June 15, 2016

Takashi Wada, Director
Santa Barbara County Public Health Department
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Dr. Wada,

Your letter dated June 6, 2016 regarding Medical Exemption Pilot Project (MEPP) is publicly available online (Exhibit A), and it was forwarded to me by several California physicians and nonprofit organizations, including the National Vaccine Information Center (NVIC).

We are concerned with the privacy intrusion proposed by your Department, Santa Barbara County Public Health Department (SBCPHD), attempting to gain unprecedented access to the confidential medical & educational records of students.

This letter respectfully requests that you immediately withdraw your Department’s MEPP because it violates both FERPA and California Medical Confidentiality Law.

Please advise as soon as possible if SBCPHD will formally withdraw the MEPP.

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

Currently, the Santa Barbara School District has the following policy (Exhibit B):

“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 above-policy covers at most the data reporting of Immunization Assessment Reports for purposes of Cal. Health & Safety Code section 120375 and 17 CCR 6075. The above-policy does not allow a release of **personally identifiable** information in a student’s confidential education and health record.

That is why the MEPP pilot program is an unprecedented intrusion into privacy.

2. **FERPA Substantive Requirements**


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 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 SBCPHD cannot implement the MEPP as proposed.


“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 C -- 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 SBCPHD to conduct a pilot test to violate the privacy of students. Indeed, based on these clear precedents, the intentions of SBCPHD with regard to the MEPP could be scrutinized for a potential willful violation of FERPA.

California Medical Confidentiality Laws

A. The Confidentiality of Medical Information Act (CMIA)

SBCPHD is 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 the MEPP.

“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


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.

B. 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”.

First, this aspect of MEPP is in direct conflict with the legislative intent of SB277, as evidenced by the following Assembly Committee hearing transcript (June 9, 2015) and Governor’s signing statement (June 30, 2015):

“Rob Bonta: Thank you, Dr. Pan. And then finally, we have an amendment regarding the medical exemption and a physician's judgement. And I've heard from a number of constituents and Californians regarding concerns that a medical exemption is difficult to obtain or was difficult to obtain. I believe that current law states that a physician has complete, professional discretion over the writing of a medical exemption. However, I have asked the author to take an amendment to clarify that a medical exemption is entirely within the professional judgement of a physician and we have agreement on that amendment.

“Richard Pan: Yes.”

...

Governor Jerry Brown’s Signing Statement, dated June 30, 2015 (“Thus, SB 277, while requiring that school children be vaccinated, explicitly provides an exception when a physician believes that circumstances – in the judgement and sound discretion of the physician – so warrant.”) See Exhibit D.

Second, SBCPHD’s proposal violates Cal. Health & Safety Code section 120440 regarding student health records, which provides:

“(c) 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. See Exhibit E. 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.

SBCPHD's 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 is only allowed to report confidential information to public health in the event of a special investigation or emergency (i.e. outbreak) as defined by CA statute. In other words, 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.

**Conclusion**

The MEPP is an unprecedented 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 MEPP.

Regards,

Greg Glaser
Attorney at Law

**CC:**

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400 Maryland Avenue, SW, Washington, D.C. 20202-5920

Encl. -- Exhibits A through E
Exhibit A
June 6, 2016

To: School Superintendents, Principals and Child Care Center Directors
CC: School Nurses

Re: Medical Exemption Pilot Project

In light of Senate Bill 277 being implemented this year, the Santa Barbara County Public Health Department is initiating the Medical Exemption Pilot Project. We are directing all schools and childcare centers to fax all Medical Exemptions (permanent or temporary) submitted for the 2016-2017 school year to the Immunization Program. This will enable a comprehensive review of each exemption by the Health Officer and Immunization Program staff. Our purpose is to collect and analyze data, identify any Medical Exemption not meeting SB 277 criteria, and provide helpful information to physicians issuing such exemptions. Our secure fax number is (805) 346-7232.

If a Medical Exemption is determined to not meet SB 277 criteria and is therefore ineligible, we will contact your school. If you do not receive such notification, please assume the submitted Medical Exemption is acceptable.

As a HIPAA-exempt entity our Immunization Program routinely requests and reviews vaccination records from schools and medical providers. Providing these documents to the Public Health Department via our secure fax line is not a violation of HIPAA.

Thank you for your leadership and partnership in implementing Senate Bill 277. Together we promote a safe and healthy community. Please contact the Immunization Program at (805) 346-8420 if you have questions.

Sincerely,

Charity Dean MD, MPH
Health Officer, Santa Barbara County Public Health Dept.

Takashi Wada MD, MPH
Director, Santa Barbara County Public Health Dept.
Exhibit B
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 C
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 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 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.

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(c) 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 information 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 personally 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 and 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 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 schools official 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. In actions that the Secretary may take in addressing violations of this and other
June 30, 2015

To the Members of the California State Senate:

SB 277 has occasioned widespread interest and controversy – with both proponents and opponents expressing their positions with eloquence and sincerity. After carefully reviewing the materials and arguments that have been presented, I have decided to sign this bill.

The science is clear that vaccines dramatically protect children against a number of infectious and dangerous diseases. While it’s true that no medical intervention is without risk, the evidence shows that immunization powerfully benefits and protects the community.

