

Sanghavi Law Office, LLC

COVID-19 AND STUDENT RIGHTS: GUIDANCE FROM THE DEPARTMENT OF EDUCATION

Over the past three weeks, the U.S. Department of Education has published several documents pertaining to the Coronavirus (COVID-19) outbreak. Key information for schools, colleges, and universities is summarized below.

Educating Students with Disabilities during School Closures, and Distance Learning Accessibility

On March 12, the Department issued Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, addressing, among other things, elementary and secondary schools' legal obligations under Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA). The document noted:

- In an elementary or secondary school that remains open, if a student with a disability is absent for more than 10 consecutive school days because of a COVID-19 infection, a placement meeting should be held, and the team should consider whether the student could benefit from homebound instructional services, to the extent available. Placement protections should also be implemented for students with disabilities who are out for more than 10 consecutive school days due to risk of severe medical complications during an outbreak of COVID-19.
- If an elementary or secondary school closes in order to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then it would not be required to provide services to students with disabilities during that same period of time.
- Elementary and secondary schools providing educational opportunities to their general student populations during school closures must ensure that students with disabilities also have equal access to the same opportunities, and that students with disabilities continue to be provided the special education and related services identified in their Individual Education Programs (IEPs) or Sections 504 plans, to the greatest extent possible.
- Students' teams may be required to make individualized determinations about whether and to what extent compensatory services may be needed for services not provided to students with disabilities during a closure.

On March 16, the Department's Office for Civil Rights (OCR) published a Fact Sheet that included similar information on the rights of students with disabilities in connection with the COVID-19 outbreak. Also on March 16, OCR released a webinar on Online Education and Website Accessibility, specifically addressing schools' legal obligations to ensure that students with disabilities can access online and virtual learning programs. Among the issues addressed in the webinar were:

- Legal Framework: Two controlling laws:
 - Section 504 applies to entities that receive federal financial assistance from the U.S. Department of Education, including school districts, and public and private colleges and universities.
 - Title II of the ADA applies to public entities, including most public educational institutions and public libraries.
 - Under both laws, educational institutions must ensure that individuals with disabilities have equal opportunities, as compared with individuals without disabilities, to participate in services, programs, and activities.
- What Access Means for Schools' Online Programs:
 - Online services, programs, and activities must be accessible to persons with disabilities unless equally effective alternate access is made available in another manner.
 - Accessible means individuals with disabilities can acquire the same information, engage in the same interactions, and enjoy the same programs and activities as their nondisabled peers with substantially equivalent ease of use.
 - When creating online resources, schools must keep in mind: blindness; low vision; mobility disabilities affecting hand control or coordination; deaf or hard of hearing; seizure; and other cognitive disabilities.
 - Individuals with disabilities can use assistive technology to help them navigate online resources. It is important that websites and online learning are built and developed to be accessible to individuals with a variety of disabilities, and compatible with forms of assistive technology students might use.
 - One way to check accessibility is to engage in routine testing of online activities. Automated testing can be used, but distance learning resources should also be manually checked for accessibility deficiencies.
- Resources
 - In June 2019, OCR launched a national Website Access Team, which is available to provide technical assistance in this area. The team can be reached via email at OCRWebAccessTA@ed.gov.

In a Supplemental Fact Sheet on March 21, OCR and the Office of Special Education and Rehabilitative Services (OSERS) provided additional information regarding access to online learning for students with disabilities, noting:

- A “serious misunderstanding” has circulated within the educational community “that federal disability law presents insurmountable barriers to remote education.”
- “Ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction,” and schools should not decline to provide distance instruction in order to address matters pertaining to services for students with disabilities.
- While many disability-related modifications and services may be effectively provided online, it may be unfeasible or unsafe for some institutions to provide services such as hands-on physical therapy or occupational therapy during periods of COVID-19-related emergency school closures.
- “The determination of how FAPE [free appropriate public education] is to be provided may need to be different in this time of unprecedented national emergency,” and where, “due to

the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services,” students’ teams must make an individualized determination whether and to what extent compensatory services may be needed when normal operations resume (as noted in the March 12 and March 16 guidance).

