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

FERPA provisions are addressed in the analysis of comments under the section in this preamble entitled *Enforcement.* While parents and eligible students do not have a right to sue for violations of FERPA in a court of law, the statute provides that the Secretary may not make funds available to any agency or institution that has a policy or practice of violating parents' and students' rights under the statute with regard to consent to the disclosure of education records. As such, parents and eligible students may file a complaint with the Office if they believe that a school has violated their rights under FERPA and has disclosed education records under § 99.36 inconsistent with these regulations. In conducting an investigation, the Office will require that schools identify the underlying facts that demonstrated that there was an articulable and significant threat precipitating the disclosure under § 99.36.

In response to the comment about what would constitute an emergency, FERPA permits disclosure "* * * in connection with an emergency * * * to protect the health or safety of the student or other persons." 20 U.S.C. 1232g(b)(1)(I). We note that the word "protect" generally means to keep from harm, attack, or injury. As such, the statutory text underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury. Moreover, to be "in connection with an emergency" means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment. It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.

Changes: We have amended the recordkeeping requirements in § 99.32(a)(5) to require educational agencies and institutions to record the articulable and significant threat that formed the basis for a disclosure under the health or safety emergency exception and the parties to whom the information was disclosed.

(c) Articulable and Significant Threat

Comment: One commenter stated that the word "articulable" in § 99.36(c) was confusing in reference to a school's determination that there is an "articulable and significant threat to the health or safety of a student or other individuals." This commenter stated that school officials might interpret the provision to mean that there must be a verbal threat or that school officials must write down the exact wording of the threat.

Discussion: The requirement that there must be an "articulable and significant threat" does not mean that the threat must be verbal. It simply means that the institution must be able to articulate what the threat is under § 99.36 when it makes and records the disclosure.

In that regard, the words "articulable and significant" are adjectives modifying the key noun "threat." As such, the focus is on the threat, with the question being whether the threat itself is articulable and significant. The word "articulable" is defined to mean "capable of being articulated." *http://www.merriam-webster.com/dictionary/articulable.* This portion of the standard simply requires that a school official be able to express in words what leads the official to conclude that a student poses a threat. The other half of the standard is the word "significant," which means "of a noticeably or measurably large amount." *http://www.merriam-webster.com/dictionary/significant.* Taken together, the phrase "articulable and significant threat" means that if a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat, such as a threat of substantial bodily harm, to any person, including the student, the school official may disclose education records to any person whose knowledge of information from those records will assist in protecting a person from that threat.

Changes: None.

(d) Parties That May Receive Information Under § 99.36

Comment: A commenter recommended that the Department adopt a more subjective standard regarding the persons to whom education records may be disclosed under § 99.36, suggesting that we remove the requirement that the disclosure must be to a person "whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." Conversely, another commenter expressed concern that the Department was sending the wrong message to educational agencies and institutions with these changes to § 99.36. The commenter stated that the health or safety emergency exception must not be perceived to permit schools to routinely disclose education records to parents, police, or others.

A commenter asked who at a school may share personally identifiable information in a health or safety emergency, and specifically whether a school secretary would be allowed to tell parents that a student on campus made a threat to others.

A commenter stated that school districts, especially small or rural districts, may not have the expertise on staff to determine whether a situation constitutes an "articulable and significant threat." The commenter said that personally identifiable information on students may need to be disclosed to outside law enforcement and mental health professionals so that they can help schools determine whether a real threat exists. The commenter recommended that the Department change the proposed regulations to allow school districts to involve outside experts in determining whether a health or safety emergency exists. Noting that the NPRM addressed the disclosure of education records to an eligible student's parents, the organization also asked for clarification regarding whether the parents of a potential perpetrator and the potential victim at the K–12 level could be told about a threat.

Several commenters stated that our proposed amendments did not go far enough and urged the Department to expand § 99.36 to permit a school to notify whomever the student has listed as his or her emergency contact. Another commenter requested that the Secretary, through these regulations, direct institutions to proactively notify parents of students who are in acute care situations, such as illness or accidents, if any institutional official is aware of the emergency.

Discussion: On its face, FERPA permits disclosure 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). FERPA does not require that the person receiving the information be responsible for providing the protection. Rather, the focus of the statutory provision is on the information itself: The "health or safety emergency" exception permits the institution to disclose information from education records in order to gather information from any person who has information that would be necessary to

records so that they may be disclosed under the health and safety emergency exception. A commenter asked that the Department clarify that college health and mental health records are not education records under FERPA and must be treated like other health and mental health records in other settings.

