate the Department's responsibility for oversight and accountability. Actions that the Secretary may take in addressing violations of this and other