

CLIENT NEWS BRIEF

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UNITED STATES DEPARTMENT OF EDUCATION ISSUES GUIDANCE REGARDING DISCLOSURE OF STUDENT RECORDS IN RELATION TO H1N1

Recently, the United States Department of Education (“DOE”) released guidance for compliance with the federal Family Educational Rights and Privacy Act (“FERPA”) (29 U.S.C. Section 1232g; 34 C.F.R. Part 99), and the disclosure of student records in relation to the H1N1 flu virus. The guidance addresses a number of questions likely to arise as school districts face H1N1 flu outbreaks during the 2009-2010 school year.

The DOE guidance highlights that, regardless of H1N1, the general rule under FERPA is that personally identifiable information from a student’s educational records cannot be disclosed without prior consent from the student’s parent, or the student, if 18 years of age. Beyond the general rule, the DOE guidance indicates that there are two circumstances in which personally identifiable information from student records may be disclosed without prior consent in light of H1N1. First, personally identifiable information from student records may be disclosed to appropriate parties “in connection with an emergency, if knowledge of that information is necessary to protect the health and safety of the student or other individuals”— the “emergency exception.” (34 C.F.R. §§ 99.31, subd. (a)(10), 99.32, subd. (a)(5), 99.36.) Second, personally identifiable student records information may be disclosed in the context of H1N1 pursuant to a lawfully issued subpoena, such as one issued by a public health department — the “subpoena exception.”

With regard to the emergency exception, the DOE set forth a number of clarifying points. First, release of information on this basis cannot be justified beyond the time of the emergency. Further, the emergency exception cannot justify a blanket disclosure of all of a student’s educational records; rather, it contemplates disclosure of just those records and information necessary to protect the safety of the student or other individuals. Examples of “appropriate parties” to whom student records information may be disclosed in an H1N1 emergency are law enforcement officials, public health officials, trained medical personnel, and parents.

Whether an emergency exists must be determined on a case-by-case basis. In this regard, the DOE directs school districts or schools to make that determination on the following flexible standard: “that there is an articulable and significant threat to the health or safety of the student or other individuals and that certain parties need personally identifiable information from education records to protect the health or safety of the student or other individuals.” Two examples of circumstances where a rational basis exists for the emergency exception are where: (1) a local public health authority declares an H1N1-related pandemic, or (2) based upon the United States Secretary of Health and Human

Services October 2009 declaration of an H1N1-related public health emergency, so long as that emergency declaration is still in effect and there is a current H1N1 outbreak within a school district or school.

Other important points in the DOE's guidance include:

- School districts and schools should consider whether they can disclose student records information in the H1N1 context without disclosing personally identifiable information, therefore avoiding the general requirement of parental consent or establishing the basis for the emergency exception.
- Even if an H1N1-related emergency exists in relation to H1N1, school districts and schools may not disclose personally identifiable student information with regard to the emergency to the media.
- Even if school districts maintain interagency agreements with local public health departments, personally identifiable student records information may not be disclosed to such agencies without prior parental consent or facts supporting application of the emergency exception.
- When a student in a class is infected with the H1N1 flu, it is generally sufficient to report only that a student in the school or class has been so infected. Disclosure of the infected student's identity is only proper under circumstances where it is necessary to protect the health or safety of other children, such as to "parents who have children who are at high risk of developing H1N1 complications or with health challenges."

The DOE's guidance is available online at: <http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf>. The guidance also includes a sample consent form for the disclosure of personally identifiable student records information, as well as discussion regarding the interaction of FERPA and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in the context of H1N1-related health records and vaccinations.

If you have questions regarding the DOE's guidance, or any other questions relating to the disclosure of student records, please contact one of our seven offices located statewide.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.



*Written by Tom Gauthier (tgauthier@lozanosmith.com) and Sloan Simmons (ssimmons@lozanosmith.com).
Tom is a shareholder in our Sacramento office and Sloan is an associate in our Sacramento office.
Sloan is co-chair of our Student Practice Group.*