Discussion: While we have carefully considered the comments concerning "treatment records," the Secretary does not believe that it is necessary to amend the regulations to provide clarification on the handling of health and medical records. The Departments of Education and Health and Human Services have issued joint guidance that explains the relationship between FERPA and the HIPAA Privacy Rule. The guidance addresses this issue for these records at the elementary and secondary levels, as well as at the postsecondary level. The joint guidance, which is on the Web sites of both agencies, addresses many of the questions raised by school administrators, health care professionals, and others as to how these two laws apply to records maintained on students. It also addresses certain disclosures that are allowed without consent or authorization under both laws, especially those related to health and safety emergency situations. The guidance can be found here: *http://www.ed.gov/policy/gen/guid/fpco/index.html.*

As discussed elsewhere in this preamble with respect to § 99.31(a)(2), while "treatment records" are excluded from the definition of *education records* under FERPA, if an eligible student's treatment records are used for any purpose other than the student's treatment, or if a school wishes to disclose the treatment records for any purpose other than the student's treatment, they may only be disclosed as education records subject to FERPA requirements. Therefore, an eligible student's treatment records may be disclosed to any party, without consent, as long as the disclosure meets one of the exceptions to FERPA's general consent rule. *See* 34 CFR 99.31. One of the permitted disclosures under this section is the "health or safety emergency" exception.

Changes: None.

Identification and Authentication of Identity (§ 99.31(c))

Comment: Several commenters supported our proposal to require educational agencies and institutions to use reasonable methods to identify and authenticate the identity of parents, students, school officials, and any other parties to whom the agency or institution discloses personally identifiable information from education records. One commenter supported the provision but advocated requiring the use of two-factor identification for information that could be used to commit identity theft and financial fraud. (Two-factor identification requires the use of two methods to authenticate identity, such as fingerprint identification in addition to a PIN.)

One commenter said that the identification and authentication requirement will help protect students affected by domestic violence who are living in substitute care situations. The commenter noted that many parents in situations involving domestic violence do not have photo identification (ID) and would be unable to meet a requirement to provide photo ID in order to access their children's education records.

One commenter strongly supported the proposed amendment and said it will be valuable in aiding the privacy and protection of homeless children. Another commenter questioned whether the identification and authentication requirement is necessary for staff of large school districts with centralized offices.

One commenter did not support the proposed regulation stating that it will be an additional burden on school districts. The commenter agreed with our statement in the preamble to the NPRM that the regulations should permit districts to determine their own methods of identification and authentication. However, the commenter stated that districts should not be required to have a sliding scale of control based on the level of potential threat and harm and that it would not be practical to give every person requesting access to education records a PIN or similar method of authentication. For example, the commenter stated that parents might be provided with a PIN, but districts would not want to provide a PIN to a reporter or other third party. The commenter requested additional examples of how districts may authenticate requests received by phone or e-mail. The commenter also stated that districts are sometimes concerned that government-issued photo IDs are fraudulent. As a result, the group requested that the Department adopt a "safe harbor" provision that requiring a government-issued photo ID for in-person requests is reasonable.

One commenter expressed concern that the proposed regulations were too restrictive and could be too complex to administer, and that this would cause an institution to choose not to transfer information even though it is permitted to do so. This commenter asked whether the Department will accept an institution's efforts at compliance as sufficient without examining the effectiveness of those efforts.

Discussion: The identification and authentication methods discussed in the NPRM (73 FR 15585) are intended as examples and should not be considered to be exhaustive. Because there are many methods available to provide secure authentication of identity, and as more methods continue to be developed, we do not think it appropriate at this time to require the use of two-factor authentication as requested by the commenter. Two-factor authentication can be expensive and cumbersome, and we believe that each educational agency or institution should decide whether to use its resources to implement a two-factor authentication method or another reasonable method to ensure that education records are disclosed only to an authorized party. The comment that a portion of the population will be disadvantaged if only photo ID is permitted to authenticate identity confirms that we need to retain flexibility in the regulations.

We do not agree that certain types of staff should be excepted from the identification and authentication requirement. All staff members, whether in a centralized office, or in separate administrative offices throughout a school system, must be cognizant of and responsible for complying with identification and authentication requirements.

Due to the differences in size, complexity, and access to technology, we believe that educational agencies and institutions should have the flexibility to decide the methods for identification and authentication of identity best suited to their own circumstances. The regulatory requirement is that agencies and institutions use "reasonable" methods to identify and authenticate identity when disclosing personally identifiable information from education records. "Effectiveness" is certainly one measure, but not necessarily a dispositive measure, of whether the methods used by an agency or institution are "reasonable". As we explained in the NPRM, an agency or institution is not required to eliminate all risk of unauthorized disclosure of education records but to reduce that risk to a level commensurate with the likely threat and potential harm. 73 FR 15585.

Further in that regard, we note that a "sliding scale" of protection is not mandated *per se*. However, it may not be "reasonable" to use the same