

Maintaining Student Confidentiality

As the number of confirmed COVID-19 cases increase state-wide, new cases of the virus may continue to arise in your community. Toward that end, your community members, understandably, may be concerned about their child's potential exposure to COVID-19. Thus, in combatting the potential spread of the novel coronavirus, it is imperative that your district keeps the community apprised of its plans. However, in doing so, districts must be cognizant of their obligations to maintain the confidentiality of student records pursuant to the Family Educational Rights and Privacy Act ("FERPA") and Education Law § 2-d. On March 12, 2020, the U.S. Department of Education issued guidance in order to assist districts in maintaining student privacy as they receive information related to COVID-19.

FERPA Applies Over HIPAA

The USDOE previously issued guidance to clarify that the HIPAA Privacy Rule does not apply to educational records under FERPA. Accordingly, the confidentiality of any records related to a student's COVID-19 diagnosis is protected under FERPA (rather than HIPAA). Generally, the consent of a parent/eligible student is required prior to disclosing personally identifiable information ("PII") from a student's educational record. However, several exceptions may apply in which districts may disclose records without the consent of the parent/eligible student.

Sharing Information with Public Health Officials

The "health or safety emergency" exception may authorize the nonconsensual disclosure of PII without consent to other public health officials. This exception ordinarily applies when a district determines (1) that there is an "articulable and significant threat" to the student or a third party; and (2) certain parties need such information in order to protect the health or safety of the student or third party. In the context of COVID-19, the USDOE's guidance provides that districts may determine that an emergency exists "[i]f local public health authorities determine that a public health emergency, such as COVID-19, is a significant threat to students or other individuals in the community." Given the various emergency declarations that have been made at the local and State level, prong one of the aforementioned analysis would likely be satisfied (see [ENTER SECTION]). As for prong two, the USDOE opined that public health department officials and trained medical personnel are typically considered "appropriate parties" who may receive information necessary to protect the health or safety of the student or other individuals. Thus, student records related to COVID-19 may generally be disclosed to the local public health department. Disclosure under the Health and Safety exception must be made in accordance with the procedures described in the "Document Disclosure of PII" section.

Sharing Information with Other Students/Parents

Districts may ordinarily inform other students/parents that a student tested positive for COVID-19. However, districts must be careful that such disclosure does not identify the particular

student, either by name or circumstance. For instance, there may be a situation in which a student left school at a particular time and date after learning of a COVID-19 diagnosis. If the district informs other students/parents that it learned a student tested positive for COVID-19 at such time/date, such disclosure may identify the particular student.

However, under limited circumstances, districts may disclose the identity of a student who has tested positive for COVID-19 to other students/parents. The USDOE's guidance provides an example in which a student with COVID-19 was in direct and close contact with other students on his wrestling team. The guidance further explained that under these limited circumstances, the parents/students may need to know this information so that they may take necessary precautions to protect the health and safety of their children or themselves. However, it is important to note that this decision should be made on a case-by-case basis. In order to fully protect your district, you may wish to consult with your local health department to determine to what extent disclosure is necessary.

Sharing Information with the Media

A student's PII may *NOT* be disclosed to the media. Although the media may play a valuable role in preventing the spread of an outbreak, the guidance provides that the media is not an "appropriate party" under the FERPA "health or safety emergency" exception.

Document Disclosure of PII

FERPA requires districts to maintain a record of each disclosure of PII from a student's record. In addition, if disclosure is made pursuant to the health or safety emergency, the district must also record the "articulable and significant threat" to the student's health or safety and to whom the district disclosed the information. This record must be included in such student's educational record.