

Department of Education Issues Guidance on Students with Disabilities, Privacy During COVID-19 Pandemic

By Susan D. Friedfel, Monica H. Khetarpal & Joseph J. DiPalma

March 19, 2020

Meet the Authors



Susan D. Friedfel

Principal

914-872-8027

Susan.Friedfel@jacksonlewis.com

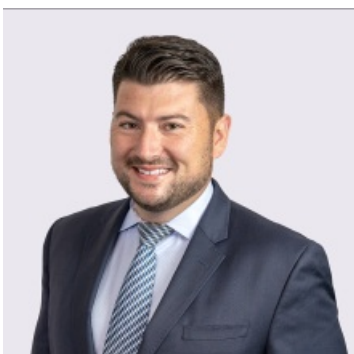


Monica H. Khetarpal

Principal

(312) 803-2529

Monica.Khetarpal@jacksonlewis.com



The U.S. Department of Education (DOE) has issued guidance to assist educators and educational institutions to ensure that students with disabilities continue to receive services mandated by the Individuals with Disabilities Education Act (IDEA) and to protect student privacy during the coronavirus (COVID-19) pandemic and related school closures.

IDEA

The rise of school closures as a result of the COVID-19 outbreak makes it imperative that students with disabilities continue to receive necessary services.

A local education agency (LEA) that does not provide services to the general student population due to COVID-19 need not provide services to students with disabilities during that same period.

If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure students with disabilities have equal access to the same opportunities, including the provision of free and appropriate public education (FAPE).

An LEA's online learning tools must be accessible to students with disabilities, and they must be compatible with the various forms of assistive technology students might use to help them learn. The DOE has released a webinar advising school leaders to routinely test their online activities to ensure accessibility.

A school must make every effort to provide special education and related services to children in accordance with their individualized education program (IEP). Additionally, an IEP team and appropriate personnel would be required to make an individualized determination as to whether compensatory services are needed if practical alterations to a student's program is required.

If a student with a disability will be absent for an extended time because the child is infected with COVID-19, an LEA must still provide special education and related services to the child. An IEP meeting may be necessary to change the child's placement or the contents of the child's IEP, if warranted. In such a situation, and a school remains open, the IEP team must determine whether the child can benefit from homebound services, such as online or virtual instruction, while following appropriate health guidelines to assess and address the risk of COVID-19 transmission while providing the child with services. This is not only an IDEA obligation, but an obligation under Section 504 of the Rehabilitation Act and under the Americans with Disabilities Act.

If an LEA does not close all its schools, but closes a public school for children with

Joseph J. DiPalma

Principal

(914) 872-6920

Joseph.DiPalma@jacksonlewis.com

Related Services

COVID-19

Disability, Leave and Health

Management

Higher Education

Privacy, Data and Cybersecurity

Sports

disabilities (because the children are at high risk of severe illness or death), the LEA must determine whether each dismissed child could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities to the extent available. Exceptional circumstances may exist that could affect how a service is provided. If a child does not receive services during a closure, a child's IEP team (or appropriate personnel) must make an individualized determination about whether and to what extent compensatory services may be needed.

If a child with a disability at high risk of severe medical complications is excluded from school during an outbreak of COVID-19 and the child's school remains open, the provision of services (such as online or virtual instruction) is not considered a change in placement if the exclusion is a temporary emergency measure. An LEA must consider an alternative placement or redetermine a child's placement if the exclusion likely will be of a long duration (generally, longer than 10 days). The decision to dismiss a child based on their high risk for medical complications must be based on the individual needs of the child, not on perceptions of the child's needs based merely on stereotypes or generalizations regarding their disability.

Under IDEA Part C, a state need not continue to provide Part C services to infants and toddlers with disabilities and their families if the early intervention service (EIS) program or provider is closed. If the office remains open, but is unable to provide Part C services, the lead agency must ensure the continuity of services on a case-by-case basis and as consistent with appropriate guidelines to protect the student and those providing services to the student. If an EIS provider cannot provide Part C services in the child's home during a COVID-19 outbreak, but the EIS program or provider determines it is safe to provide face-to-face Part C services in another environment (such as a hospital or medical clinic), then the child could receive temporary services at the hospital or clinic.

