



nsba

SETTING A NEW COURSE

A Legal Guide to
Operating Schools in
the Pandemic Era

Table of Contents

Introduction	5
Health and Safety	7
Funding	12
Employment and Labor	15
School District Operations	24
Equity & Discrimination	26
Serving Students with Disabilities	30
Serving English Learners	35
Virtual Platforms and Student Data Privacy	37
Sources	41

Introduction

Perhaps no public service shutdown has affected other enterprises more than the mass closures of K-12 public schools associated with the coronavirus pandemic. When K-12 school districts nationwide closed buildings and moved instruction online in the spring of 2020, American life changed. Teachers, students, and their families were asked to support the online learning effort, and employers were asked to adjust for employees whose children were learning from home. Families struggled to support their learners. Many of them faced extra challenges like limited technology access, limited supports for students with disability-related needs, and limited time given other demands like working and caring for family members.

The Centers for Disease Control and Prevention (CDC) suggest that schools consider risks associated with various reopening models and determine reopening measures that are “feasible, practical, acceptable, and tailored to the needs of each community.” Some schools may limit attendance to those children who live in the school’s geographical area only or who come from limited transmission areas in a phased process. The CDC notes that schools must provide students experiencing homelessness equal access to free, appropriate public education, and residency requirements should not be a barrier to the enrollment, attendance, or success in school. McKinney Vento Act, 42 U.S.C. 11431 *et seq.*

K-12 schools are considering a new pandemic operating scheme that presumes the following realities will continue:

1. **Classrooms and activities will be less crowded.** Any in-person instruction will take place with active mitigation measures in place. These measures likely will include social distancing of staff and students, reduced class sizes, elimination of events with large crowds like sports spectators, and elimination of travel events like field trips. Other measures include the formation of cohorts of students and staff that do not mix with other cohorts, frequent handwashing and sanitizing, frequent disinfecting of facilities, and personal protective equipment (PPE) for at least some staff and students.
2. **Some staff and students will not return right away.** Due to illness, high risk for infection, or changed personal circumstances, some students and staff will not return to school buildings when they reopen.
3. **Online programs will continue.** Many schools will continue to offer instruction and certain administrative functions online to accommodate staff and students and free up physical space in school buildings.
4. **Schools will provide additional supports.** Staff, students, and families will need additional support and services because of pandemic-related hardships, stress, illness, and learning losses.
5. **Schools will have fewer resources.** With the anticipated state-level cuts in school budgets caused by the economic downturn during the pandemic, even with potential additional federal funding, most schools will have even fewer resources to devote to these significant efforts.

In this guide, we identify some of the legal issues you, as school leaders, should be considering as you reopen schools in a world where the new coronavirus and the illness it causes, COVID-19, continue to be major public health concerns. We identify areas where the operational shifts may increase schools' risk of legal liability and suggest issues for school leaders to consider as you develop policies to address those risks.

NSBA offers an updated list of coronavirus resources for schools at <https://www.nsba.org/Resources/coronavirus>.



Members of the NSBA Council of School Attorneys can access helpful resources uniquely tailored to their work for school districts during the pandemic at <https://community.nsba.org/home>. For information on member benefits, go to <https://www.nsba.org/Services/Council-of-School-Attorneys/Member-Benefits>.

Health and Safety

Schools will play a crucial role in their local unified public health strategy to address COVID-19. This will require coordination, communication, some regulatory flexibility at the state level, and privacy protections. A simple first step in this strategy, of course, will be to modify operations based on guidance from national, state, and local health officials. This is likely to include physical distancing, temperature screenings, viral testing in the community, and frequent disinfecting of buildings.

1. May school districts require temperature checks of students?

It depends on the rules your state and local health agencies have in place. Many schools will require that students and staff take their own temperatures before reporting to school and stay home if their temperature reads above 100.4° Fahrenheit, or if they are experiencing symptoms. Other schools may screen students and staff before they enter the building.

Courts have not addressed whether temperature checks for students and staff constitute searches under the Fourth Amendment’s prohibition against “unreasonable searches and seizures.” The doctrines of “administrative searches” and “exigent circumstances,” however, likely support the ability of public school officials to take temperature checks during this public health emergency, particularly if state or local health officials have ordered those with symptoms to remain at home. *See, e.g., Law Enforcement Searches and Seizures During the COVID-19 Pandemic*, Faegre Drinker (Mar. 25, 2020), <https://www.faegredrinker.com/en/insights/publications/2020/3/law-enforcement-searches-and-seizures-during-the-covid-19-pandemic>.

Keep in mind that under the Supreme Court’s ruling in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), public school officials may search a student when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or school rules. They may also search students when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive considering the student’s age and sex and the nature of the infraction. Temperature checks, however, likely will not fall under this general search authority.

