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August 25, 2017

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Dr. Wada and Mr. Ontiveros,

I represent [redacted] who is enrolled in Santa Maria-Bonita School District (SMBSD) at Fesler Junior High School. I have been notified that the Medical Exemption Pilot Project (MEPP) being implemented by Santa Barbara County Public Health Department (SBCPHD), in conjunction with schools such as SMBSD, recently intruded the privacy of my clients for the 2017-18 school year.

For a summary of the relevant facts, please see the attached witness statement from [redacted]

A particularly key fact is that SMBSD verbally told [redacted] that they were *required* to provide individually identifiable health information about [redacted] the SBCPHD. This statement and action by SMBSD was contrary to the terms of the MEPP stated in Dr. Wada's letter of June 24, 2016. And so it emphasizes (1) the high-risk for privacy violation where parents are not expressly opting-in to record sharing, and (2) the failure of the MEPP to prevent violations of student privacy.

Fundamentally, the MEPP is an attempt to insert the SBCPHD into the confidential doctor-patient relationship, such that the MEPP intrudes into the privacy of student health and education records.

My clients respectfully request that SBCPHD immediately withdraw the MEPP, and that SMBSD immediately cease implementing the MEPP, because the MEPP violates both FERPA and California Medical Confidentiality Law.

Please advise as soon as possible if you will comply with this request.

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

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

The policy on record sharing for SMBSD is stated in the Parent-Student Handbook as follows:

> "Parents or guardians may refuse to allow the sharing of personal information related to their child's immunization records by notifying the County Health Department listed in this section. [HSC 120335, 120335, 120338, 120370, 120375, 120400, 120405, 120410, 120415, 120480, EC 48216, 49403, 48852.7, 48853.5, 17 CCR 6000-6075; 42 USC 11432(C)(i)]."
>
> SMBSD Annual Notification to Parents/Guardians, *2017-18, Health Services, Immunizations,* page 11.

Conspicuously absent from this list of law citations by SMBSD is any reference to FERPA, or to Cal. Health & Safety Code section 120440 (specifically governing parent/guardian opt outs of immunization record sharing). Moreover, the SMBSD policy attempts to put the burden on *parents* to contact the County Health Department (rather than for parents to contact the school) to refuse 'sharing of personal information'. First, such SMBSD policy immediately violates the family's privacy, because the family becomes required to personally identify themselves directly to the Public Health Department as a family with a medical exemption. Second, such SMBSD policy is not a true opt-out because the school is not *expressly* prevented from giving the Public

Health Department access to the confidential record. Instead, the SMBSD policy is written ambiguously so the parent/guardian cannot know with whom they are actually opting out of record sharing (i.e., County, State, other, departments?).

Another factor for consideration is that the California Department of Public Health is currently in the process of revising 17 CCR 6000-6075, and such revisions are expected to clarify that parties like SMBSD and SBCPHD must ensure strict privacy protections and opt-outs (such as those stated in Cal. Health and Safety Code section 120440).

Notably, Santa Barbara also has the following policy (Exhibit A):

> "Discretionary Access. At his/her discretion, the Superintendent or designee may release information from a student's records to the following: ...
>
> "5. Local health departments operating countywide or regional immunization information and reminder systems and the California Department of Public Health, unless the parent/guardian has requested that no disclosures of this type be made (Health and Safety Code 120440)."

This policy (Exh. A) covers at most the data reporting of Immunization Assessment Reports for purposes of Cal. Health & Safety Code section 120375 and 17 CCR 6075. This policy (Exh. A) does not allow a release of **personally identifiable** information in a student's confidential education and health record.

That is why the MEPP is an unprecedented intrusion into privacy, seeking to gain access to medical exemption documents themselves.

Another key factor to this medical exemption privacy issue is that school nurses (who routinely review medical exemptions) are typically contracted through the County Health Department, whereby each school in the District may work with several rotating nurses. It is unlikely or impossible for these nurses to be able to wear two hats (school hat, and health department hat) and still maintain confidentiality at the school without causing the release of information to the health department. At a minimum, schools should have policies in place that state that nurses will not share confidential student records with the health department without parental consent, an emergency, or an authorized court order or administrative order.