Discrimination on the Basis of Race, Color, or National Origin, or on the Basis of Actual or Perceived Disability

On March 4, the Department issued a letter to school leaders on preventing and addressing potential discrimination associated with COVID-19. The letter noted an increasing number of news reports regarding stereotyping, harassment, and bullying directed at persons perceived to be of Chinese descent or, more generally, Asian descent, and stated:

- “Title VI of the Civil Rights Act of 1964 (Title VI) may require educational institutions to investigate bias incidents and take reasonable steps to end unlawful harassment, eliminate hostile environments, prevent the harassment from recurring, and, as appropriate, remedy its effects.”

OCR’s March 16 Fact Sheet also included information on preventing discrimination and harassment while addressing the risk of COVID-19. The document noted:

- Both Section 504 and Title VI require educational institutions that receives federal funds to take appropriate action to investigate reports of bullying and harassment based on actual or perceived disability, race, color, or national origin, and to respond appropriately when such conduct limits or denies a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.
- School officials may not rely on assumptions or stereotypes related to race, color, or national origin in identifying students who may be at risk of coronavirus infection.

Disclosure of Information about COVID-19 Exposure

On March 12, the Department’s Student Privacy Policy Office (SPPO) published Frequently Asked Questions pertaining to the Family Education Records Privacy Act (FERPA) and COVID-19. The document noted:

- In general, schools, colleges and universities subject to FERPA may not release personally identifiable information from a student’s education records without written consent.
- Pursuant to an exception to FERPA’s privacy constraints, schools may disclose personally identifiable information to appropriate parties if necessary to protect the health or safety of students or other individuals in an emergency.
- Public health officials and trained medical personnel are among the types of appropriate parties to whom information may be disclosed under FERPA’s health or safety emergency exception. This may include contact information for absent students.
 - Absent an emergency or other FERPA exception, schools should obtain written consent before sharing information.
 - Media outlets are not considered appropriate parties to whom disclosure would be permitted.
 - Schools should keep records of any disclosures and the basis for such disclosures.

- If a school learns that a student is out sick due to COVID-19, it may disclose information about the illness to other students and their parents in the school community in a non-personally identifiable form, i.e., “in a manner that does not disclose other information that, alone or in combination, would allow a reasonable person in the school community to identify the students who are absent due to COVID-19 with reasonable certainty.”
- “There may be a rare situation during a health or safety emergency” when it would be appropriate for a school, in conjunction with health, law enforcement, or other officials, to disclose identifiable information about a student with COVID-19 to other students or parents, if necessary to protect the health or safety of students. The document described, as an example, a student with COVID-19 who “is a wrestler and has been in direct and close contact with other students who are on the team or who are in the school and have higher health risks.”
- Colleges and universities can disclose a student’s treatment for COVID-19 to his or parents if the student is a dependent, or if appropriate in connection with a health or safety emergency.

Effective Communication and Language Assistance

The March 16 OCR Fact Sheet also noted:

- When school officials provide information to students, parents, and the community about any aspect of coronavirus or actions the schools are taking in response to coronavirus, they generally need to provide meaningful access to such information to English learner students and adults with limited English proficiency.
- In addition, School officials also must ensure equally effective communications with persons with disabilities (such as persons who are deaf, deaf-blind, or blind). Thus, the information and materials must be provided, as appropriate, in alternate formats to facilitate effective communication for individuals with disabilities.

Information promulgated by the U.S. Department of Education regarding COVID-19 can be found at <https://www.ed.gov/coronavirus/>, and information from the Centers for Disease Control and Prevention is available at <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

Please contact us at (617) 505-3010 or elizabeth@sanghavi-lawoffice.com if you have questions about any of these issues.

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