School officials should consider the reality that all students will not be equally supported in a self-assessment. A student with higher needs—whose parents are ill, working long hours, in poverty, etc.—may not have access to regular temperature checks at home. Schools should endeavor to provide equal access to required health checks. They should communicate clearly and regularly that those who are ill must stay home from school and will be sent home if they become ill at school, particularly if they have

COVID-19 symptoms. Schools should adopt clear procedures for staff on how this process will work. For example, state whether ill persons will be required to wear a face mask and will be placed in an isolation room, overseen by a staff person who also is wearing a mask.

Student Medical Information Privacy

If your schools are undertaking temperature checks or other health screenings, you may be wondering whether the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d–6, prevents school employees from revealing results of those screenings to others. Generally, the HIPAA privacy rule does not apply to elementary and secondary schools, because they are not HIPAA covered entities, or any health information they maintain is kept in education records governed by different laws. The federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and state education records laws govern personal information related to students contained in education records. Keep in mind:

- Under FERPA, schools are permitted to disclose information from student records to a public health agency connected with an emergency, if the public health agency’s knowledge of the information is necessary to protect the health or safety of students or other individuals.
- If a school can disclose to its community (parents and students) that a student has tested positive for the coronavirus without identifying the student, FERPA likely will not prohibit that disclosure.
- If your school district bills a health plan electronically for services, there is a chance that HIPAA applies. Please consult your COSA school attorney for guidance.
- If your school district has placed a student served under the Individuals with Disabilities Education Act (IDEA) in a private school for the provision of services, the education records of the privately placed student maintained by the private school are subject both to FERPA and to the confidentiality requirements under the IDEA, which incorporate the provisions of FERPA, but likely not the HIPAA privacy rule.

The following guidance documents provide useful information on this topic. It is best to consult with your state school boards association and school attorney before making decisions about disclosures of student information.

U.S. Department of Education, Student Privacy Policy Office, FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs) (March 2020), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf.

U.S. Departments of Health and Human Services and Education, Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records (Updated December 2019, first published November 2008), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf.

2. Our school district will be imposing social distancing measures. What legal risks might arise?

The era of social distancing at school is new legal territory, but existing legal standards of care are likely to apply. Many schools will be adjusting patterns to limit the number of students flowing in and out of rooms, requiring eating lunch in classrooms, or spacing out students at cafeteria tables. They will be assigning fewer students per classroom and rotating teachers—instead of students—between classrooms. Physical distancing is more practical for older students, educators say. Keeping elementary or pre-K students from hugging, moving around, or touching things and each other will pose a challenge, as will maintaining distance and other hygiene practices on playgrounds or other play areas. Most health experts, educators, and guidelines agree that masks or face-covering cloths should be worn. The CDC recommends that face coverings be worn by staff and students “as feasible.” Many consider expecting younger students to wear masks impractical.

Transportation of students presents a separate set of operational challenges and significant strain on school districts’ resources. Limiting the number of students on a bus to maintain distance could mean increasing the number of buses, drivers, and routes, which many districts cannot afford. This could be even less practical considering a nationwide bus driver shortage. Also, many drivers have preexisting conditions or are in an age range more susceptible to the coronavirus. Installing plexiglass in buses also presents similar logistical and financial challenges.

To assess whether your district might be at risk of claims for harm occurring during social distancing measures, remember that schools stand “in loco parentis,” in the place of parents, with regard to the students in their care. This means school officials have a legal duty to exercise reasonable care to supervise and to provide for the safety of students. See, e.g., *Watkins Glen Central Sch. Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 732 N.Y.S.2d 701, 58 Ed. Law Rep. 768 (2001); *Dunn v. Unified Sch. Dist. No. 367*, 40 P.3d 315 (Kan. Ct. App. 2002). Schools also have a duty to protect the health and safety of employees. See, e.g., *Pita v. Roosevelt Free Union Sch. Dist.*, 68 N.Y.S.3d 84, 351 Ed. Law Rep. 1153 (2017).

While schools generally enjoy governmental immunity from liability for negligence under tort law (as most states require that claims against public officials prove willful or wanton conduct), they nonetheless must address the needs of vulnerable students and staff. In the time of the pandemic, that might mean taking extra steps to accommodate students and staff living with elderly or immune-compromised family members and those who are particularly susceptible to infection themselves. It also may mean continuing accommodations such as remote instruction, even after schools reopen, for older or immune-compromised teachers who can continue working safely from home and for students who cannot return to school. Jake Bryant, Li-Kai Chen, Emma Dorn, and Stephen Hall, *School-system priorities in the age of coronavirus*, McKinsey & Co. (Apr. 21, 2020), <https://www.mckinsey.com/industries/public-sector/our-insights/school-system-priorities-in-the-age-of-coronavirus#>.

3. What obligations do schools have to address student mental health and psychosocial support needs?

Schools have legal and ethical obligations to support students’ mental health and emotional well-being. Social and emotional health is now widely recognized as a critical component of education. It is wise to train staff to encourage children to discuss their questions and concerns and provide information and support in an honest, age-appropriate manner. One area of focus will be to help students support their peers and prevent exclusion and bullying. Your school-based health and social workers should be identifying and supporting students and staff who exhibit signs of distress.