The Legislature, after considerable debate, specifically amended SB 277, to exempt a child from immunizations whenever the child’s physician concludes that there are “circumstances, including but not limited to, family medical history, for which the physician does not recommend immunization…”

Thus, SB 277, while requiring that school children be vaccinated, explicitly provides an exception when a physician believes that circumstances – in the judgement and sound discretion of the physician – so warrant.

Sincerely,

Edmund G. Brown Jr.
Exhibit E
1. Access Kindergarten Immunization Tools

- Guide to Immunizations Required | K-12
- California School Immunization Record | Blue Card
- Conditional Admission Immunization Schedule

These are available for download at shotsforschool.org or contact your local health department to request hardcopies.

Note:

- Report immunization status of ALL kindergarten students (traditional AND transitional) as of the date the report is completed.
- For ungraded classes, report on entering students from age 4 years-9 months to age 5 years-9 months.
- Do not report on pre-K students or after-care enrollees.
- Submit one report for each school campus per year.
- If a student has an exemption and is also a conditional entrant, please report the student as having an exemption only. If a student has a permanent medical exemption and a personal beliefs exemption, report the student as having received a personal beliefs exemption only.

2. Determine Number of Doses

- Kindergarten Immunization Assessment Worksheet | PM236A Optional

- Some facilities have electronic systems and may not need the worksheet.

For more resources, please go to http://www.shotsforschool.org/k-12/tools/
3. Completing & Submitting Your Report Online

1) **Log in**

- Password: `school` and click the *Log in* button.
- OR enter your seven-digit *School Code* (the last seven numbers of your County-District-School (CDS) code).

*If you cannot find your school, please follow the procedures in the FAQs*

---

**Please confirm the following information:**

<table>
<thead>
<tr>
<th>Field</th>
<th>Value</th>
</tr>
</thead>
<tbody>
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<td>School Name</td>
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<tr>
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<td>School Code</td>
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<tr>
<td>Public School District</td>
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</tr>
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<td>Zip</td>
<td>91910</td>
</tr>
<tr>
<td>...</td>
<td>...</td>
</tr>
</tbody>
</table>

Do you have any kindergarten students enrolled this year? 
Yes [ ] No [X]

If not, why?

Are students schooled at home? [ ] No [X]

Is this an online/virtual school? [ ] No [X]

Then select *Confirm and continue* at the bottom to proceed.
# Immunization Assessment of Kindergarten Students

**School Name:** PRACTICE WORKSHEET  
**School Code:** 1234567  
**Number of Kindergarten Students Enrolled This Year:**  

---

## Immunization Status of Kindergarten Students

### Unconditional Entrants

1. **Indicate the number of kindergartners with:**
   - All required immunizations and/or documented history of disease
   - Permanent Medical Exemptions to any immunizations
   - Personal Beliefs Exemption to any immunizations

   *(Row 3 = 3a + 3b)*

2. **Health Care Practitioner**
   - Practitioner
   - Counselor Exemption

3. **Religious Exemption**

### Conditional Entrants

4. **Number of Kindergartners who do not meet the immunization requirements, but are Not Currently Due for a missing dose or qualify for other reasons.** *(THESE STUDENTS REQUIRE FOLLOW-UP)*

   - Of the pupils in category 4 above, please indicate the numbers **NOT** meeting the requirement for:
     - a. Polio
     - b. DTP/DTaP/DT
     - c. MMR
     - d. Hepatitis B
     - e. Varicella (child has not received vaccine and has not had chickenpox)

5. **Number of children not in attendance (at time of reporting) due to not meeting unconditional or conditional admission requirements.**

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**Note:** The total of lines 1+2+3+4+5 should equal **NUMBER OF KINDERGARTEN STUDENTS ENROLLED THIS YEAR**, shown above.

---

**School Staff Member Completing This Form**

- **Name:**  
- **Email:**  
- **Confirm Email:**  
- **Phone:** *Phone number format: xxx-xxx-xxxx*  
- **Date:** 8/27/2015

**Designated School Contact** *(Check if same person)*

- **Name:**  
- **Email:**  
- **Confirm Email:**  
- **Phone:** *Phone number format: xxx-xxx-xxxx*  

- Please enter the correct Designated School Contact if the above is incorrect or empty.

---

Your data will not be submitted unless you select 'Submit' and you see the next screen confirming your school information!

[Submit] [Cancel]
3) **Complete the Report**

- Enter the total 
  *Number of Kindergarten Students Enrolled.*

- **Optional worksheet:** Transfer the Totals 
  from the worksheet [PM236A](#) into the corresponding spaces on the report

**Double check the numbers add up:**
- Row 3, *Personal Beliefs Exemption to any immunizations* will **autosum online based on 3a+3b.**
- Row 1+ 2+ 3+ 4+ 5= *Number of Kindergarten Students Enrolled*
- Row 4, *Conditional Entrants* must also specify a-e.
- Row 5, *Enrolled but not Attending* are students who require doses and should be sent home with a [notice of immunizations needed](#)

4) **Submit Your Report**

- Include your contact information as the report submitter and enter a designated school contact.
- Review your information for accuracy and then select *Submit.*

5) **Print and Save a Copy**

Print/Save a copy for your records by selecting *Print* or *Download PDF.* Retain your worksheet for your records. All reports must be submitted by **October 15** or earlier if instructed by your local health department.

**Submitting for Another School?**

*Logout* to return to the log in page.

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**Congratulations, you have completed the report!**

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*Questions? Please contact your [local health department](#) or email [SchoolAssessments@cdph.ca.gov](mailto:)"