2. FERPA Substantive Requirements

Under law, routine vaccine administration is not an "emergency", so SMBSD and SBCPHD 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 such letter, the U.S. Department of Education **rejected** 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 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. ...

> **"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 SMBSD and SBCPHD cannot implement the MEPP 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 SMBSD and SBCPHD to conduct a systematic violation of the privacy of students.

B. California Medical Confidentiality Laws

1. The Confidentiality of Medical Information Act (CMIA)

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.

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 MEPP 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

One of the most troubling aspects of the MEPP is SBCPHD's proposal to scrutinize medical exemptions and ambiguously contact student's doctors with "helpful information".

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 attempt by SBCPHD 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. SMBSD and SBCPHD have provided no such order to my clients.

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), my client has not provided consent to share [redacted] 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, my client asserts and reserves her fundamental privacy rights.

Conclusion

The MEPP is an attempt to insert the SBCPHD into the confidential doctor-patient relationship, which intrudes into the privacy of student health and education records. On its face, and through its implementation over my clients, the MEPP violates FERPA, and California Medical Confidentiality law.

My client respectfully requests that SBCPHD immediately withdraw the MEPP, and that SMBSD immediately cease complying with the MEPP.

Regards,

DocuSigned by:
Greg Glaser
1863160CBC144A1...

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

Exhibit A

Santa Barbara Unified School District
Administrative Regulation

Students **AR 5125**

STUDENT RECORDS

Definitions
Student means any individual who is or has been in attendance at the district and regarding whom the district maintains student records. (34 CFR 99.3)

Attendance includes, but is not limited to, attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunication technologies for students who are not physically present in the classroom, and the period during which a person is working under a work-study program. (34 CFR 99.3)

Student records are any items of information (in handwriting, print, tape, film, computer, or other medium) gathered within or outside the district that are directly related to an identifiable student and maintained by the district, required to be maintained by an employee in the performance of his/her duties, or maintained by a party acting for the district. Any information maintained for the purpose of second-party review is considered a student record. Student records include the student's health record. (Education Code 49061, 49062; 5 CCR 430; 34 CFR 99.3)

Student records do not include: (Education Code 49061, 49062; 5 CCR 430; 34 CFR 99.3)

1. Directory information. Schools cannot provide directory information to organizers of a student/parent school directory. If parents wish to compile a school directory, they should do it through the school PTA/PTO. Parents who are organizing a school directory must solicit information from individual families. It is at the discretion of the individual family to release their personal information to anyone other than a school entity.

(cf. 5125.1 - Release of Directory Information)

2. Informal notes compiled by a school officer or employee which remain in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a substitute employee

3. Records of the law enforcement unit of the district, subject to 34 CFR 99.8

(cf. 3515 - Campus Security)
(cf. 3515.3 - District Police/Security Department)

4. Records created or received by the district after an individual is no longer a student and that are not directly related to the individual's attendance as a student

5. Grades on peer-graded papers before they are collected and recorded by a teacher

Mandatory permanent student records are those records which are maintained in perpetuity and which schools have been directed to compile by state law, regulation, or administrative directive. (5 CCR 430)

In such cases, the Superintendent or designee shall provide information about the identity and location of the student as it relates to the transfer of that student's records to another public school district or California private school. (Education Code 49076.5)

When disclosing records for the above purposes, the Superintendent or designee shall obtain the necessary documentation to verify that the person, agency, or organization is a person, agency, or organization that is permitted to receive such records.