Prior to the pandemic, at least 20 states and territories had enacted measures to institute or expand mental health training or services for students and teachers in K-12 schools and higher education. State executive branches, school districts, and national organizations are working now to support mental health services for students, parents, and caregivers through technology-based solutions and communication. Governors and state agencies have issued directives calling for school districts to provide student mental health services remotely and for health and managed care organizations to provide families digital access to mental health services for children.

The federal Every Student Succeeds Act (P.L. 114-95) (ESSA) and state law permit services to be delivered by school counselors, school social workers, school psychologists, and other qualified professional personnel. School-based remote mental health services also may be provided by non-physician mental health professionals employed by the local educational agency (LEA) or contracted to provide school-based mental health services, with the appropriate privacy protocols in place.

Some states are providing regulatory flexibility that should permit school districts to address students' mental health needs more easily in a remote context. The New Jersey State Board of Education, for example, approved emergency changes to the state administrative code, allowing "authorized agencies to waive/suspend/modify any existing rule, where the enforcement of the rule would be detrimental to the public welfare during the emergency." This change should allow districts in New Jersey to deliver services such as physical therapy, occupational therapy, speech therapy, and counseling through telehealth. Noah Cruz and Tammy Jo Musgraves, *Bridging the Gap to Youth Mental Health During COVID-19*, National Conference of State Legislatures, <https://www.ncsl.org/blog/2020/04/17/bridging-the-gap-to-youth-mental-health-during-covid-19.aspx>.

School leaders should review their bullying and harassment policies with students and staff, emphasizing the school's expectations about maintaining an environment in which all are supported and welcomed. If a school were to face a legal claim, the district would be on better legal footing if its training and school culture resulted in all bullying or harassment instances being reported to school officials so that they can be addressed. Generally, a school will not be held liable unless it knew or reasonably should have known that bullying was likely to lead to some form of injury. Jessica Brookshire, *Civil Liability For Bullying: How Federal Statutes and State Tort Law Can Protect Our Children*, 45 *Cumb. L. Rev.* 351, 363 (2015).

Some federal district courts have ruled that if school employees acted contrary to the school district's anti-bullying policies, the school district could not be held liable. *Doe v. Big Walnut Local School Dist. Bd. of Educ.*, 837 F.Supp.2d 742 (S.D. Ohio 2011); *Long v. Murray County School Dist.*, 2012 WL 2277836 (N.D. Ga. 2012). When a district fails to act in a manner that meets that duty to address bullying incidents, permitting, and even encouraging the bullying to continue, however, that district and its employees may be held responsible. Put simply, school districts must take steps to provide a safe school environment that is conducive to learning.

Consider how you will address, through policy, working with social service systems to ensure continuity of critical services that may take place in schools. These services include health screenings, feeding programs, or therapies for children with special needs and the specific needs of children with disabilities. Consider how marginalized populations may be more acutely impacted by the illness or its secondary effects. Examine any specific implications that may increase infection risk in certain student populations, such as responsibility for taking care of the sick at home, or exploitation when out of school.

4. If our state mandates vaccinations for the coronavirus, will families be able to opt out?

It depends on your state law. Once a safe and effective vaccine is available, state health departments will decide whether immunization should be mandatory for entrance into school and will update their vaccination schedules for children accordingly. As some families may oppose any new required vaccine, schools should be aware of their legal obligations.

Under the old but still binding precedent set in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), it is within the police power of a state to require vaccinations. This includes the authority of school districts to require mandatory vaccinations for students to attend school. Courts generally have upheld mandatory vaccinations against challenges brought by families. The U.S. Court of Appeals for the Fourth Circuit held in 2011 that a West Virginia statute requiring mandatory vaccination of children as a condition of attending school in the state was constitutional and that the mandatory vaccination statute did not infringe on either the parent's or child's rights to free exercise of religion. *Workman v. Mingo County Bd. of Educ.*, 419 Fed.Appx. 348 (4th Cir. 2011). Similarly, the Second Circuit ruled in 2015 that a New York state law requiring that all children be vaccinated to attend public school was constitutional. It upheld a state regulation permitting state officials to temporarily exclude students who are exempted from the vaccination requirement from school during an outbreak of a vaccine preventable disease. *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015).

The U.S. Department of Education has indicated that school districts may not use IDEA Part B or C funds to administer future COVID-19 vaccinations to any children, including those with disabilities. U.S. Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, March 2020, <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>.

Currently all 50 states + D.C. allow medical exemptions to mandatory vaccinations for school children.

Currently 45 states + D.C. allow religious exemptions to mandatory vaccinations for school children.

Currently 15 states + D.C. allow philosophical exemptions to mandatory vaccinations for school children.

State Vaccination Exemptions for Children Entering Public Schools, [ProCon.org](https://procon.org) (last updated Mar. 4, 2020), <https://vaccines.procon.org/state-vaccination-exemptions-for-children-entering-public-schools/>.