Family Education Rights and Privacy Act (FERPA)

The FERPA gives parents certain rights with respect to their children's education records at educational agencies and institutions to which FERPA applies. FERPA rights transfer to the student when they reach the age of 18 or attends an institution of postsecondary education at any age (become an "eligible student"). 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5(a)(1).

FERPA prohibits educational agencies (*e.g.*, school districts) and institutions (*i.e.*, schools) from disclosing personally identifiable information (PII) from students' education record without the prior written consent of a parent or the eligible student, unless an exception to FERPA's general consent rule applies. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31.

The DOE guidance provides that FERPA permits educational agencies and institutions to disclose COVID-19-related PII from students' education records to appropriate officials, without prior written consent, if knowledge of that information is necessary to protect the health or safety of a student or other individuals. Typically, public health officials, trained medical personnel, and parents are considered appropriate parties. The agency or institution must assess, while considering the totality of the circumstances, whether an articulable and significant threat exists to the health or safety of a student at the agency or institution. Educational agencies or institutions must maintain a record of each request for access to and each disclosure of PII from a

student's education records, even in connection with a health or safety emergency.

If an educational agency or institution learns a student at the school is out sick due to COVID-19, it may disclose the information to other students in a non-personally identifiable form without consent from the student's parents or the eligible student. The DOE cautions educational and institutions to ensure they release such information without disclosing other information that would allow a reasonable person in the school community to identify with reasonable certainty the students who are absent due to COVID-19. FERPA does not allow nonconsensual disclosures of PII from students' education records to the media under its health or safety emergency exception.

The DOE guidance permits school officials to determine, on a case-by-case basis, whether to disclose the identity of a student with COVID-19. Schools should make the determination based on whether disclosure of the student's name is absolutely necessary to protect the health or safety of students or individuals (for example, if a student who tests positive for COVID-19 plays a sport, such as wrestling, and has been in direct and close contact with other students) or if a general notice is sufficient. FERPA does not prevent schools from telling parents and students that a specific teacher or school official has COVID-19, but institutions should check for any state laws that may apply in this situation.

An educational agency or institution may disclose PII from an eligible student's education records to the student's parents if the student is determined to have COVID-19. For example, if a university physician treating an eligible student for COVID-19 determines the student's records should be disclosed to the student's parents, they may do so. If an eligible student's parents claim the student as a dependent, such a disclosure may be made without the student's consent. If the parents do not claim the student as a dependent, the disclosure may be made only in connection with a health or safety emergency, which likely applies in the case of COVID-19.

Elementary and Secondary Education Act (ESEA)

The DOE also released guidance on flexibilities it could grant related to the accountability standards required by the ESEA.

Assessments

If a school remains closed throughout the entire assessment window, the DOE stated that it would consider a targeted, one-year waiver of the assessment requirements for schools affected by COVID-19's extraordinary circumstances. The DOE notes that schools may want to consider adjusting or extending the testing window to accommodate as many students as possible, including students in schools that were closed.

Accountability Determinations

The DOE stated it recognizes that COVID-19 will affect each state's accountability system differently. Consequently, it would consider a targeted, one-year waiver of the requirement to identify a school for comprehensive or targeted support and improvement, if the school was identified as needing such support because it was closed for a significant portion of the school year.

Accountability Components

The DOE stated it recognizes that a state may be able to administer its assessments and receive data that it considers sufficient to produce accountability determination, even if the state faces COVID-19 closures but may still require some flexibility around other components of its accountability system. The DOE identifies the ESEA's required 95-percent assessment participation rate and chronic absenteeism as two areas most likely to be affected by COVID-19. Consequently, the DOE would consider a targeted, one-year waiver for an affected school to exclude its participation rate from its Academic Achievement indicator, as well as exclude absenteeism from a state's accountability system.

Finally, the DOE stated it understands that districts could face challenges meeting certain ESEA fiscal requirements, such as maintenance of effort and the limitation on carrying over more than 15 percent of Title I, Part A funds. The DOE encourages districts and schools to reach out to their appropriate contacts at the DOE.

Jackson Lewis attorneys and the dedicated [COVID-19 Task Force](#) are ready to assist if you have any questions.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.