



CLIENT ALERT
March 17, 2020

CORONAVIRUS (COVID-19)

District Obligations under the IDEA and Chapter 14

As of this writing, OSEP has indicated the following as it relates to providing services to disabled/eligible students:

Is a school required to continue to provide FAPE to students with disabilities during a school closure caused by COVID-19 response efforts?

- When a school is closed because of COVID-19 response efforts and *does not provide any educational services to the general student population*, the school is not required to provide services to students with disabilities during that closure period. Once school resumes, the district/school must provide special education and related services to the child in accordance with the child's individualized education program (IEP) or Section 504 plan.
- When a school is closed because of COVID-19 response efforts and *does provide educational services to the general student population*, the school must ensure that students with disabilities have equal access to the same opportunities, including the provision of FAPE. In addition, districts/schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP or Section 504 plan. Once school resumes, a child's IEP team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost during the closure within a reasonable timeframe.

In the event that a school is closed for an extended period of time due to a disaster, would an IEP Team be required to meet? Would an LEA be required to conduct an evaluation of a student with a disability?

IEP Teams are not required to meet in person while schools are closed. IEP Teams may continue to work with parents and students with disabilities during such school closures and offer advice, as needed. If an evaluation of a student with a disability requires a face-to-face meeting or observation, the evaluation would need to be delayed until school reopens. Evaluations and reevaluations that do not require face-to-face assessments or observations may take place while schools are closed, if the parent consents. These same principles apply to similar activities conducted by appropriate personnel for a student with a disability who has a plan developed under Section 504 or who is being evaluated under Section 504.

Must an LEA provide special education and related services to a child with a disability who is absent for an extended period of time because the child is infected with COVID-19, while the schools remain open?

While schools remain closed, Administration must begin to establish a plan for those students who may have severe disabilities or complications that require the student to remain home, if the school should reopen. In short, the answer above is, Yes. It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted. Further, if the IEP goals will remain the same and only the time in special education will change, then the IEP Team may add an amendment to the IEP stating specifically the amount of time to be spent in special education. If a child with a disability is absent for an extended period of time because of a COVID-19 infection and the school remains open, then the IEP Team must determine whether the child is available for instruction and could benefit from homebound services. This does not mean that a teacher will have to enter the home of the student, but other avenues are available for instruction such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services.

The excerpt above is taken from the *U.S. Department of Education's Non-Regulatory Guidance on Flexibility and Waivers for Grantees and Program Participants Impacted by Federally Declared Disasters*. <https://www2.ed.gov/policy/gen/guid/disasters/disaster-guidance.docx>

While this is the current position of the U.S. Department of Education, in all reality this is probably not going to be a viable position to take especially if closures extend beyond the initial 10-day period. While parties are encouraged to come up with creative ways to work remotely through conferencing, Skype, Zoom, Facebook Live, and other ways to hold such meetings, in the end if it cannot be accomplished this will have to get sorted out after the fact. Psychologist always have the option of completing an initial evaluation without the student being present and then conduct a RR once the student returns. You may even add under "other considerations" in the NOREP something that indicates, "Upon resumption of school following the current COVID-19 closure, a new evaluation or further completion of the current evaluation may be proposed and, if parental consent is provided, will be completed concerning any determination and/or changes regarding special education eligibility and/or continuation." Please keep in mind though that once an Evaluation is complete it triggers the timelines of meeting with the family and implementing the IEP to the best of the school's ability. In short, it is our hope that additional guidance is received for Pennsylvania in the upcoming days.

Additional informational links are outlined below:

U.S. Department of Education Resources on Coronavirus/COVID-19:
<https://www.ed.gov/coronavirus?src=feature>

Frequently Asked Questions: <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>

Office of Civil Rights Compliance, Letter to Educational Leader:
<https://content.govdelivery.com/accounts/USED/bulletins/27f5130>

Council of Parent Attorneys and Advocates: <https://www.copaa.org/news/493349/COPAA-Statement-on-Student-Rights-Under-IDEA-During-the-COVID-19-Outbreak.htm>

Please also find attached a Fact Sheet in regards to the Impact of COVID-19 on Assessments and Accountability under the Elementary and Secondary Education Act which was sent on March 12, 2020.

Family Education Rights and Privacy Act (FERPA) and COVID-19 disclosures

One additional element for School Districts to consider is the extent of information that can be disclosed from a student's educational records during this pandemic. Per the Federal Educational Rights and Privacy Act (FERPA), a parent or eligible student must provide written consent before an educational agency can disclose personally identifiable information (PII) from education records unless one of the exceptions to consent is applicable. See 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31.

The U.S. Department of Education recently issued guidance for School Districts on working with public health officials to manage COVID-19-related issues while protecting the privacy of students' education records. <https://studentprivacy.ed.gov/resources/ferpa-and-coronavirus-disease-2019-covid-19>

Health or safety emergency exception

FERPA permits educational agencies and institutions to disclose, without prior written consent, PII from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36. This exception is limited to the period of the emergency and to disclosing PII to "appropriate parties" providing specific medical or safety attention, such as law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student). The guidance is clear that the media does not qualify as an appropriate party under this exception.

Educational agencies must still complete a case-by-case determination whether to disclose PII, which can include the totality of the emergency. If the educational agency concludes that there is an "articulable and significant threat to the health or safety of the student or another individual" and PII from education records is needed, the PII may be disclosed without consent.

However, the requirement to record disclosures of PII submitted to the public health department or other outside parties still remains, even in the context of a health or safety emergency. School districts must likewise record the articulable and significant threat to the health or safety of a student or other individual that formed the basis for the disclosure and the parties to whom the agency or institution disclosed the information. 34 C.F.R. § 99.32(a)(5).

Disclosures relative to absent students

The Department of Education's guidance further addresses the ability of educational agencies to disclose information about student absences due to COVID-19. Of note is the question concerning non-consensual disclosures to public health departments:

May educational agencies and institutions disclose without consent the names, addresses, and phone numbers of absent students to the public health department so that the health department may contact their parents in order to assess the students' illnesses?

FERPA permits educational agencies and institutions to non-consensually disclose PII from education records in the form of contact information of absent students to the public health department in specific circumstances, such as in connection with a health or safety emergency (20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36) or pursuant to other applicable exceptions.

While FERPA generally permits the nonconsensual disclosure of properly designated "directory information" (e.g., name, address, phone number, grade level) when parents or eligible students have not opted out of such a disclosure, it does not permit an educational agency or institution to disclose "directory information" on students that is linked to non-directory information (such as information regarding a student's illness). For instance, an educational agency or institution may not disclose directory information on all students who are receiving special education services or those who have been absent from school.

Therefore, unless a specific FERPA exception applies, educational agencies and institutions should prepare consent forms for parents and eligible students to sign to allow the potential sharing of this type of information if they create, or intend to create, a tracking or monitoring system to identify an outbreak before an emergency is recognized.

We encourage school districts to review their FERPA consent forms and consult legal counsel to appropriately document the "articulable and significant threat" determination required by the health or safety emergency exception to FERPA.

While the Beard Legal Group Client Alert is designed to provide inform on topics of concern to Pennsylvania Public Schools, it is not legal advice and School Districts should contact their Solicitor, Labor of Special Counsel for advice related to their specific circumstances.