For more information on each state's statutory exemptions, see *School Vaccine Exemption Laws by State* (Jan. 21, 2020), <https://healthcare.findlaw.com/patient-rights/vaccine-exemption-laws-by-state.html>; and the National Conference of State Legislatures, *States With Religious and Philosophical Exemptions From School Immunization Requirements* (Jan. 3, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

Funding

5. With decreases in state funding for education, will schools' legal obligations decrease?

Without specific waivers or flexibility from state lawmakers, the state education funding picture is grim. Unlike the federal government, most state governments are required to balance their budgets. States already have lost tens of billions of dollars for this fiscal year, and experts predict states will likely lose hundreds of billions more in the 2021 fiscal year due to the economic fallout from the coronavirus pandemic. For the 2020-21 school year, school leaders should expect state revenue shortfalls to hit district budgets. Some preliminary estimates from states are showing state revenue drops of between 10% and 20%. These drops are likely to be larger in 2021-22, when the sales and income tax effects will be felt more fully. <https://ednote.ecs.org/covid-19-and-school-funding/>.

The CARES Act provides approximately \$13.2 billion to help fund public education. While the federal funding is helpful, it is not nearly sufficient to make up for all the state budget cuts. The CARES Act education funding is equivalent to only 1.9% of K-12 education revenue in the 50 states and Washington, D.C., in the 2020-21 school year. The funding is equivalent to only \$286 per student. <https://learningpolicyinstitute.org/blog/covid-19-and-school-funding-what-expect-and-what-you-can-do>.

In this time of reductions in state education budgets, some states are waiving certain financial burdens required of schools. The CARES Act gives the U.S. Secretary of Education new waiver power to grant states and schools flexibility under the main federal K-12 law. In addition to providing flexibility to all states regarding the assessment and accountability requirements under ESSA, the secretary may waive the CARES Act programs, Maintenance of Effort (MOE) requirements and offer states more flexibility in how they spend their existing money. U.S. Department of Education, *Frequently Asked Questions on the Maintenance-of-Effort Requirements Applicable to the CARES Act Programs*, <https://oese.ed.gov/files/2020/06/CARES-Act-Programs-Maintenance-of-Effort-FAQ.pdf>.

Some states are requesting additional flexibility or waivers on the federal funding awards. For example, for school year 2019-20 Title I, Part A funds that carry over into school year 2020-21 will be allowed a general waiver to carry over more than the statutory 15%. Additionally, states are waiving the period of availability of some ESSA funds that would have ended on Sept. 30, 2020, and granting a one-year extension for the use of the funds. https://tea.texas.gov/sites/default/files/covid/federal_funding_and_grants_faqs_5.7.pdf.

It is still unclear whether LEAs will be granted flexibility on MOE requirements under IDEA.

6. Can we expect to cut staff?

Unfortunately, yes. With budget shortfalls, there will likely be cuts in school staff. Preliminary estimates predict that the state budget holes discussed earlier could result in the loss of around 300,000 teaching positions. <https://learningpolicyinstitute.org/blog/impact-covid-19-recession-teaching-positions>. Districts under collective bargaining agreements should address this reality proactively with their unions. Districts not under collective bargaining agreements should review reductions-in-force requirements in their states and begin communicating honestly with staff and the community.

7. Will there be further federal stimulus?

At this time, there is no guarantee there will be another federal stimulus package. If there is a new package, it is uncertain how much money would be allocated to K-12 education. The HEROS Act, which has only passed in the U.S. House of Representatives as of spring 2020, would provide an additional \$100 billion for K-12 and higher education along with \$915 billion in state and local aid to address budget gaps that could be used for public schools. However, the Senate leadership has expressed apprehension about passing another major stimulus bill. School districts should plan for cuts as if there will not be any additional federal funding.

8. What is the authority for requesting new federal funding streams and approved uses of the federal money?

Through the CARES Act, Congress set aside approximately \$13.2 billion for an Elementary and Secondary School Emergency Relief Fund (ESSER Fund). The Department of Education awards these grants to state educational agencies (SEAs) to provide LEAs with funds to address the impact of the coronavirus on K-12 schools. LEAs like school districts must apply to their SEA. Every SEA must use at least 90% of its ESSER Fund grant to make subgrants to LEAs by a formula based on fiscal year 2019 Title I, Part A allocations. <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/>.

According to department guidance, “The ESSER Fund provides LEAs considerable flexibility in determining how best to use ESSER funds (see Section 18003(d) [of the CARES Act]).” <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf>. LEAs may use the funds for PPE such as face masks and gloves, cleaning and sanitizing products, and similar supplies necessary to maintain school operations during and after the coronavirus pandemic. The funds can be used to support or help develop distance learning for all students and teachers. The department’s Frequently Asked Questions about the ESSER Fund are available at: <https://oese.ed.gov/files/2020/05/ESSER-Fund-Frequently-Asked-Questions.pdf>.