Any person, agency, or organization granted access is prohibited from releasing information to another person, agency, or organization without written permission from the parent/guardian or adult student unless specifically allowed by state law or the federal Family Educational Rights and Privacy Act. (Education Code 49076)

In addition, the parent/guardian or adult student may provide written consent for access to be granted to persons, agencies, or organizations not afforded access rights by law. The written consent shall specify the records to be released and the party or parties to whom they may be released. (Education Code 49075)

Only a parent/guardian having legal custody of the student may consent to the release of records to others. Either parent/guardian may grant consent if both parents/guardians notify the district, in writing, that such an agreement has been made. (Education Code 49061)

(cf. 5021 - Noncustodial Parents)

Discretionary Access

At his/her discretion, the Superintendent or designee may release information from a student's records to the following:

1. Appropriate persons, including parents/guardians of a student, in an emergency if the health and safety of the student or other persons are at stake (Education Code 49076; 34 CFR 99.31, 99.32, 99.36)

   When releasing information to any such appropriate person, the Superintendent or designee shall record information about the threat to the health or safety of the student or any other person that formed the basis for the disclosure and the person(s) to whom the disclosure was made. (Education Code 49076; 34 CFR 99.32)

   Unless it would further endanger the health or safety of the student or other persons, the Superintendent or designee shall inform the parent/guardian or adult student within one week of the disclosure that the disclosure was made, of the articulable and significant threat to the health or safety of the student or other individuals that formed the basis for the disclosure, and of the parties to whom the disclosure was made.

2. Accrediting associations (Education Code 49076; 34 CFR 99.31)

3. Under the conditions specified in Education Code 49076 and 34 CFR 99.31, organizations conducting studies on behalf of educational institutions or agencies for the purpose of developing, validating, or administering predictive tests, administering student aid programs, or improving instruction, provided that: (Education Code 49076; 34 CFR 99.31)

a. The study is conducted in a manner that does not permit personal identification of parents/guardians and students by individuals other than representatives of the organization who have legitimate interests in the information.

b. The information is destroyed when no longer needed for the purposes for which the study is conducted.

c. The district enters into a written agreement with the organization that complies with 34 CFR 99.31.

4. Officials and employees of private schools or school systems where the student is enrolled or intends to enroll, subject to the rights of parents/guardians as provided in Education Code 49068 and in compliance with 34 CFR 99.34 (Education Code 49076; 34 CFR 99.31, 99.34)

5. Local health departments operating countywide or regional immunization information and reminder systems and the California Department of Public Health, unless the parent/guardian has requested that no disclosures of this type be made (Health and Safety Code 120440)

6. Contractors and consultants having a legitimate educational interest based on services or functions which have been outsourced to them through a formal written agreement or contract by the district, excluding volunteers or other parties (Education Code 49076)

(cf. 3600 - Consultants)

7. Agencies or organizations in connection with the student's application for or receipt of financial aid, provided that information permitting the personal identification of a student or his/her parents/guardians for these purposes is disclosed only as may be necessary to determine the eligibility of the student for financial aid, determine the amount of financial aid, determine the conditions which will be imposed regarding the financial aid, or enforce the terms or conditions of the financial aid (Education Code 49076; 34 CFR 99.31, 99.36)

8. County elections officials for the purpose of identifying students eligible to register to vote or offering such students an opportunity to register, subject to the provisions of 34 CFR 99.37 and under the condition that any information provided on this basis shall not be used for any other purpose or transferred to any other person or agency (Education Code 49076; 34 CFR 99.31, 99.37)

(cf. 1400 - Relations Between Other Governmental Agencies and the Schools)

When disclosing records for the above purposes, the Superintendent or designee shall obtain the necessary documentation to verify that the person, agency, or organization is a person, agency, or organization that is permitted to receive such records.

De-identification of Records

When authorized by law for any program audit, educational research, or other purposes, the Superintendent or designee may release information from a student record without prior consent of the parent/guardian or adult student after the removal of all personally identifiable information. Prior to releasing such information, the Superintendent or designee shall make a reasonable determination that the student's identity is not personally identifiable, whether through single or multiple releases and taking into account other reasonably available information. (Education Code 49074, 49076; 34 CFR 99.31)

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