

Memo



COLORADO
Department of Education

To: Superintendents and Colorado BOCES
FROM: Randy Boyer, Assistant Commissioner
DATE: February 13, 2015
Re: Communicable Diseases and Conditions Reportable by School Personnel
under Colorado Law and Related Confidentiality Duties Under Federal Law

Over the last several months, there has been an increase in incidences of pertussis and flu in Colorado. The Colorado Department of Education (CDE) has been asked to provide updated guidance to school districts regarding: (1) Schools providing timely reports to Colorado Department of Health and Environment (CDPHE) or local health departments about the occurrence of pertussis in public school settings; and (2) state and/or local public health department's duty and authority to conduct public health investigations in response to reports of pertussis and other 24 hour reportable conditions (as defined by the CDPHE) in public school settings.

In response to various media outlets reporting the rise in reported cases of the Enterovirus D68, as well as the Ebola outbreak, on October 3, 2014, the United States Department of Education (USDOE) Family Compliance Office (FPCO) issued the following statement and guidance, affirming that the October 2009 USDOE guidance remains in effect:

the Family Policy Compliance Office (FPCO) has received a few inquiries regarding the applicability of the Family Educational Rights and Privacy Act (FERPA) in regard to the disclosure of personally identifiable information from education records to local health officials. Given these inquiries, we thought it prudent to remind you of the guidance issued by FPCO in October 2009 in response to concerns at that time regarding the H1N1 flu outbreak. This guidance document is available on our website at: <http://www2.ed.gov/policy/gen/guid/fpcopdf/ferpa-h1n1.pdf>. Although, the guidance is specific to H1N1, the context of the guidance is applicable today in terms of Enterovirus D68, Ebola, etc. Additional questions may be forwarded to FERPA@ed.gov.

Set forth below is a summary of applicable law.

State Law Requirements

The State Board of Health is authorized to determine which diseases and conditions are dangerous to the public health. The State Board of Health also has the authority to require reports by persons with knowledge and without patient consent to the CDPHE and local health departments of the occurrences of such diseases and conditions.¹ The reports must contain "the name, address, sex, diagnosis, and such other information as

¹ See C. R.S. §§ 25-1.5-102(1)(a)(II) and 25-1-122.

the board determines is necessary to protect the public health."² The CDPHE and local health departments are authorized "to investigate and control the causes of epidemic and communicable diseases affecting the public health."³

The State Board of Health has designated certain communicable diseases that must be reported to the state or local public health department within 24 hours of confirmation or suspicion. The current list of 24-hour reportable communicable diseases and conditions, which includes "pertussis" can be accessed at: https://www.colorado.gov/pacific/sites/default/files/DC_ComDis_Reportable-Conditions-Health-Care-Providers.pdf.

The communicable diseases and conditions identified are considered emergency public health events due to some combination of the potential seriousness of the illness; degree of communicability (and therefore, potential to cause a disease outbreak); and existence of specific health intervention (e.g., post-exposure vaccination, post-exposure administration of antibiotics, isolation or quarantine) to interrupt transmission (and prevent /control outbreak). To be effective, these public health interventions are, typically, extremely time sensitive.

FERPA Requirements

FERPA applies to all schools that receive federal funding under an applicable program of the U.S. Department of Education. Generally, schools must obtain the parent's written consent before releasing information from his/her child's education records.

FERPA contains several exceptions to the general prohibition of disclosure of information from education records without prior parent consent. Applicable here are the following exceptions:

- Disclosure to appropriate officials in cases of health and safety emergencies⁴
- Disclosure of directory information such as a student's name, address, telephone number, date and place of birth and dates of attendance.⁵ It should be noted that, in order to publish directory information, the school district must give the parent notice of the intended publication and an opportunity to opt out of the publication.

Regarding health or safety emergencies, in its recently reaffirmed 2009 guidance, the Family Policy Compliance Office states as follows:

an educational agency or institution is responsible for making a determination whether to make a disclosure of personally identifiable information on a case-by-case basis, taking into account the totality of the circumstances pertaining to the threat. If the school district or school determines 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, it may disclose that information to such appropriate parties without consent. 34 CFR § 99.36. This is a flexible standard under which the Department defers to school administrators so that they may bring appropriate resources to bear on the situation, provided that there is a rational basis for the educational agency's or institution's decisions about the nature of the emergency and the appropriate parties to whom information should be disclosed. We note also that, within a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed. 34 CFR § 99.32(a)(5).

Thus, it continues to be the guidance of the CDE that those communicable diseases and conditions that are required to be reported within 24 hours and considered to be emergency public health events should generally be considered to fall within the "health or safety" exception to FERPA's "prior parent consent" rule.

It should be noted that FERPA applies only to information in education records; it does not apply to information known or obtained from sources other than education records, such as personal observations or verbal communication with parents. Thus, information that is not contained in education records, including direct observation of those communicable diseases and conditions that are considered emergency public health events, should not be considered as falling within FERPA's "prior parent consent" rule.

Finally, a school district may seek to obtain prior written parent consent for release by school officials of information required by Colorado law through a consent form presented to parents during the annual registration process. Prior parent consent obtained in this manner would apply to situations involving not only health emergencies but also to other diseases and conditions, such as varicella (chicken pox), authorized by the State Board of Health to be reported to the CDPHE and local health departments within 7 days of diagnosis.

To report a communicable disease:

<https://www.colorado.gov/pacific/cdphe/report-a-disease>

Note: This is guidance issued by the Colorado Department of Education and does not constitute legal advice. If you need legal advice, please contact your legal counsel.

² Colo. Rev. Stat. §25-1-122(1)

³ Colo. Rev. Stat. §25-1.5-102(1)(a)(I).

⁴ 20 U.S.C. § 1232g(b)(1)(I) and (h); 34 C.F.R. Part 99.36

⁵ 20 U.S.C. § 1232g(a)(5)(A) and (B); 34 C.F.R. Part 99.36