The department released a controversial guidance document in April 2020 regarding the use of CARES Act K-12 emergency relief funds to provide services to non-public school students and teachers under the law’s equitable services provision. NSBA sent a letter to the secretary expressing its concern over the guidance, which seems to ignore the act’s requirements. It urged that the guidance be revised to ensure that the equitable services share for private schools is determined by poverty rates rather than overall enrollment. The department issued an [interim final rule](#) in June providing school districts with two

options for implementing the CARES Act's equitable services requirement: (1) If a district chooses to use CARES Act emergency funding only for Title I eligible students, then it may elect to only set aside funding for equitable services for Title I eligible students that attend private schools; or (2) If a district chooses to use CARES Act funding for all students, then the district must set aside funding to provide equitable services to all students that attend private schools in their region. This interim rule has been challenged in court. Please consult with your SEA and state school boards association to determine how your state is addressing equitable services funding under the CARES Act.

SEAs and LEAs must keep a detailed record of the distribution and use of federal funds. The department will monitor the use of the ESSER funds, which are subject to audit requirements under the Single Audit Act and to review by the Government Accountability Office.

For additional resources on funding, visit the Education Commission of the States, ["COVID-19 Update: State Policy Responses and Other Executive Actions to the Coronavirus in Public Schools."](#)

Employment and Labor

9. What kind of modifications will need to be made to teaching contracts and teacher assignments due to the coronavirus pandemic or a future pandemic of this nature?

Because working conditions will change for school staff, many issues will need to be addressed in collective bargaining agreements, teacher contracts, and policies. School district employers in states that allow collective bargaining for school employees have the duty to bargain over hours, wages, and other conditions of employment. The coronavirus pandemic has fundamentally changed how schools operate, so districts can expect to bargain with unions over working conditions for employees who are working remotely. They also will be asked to address issues such as employees' right to refuse dangerous work, hazard pay, protocols regarding screening and testing for the virus, and extracurricular activities.

Districts with collective bargaining agreements should already be talking with union leadership to address the changes in working conditions. Take the initiative to contact union leadership as soon as possible to allow the unions to become more comfortable with necessary concessions.

Those discussions should result in a memorandum of understanding (MOU) or a new contract if the parties are already in negotiations for the upcoming school year. Some other issues covered in those contracts or MOUs could be provisions about working hours, which might include agreements about start times, lunch breaks, planning periods, and the end of the workday times for employees who are working from home. The contract will need to address any extra-duty activities. There also will need to be an agreement on any additional compensation for items that may be required if teachers are working from home (e.g., Wi-Fi).

Extracurricular activities are likely to cease or decrease while pandemic-related social distancing measures or school closures are in place. Many teachers derive a portion of their income from those duties, so the district should make certain that the contracts/MOUs address cessation of extracurriculars until further notice.

The Education Commission of the States provides helpful information on collective bargaining for each state: <https://www.ecs.org/clearinghouse/99/78/9978.pdf>.

School districts in states without collective bargaining will need to be aware of their state law and their state department of education regulations regarding teaching contracts. They will need to change their teaching contracts to reflect what instruction will look like going forward. They also will need to make certain that their policies are aligned with the provisions outlined in the contracts.

School districts also should ensure that any MOUs and teachers contracts reflect the changes that are required by state executive and agency orders. Most state executive orders are short-term in nature. Schools should capture requirements in those orders in MOUs, which are meant to handle short-term events or change the terms of a collective bargaining agreement mid-contract. Chart 1 provides examples of state directives and announcements.

CHART 1: STATE ORDERS ON SCHOOL CLOSURE

AL	Order of the State Health Officer (March 19, 2020)	https://www.alsde.edu/COVID19%20Updates/Alabama%20State%20Health%20Officer%20Statewide%20Social%20Distancing%20Order%20%20%283.19.20%29.pdf
AK	COVID-19 Health Mandate** Issued: April 9, 2020, by Gov. Mike Dunleavy	https://gov.alaska.gov/wp-content/uploads/sites/2/04092020-SOA-COVID-19-Health-Mandate-013.pdf
AZ	Gov. Ducey, Superintendent Hoffman Announce Extension of School Closures Through End of School Year (March 30, 2020)	https://azgovernor.gov/governor/news/2020/03/governor-ducey-superintendent-hoffman-announce-extension-school-closures
AR	Gov. Hutchinson Announces All Schools to Remain Closed for Remainder of Academic Year (April 6, 2020)	https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-announces-all-schools-to-remain-closed-for-remainder-of
CA	Executive Order N-26-20	https://www.gov.ca.gov/wp-content/uploads/2020/03/3.13.20-EO-N-26-20-Schools.pdf
CO	Executive Order D 2020 035	https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20035%20Childcare%20and%20Schools.pdf
CT	Executive Order No. 7R	https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7R.pdf?la=en
DE	Gov. John Carney letter to Students, Educators, Families, and School Communities	https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Letter-to-Schools-03.23.2020.pdf
DC	Mayor Bowser Adjusts the District of Columbia Government's Operating Status	https://mayor.dc.gov/release/mayor-bowser-adjusts-district-columbia-government%E2%80%99s-operating-status
FL	Florida Governor Orders Schools Closed Rest of Academic Year	https://www.edweek.org/ew/articles/2020/04/18/florida-governor-orders-schools-closed-rest_ap.html

GA	Executive Order	https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders
HI	HIDOE Extends School Closures, Implements Remote Work to Maintain Essential Functions	http://www.hawaiipublicschools.org/ConnectWithUs/MediaRoom/PressReleases/Pages/HIDOE-extends-school-closures-implements-remote-work-to-maintain-essential-functions.aspx
ID	March 23 Board Approves Statewide School Operations Guidance to Deal with Coronavirus	https://boardofed.idaho.gov/resources/board-approves-covid-19-statewide-guidance/
	April 16 Board Approves Criteria for Schools to Resume Normal Operations	https://boardofed.idaho.gov/resources/board-approves-criteria-for-schools-to-resume-normal-operations/
IL	Executive Order in Response to COVID-19	https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-15.aspx
IN	Executive Order 20-16: Education Matters and COVID-19	https://www.in.gov/gov/files/Executive%20Order%2020-16%20Education.pdf
IA	Gov. Reynolds Signs New Proclamation Continuing State Public Health Emergency Declaration (April 2)	https://governor.iowa.gov/press-release/gov-reynolds-signs-new-proclamation-continuing-state-public-health-emergency-2
KS	Executive Order 20-07: Temporary Closing K-12 Schools to Slow the Spread of COVID-19	https://governor.kansas.gov/wp-content/uploads/2020/03/EO-20-07-Executed.pdf
KY	Department of Education Press Release: Gov. Beshear Recommends School Closure Period Be Extended Through May 1	https://content.govdelivery.com/accounts/KYDE/bulletins/2849f72
LA	Executive Department Proclamation No. 47 JBE 2020	https://gov.louisiana.gov/assets/Proclamations/2020/47-JBE-2020-State-of-Emergency-Elementary-and-Secondary-Education.pdf
ME	Executive Order No. 28 FY 19/20: An Order Regarding Further Restrictions on Public Contact and Movement, Schools, Vehicle Travel and Retail Business Operations	https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/CORRECTED_An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations.pdf
MD	Updates from the State Superintendent Special Announcement: School Closure Extended Through 2019-20 Academic School Year	http://marylandpublicschools.org/newsroom/Pages/COVID-19/SchoolClosure.aspx

MA	Press release: Baker-Polito Administration Announces Extension of School and Non-Emergency Child Care Program Closures, Continued Steps to Support COVID-19 Response	https://www.mass.gov/news/baker-polito-administration-announces-extension-of-school-and-non-emergency-child-care-0
MI	Executive Order 2020-35 (COVID-19): Provision of K-12 Education During the Remainder of the 2019-2020 School Year	https://www.michigan.gov/
MN	Emergency Executive Order 20-19 Authorizing and Directing the Commissioner of Education to Implement a Distance Learning Period and Continue to Provide a Safe Learning Environment for Minnesota's Students	https://mn.gov/governor/assets/2a.%20EO%2020-19%20FINAL%20SIGNED%20Filed_tcm1055-425019.pdf
MS	Executive Order No. 1460 (March 19)	https://www.sos.ms.gov/Education-Publications/ExecutiveOrders/1460.pdf
MO	Missouri Department of Elementary & Secondary Education: Gov. Parson Announces Schools Closed for the Year	https://dese.mo.gov/sites/default/files/Gov-Closes-Schools-April-9.pdf
MT	Local Control of School Closure Beginning May 7 <ul style="list-style-type: none"> All non-residential public schools are closed through May 6 and will continue to be eligible for a waiver of pupil-instruction time and receive associated state funding through the funding mechanism described in prior Directives. Beginning May 7, all schools have the option to return to in-classroom teaching delivery, at the discretion of local school boards. 	https://drive.google.com/file/d/1999aWfT-U6yLJWmikDcN7ofxv-QOoOb8/view
NE	Gov. Pete Ricketts Issued a Directed Health Measure (DHM) (April 1)	https://governor.nebraska.gov/press/gov-ricketts-announces-15-counties-north-and-central-nebraska-now-included-state%E2%80%99s-directed
NV	Nev. Executive Dept. Declaration of Emergency Directive 005: Gov. Steve Sisolak	http://gov.nv.gov/uploadedFiles/govnewnv.gov/Content/News/EmergencyOrders/2020/2020-03-20-%20COVID-19%20Declaration%20of%20Emergency%20Declaration%20Directive%20005.pdf
NH	Office of Governor: Emergency Order# 19 Pursuant to Executive Order 2020-04 Extension of Emergency Order #1 (temporary remote instruction and support for public K-12 school districts)	https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-19.pdf

NJ	Executive Order No. 104	https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf
NM	Executive Order 2020-012: Order Directing the Closure of All Public Schools for the Remainder of the 2019-2020 Academic Year	https://www.governor.state.nm.us/wp-content/uploads/2020/03/MLG_EO_2020_012.pdf
NY	Gov. Cuomo Directs Schools and Nonessential Businesses to Stay Closed for Additional Two Weeks Through April 29	https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-ny-0
NC	Executive Order No. 120 Additional Limitations on Mass Gatherings, Restrictions on Venues and Long-Term Care Facilities and Extension of School Closure Date	https://files.nc.gov/governor/documents/files/EO120.pdf
ND	Executive Order 2020-10	https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-10.pdf
OH	Ohio Department of Health: Director's Order Amended Order the Closure of all K-12 Schools in the State of Ohio	https://coronavirus.ohio.gov/wps/wcm/connect/gov/72a6497a-a816-4256-8555-cd5eab60278d/1923_001.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIKON0J000Q09DDDDM3000-72a6497a-a816-4256-8555-cd5eab60278d-n4KeNm-
OK	On March 25, the State Board of Education amended its first order to direct all accredited public schools to suspend all in-person and extracurricular activities and close buildings for the remainder of the school year.	https://sde.ok.gov/sites/default/files/documents/files/20200325124831229.pdf
OR	Gov. Kate Brown Extends Coronavirus School Closures Through End of School Year	https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36318
PA	Gov. Wolf Extends School Closure for Remainder of Academic Year	https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year/
RI	April 23, 2020: Rhode Island Gov. Gina Raimondo announced that schools would not reopen for in-person instruction for the remainder of the academic year.	https://thejournal.com/articles/2020/03/17/list-of-states-shutting-down-all-their-schools-grows-to-36.aspx https://www.wpri.com/news/education/distance-learning-in-ri-continuing-for-rest-of-school-year/

SC	<p>South Carolina Department of Education: All South Carolina public K-12 schools are closed through the end of the 2019-2020 school year.</p>	<p>https://ed.sc.gov/newsroom/covid-19-coronavirus-and-south-carolina-schools/</p>
SD	<p>On March 24, Gov. Noem asked schools to remain closed through May 1, 2020. During the closures, schools are asked to continue assisting their communities.</p>	<p>https://doe.sd.gov/coronavirus/</p>
TN	<p>Governor Calls for Closing for Remainder of School Year</p>	<p>https://dailymemphian.com/article/12992/gov-bill-lee-school-closing</p>
TX	<p>Gov. Greg Abbott keeps Texas classrooms closed for remainder of school year.</p>	<p>https://www.texastribune.org/2020/04/17/gov-greg-abbott-keeps-texas-classrooms-closed-remainder-school-year/</p>
UT	<p>Gov. Herbert Announces Extension “Soft Closure” for Public Schools (April 14)</p> <p>Gov. Gary Herbert, along with state superintendent Syd Dickson, announced that public schools will extend their “soft closure” until the end of the school year.</p>	<p>https://coronavirus.utah.gov/governor-herbert-announces-extension-soft-closure-for-public-schools/</p>
VT	<p>State of Vermont Executive Department Gubernatorial Directive to All School Boards and Superintendents and Child Care Providers</p> <p>Continuity of Learning Planning Provision of Services to Children of Essential Persons During Closure Period in Response to COVID-19</p>	<p>https://governor.vermont.gov/sites/scott/files/documents/Directive%205%20-%20Continuity%20of%20Learning%20Planning%20_0.pdf</p>
VA	<p>Executive Order 53 (2020): Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (COVID-19)</p>	<p>https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf</p>
WA	<p>Proclamation by the Governor Extending Proclamations 20 08 and 20 09</p> <p>20-09.1 Statewide K-12 School Closures</p>	<p>https://www.governor.wa.gov/sites/default/files/20-09.1%20-%20COVID-19%20School%20Closure%20Extension.pdf?utm_medium=email&utm_source=govdelivery</p>
WV	<p>West Virginia Department of Education</p> <p>Gov. Jim Justice announced today that school buildings and facilities will remain closed while remote learning continues through the end of the school year.</p>	<p>https://wvde.us/the-west-virginia-department-of-education-and-counties-sustain-student-support-through-end-of-school-year/</p>

WI	State of Wisconsin Department of Health Services Emergency Order #28	https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf
WY	Superintendent Balow's Statement on School Closure Extension	https://edu.wyoming.gov/blog/2020/04/03/superintendent-balows-statement-on-school-closure-extension/

10. Are school districts liable for workers' compensation when employees (either those working at home or those working in school buildings) are exposed to the coronavirus or develop COVID-19?

Whether or not workers' compensation covers a particular illness depends on the law in the state in question. Workers' compensation laws generally do not cover routine community spread from illnesses such as a cold or flu because they typically cannot be tied to the workplace.

Recognizing that medical personnel and first responders may be routinely exposed to the coronavirus because of the kind of work they do, many states are changing their workers' compensation laws to protect hospital employees and first responders. While there are no known proposed changes in the law that specifically protect school employees, employees such as day care workers in public schools may be protected under new laws. The National Conference of State Legislatures provides updates on changes in workers' compensation laws in response to the coronavirus pandemic at <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

11. How do the new federal FMLA/ sick leave provisions for employees affected by the coronavirus impact school districts?

School districts are employers subject to the new FMLA and sick leave provisions. These changes affect emergency sick leave and make temporary changes to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2601 *et seq.*, 29 C.F.R. Part 825. Local, state, and federal government (including local public school district) employees, employees at companies with fewer than 500 employees, and employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are eligible for the new sick leave benefits.

Full-time employees are entitled to 80 hours (two weeks) of paid sick leave to self-quarantine, seek preventive care or a diagnosis, or receive treatment for COVID-19. The benefit for full-time employees is capped at \$511 per day. Part-time employees are also entitled to paid time off to self-quarantine, seek preventive care or a diagnosis, or receive treatment for COVID-19. The paid time off for part-time employees is capped at \$511 per day for the average number of hours that they work in a typical two-week period. If a full-time employee needs to care for a family member, or a child whose school or childcare provider is closed due to COVID-19, that employee is entitled to 80 hours (two weeks) of paid sick leave at two-thirds of their regular pay (capped at \$200 per day). Part-time employees are entitled to the average number of hours they work in a typical two-week period at two-thirds of their typical pay (capped at \$200 per day).

The statute also makes temporary changes to FMLA that require government employers or those employers who have 50 or more employees to provide an initial 10 days of unpaid sick leave to employees affected by the coronavirus. This would be followed by paid leave equal to at least two-thirds of their regular pay. There are caps on this of \$200 per day or \$10,000 in the aggregate. The leave provisions are set to expire on Dec. 31, 2020. In March 2020, the U.S. Department of Labor issued guidelines to assist employers in calculating the amount of paid sick time: <https://www.dol.gov/newsroom/releases/whd/whd20200324>; <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>; <https://www.dol.gov/agencies/whd/fmla/pandemic>.

NSBA issued an FAQ on the changes to the FMLA and the sick leave provisions mandated by the CARES Act: <https://www.nsba.org/-/media/NSBA/File/cosa-families-first-coronavirus-response-act-faq-march-3-2020.pdf>. The U.S. Department of Labor issued temporary regulations regarding paid leave and FMLA provisions of the CARES Act, available at: <https://www.dol.gov/agencies/whd/ffcra>.

12. What accommodations will districts need to make for employees who are vulnerable or have been exposed to the coronavirus or are ill with COVID-19?

The Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, Section 1, 104 Stat. 328 (1990), requires employers to provide reasonable accommodation for employees with disabilities unless providing such accommodation will result in undue hardship to the employer. This provision of the law applies to employees who are vulnerable or have been exposed to the coronavirus or who are ill with COVID-19 if those conditions amount to a “disability” under the law. According to the ADA, a disability is “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” 42 U.S.C. §12102(1). A school district must provide reasonable accommodations that would allow the employee to perform the essential functions of his or her job. Such accommodations ideally would be settled upon after the employer engages in an interactive process with the employee. A school district employer would have to make the same kind of accommodation for an employee who has long-term health effects from COVID-19 that it would have to make for any other employee who has a “disability” as defined by the ADA.

The Equal Employment Opportunity Commission (EEOC) has developed a thorough technical assistance document that provides guidance on reasonable accommodations and other issues under the ADA for employers whose employees either were exposed to coronavirus or have been ill with COVID-19: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

13. What kind of staff onboarding or training will be required for new operational realities upon return to school buildings?

The kind of staff onboarding or training for online learning and adapted schedules upon return to school will depend wholly upon the employees’ duties. All instructional staff should be trained on how to use online learning platforms consistent with federal and state student privacy laws (see the “Virtual Learning” section below) and district policies and procedures. Teachers and other employees who work in school buildings also might be required to learn new procedures on infection control, social distancing, and other practices that will help them safely and effectively perform their jobs.

14. If a district requires employees to return to work, and an employee subsequently contracts the coronavirus from a student or fellow employee, does the district have any potential liability?

Very few legal claims associated with the pandemic have been litigated, and very few federal and state statutes have been passed addressing liability for school districts. It is unlikely that schools will face a large number of claims under Section 1983, 42 U.S.C. §1983, the provision allowing people to sue for violations of federal law. Claims under this statute arise when a defendant allegedly violated an established constitutionally guaranteed right. At this point, the kind of claim that an employee might have against a district related to the coronavirus would not rise to that level. Similarly, it is unlikely that most state tort claims acts would provide a remedy to an employee who contracts COVID-19 on the job because workers' compensation is generally the only remedy that will allow an employee to obtain damages for an injury received at work. Even if a tort claim were a potential remedy, causation would be an issue. (See Question 10 for more on workers compensation.)

State Action Protecting Employers

Your state may be addressing school district liability for COVID-19-related risks to employees through executive order or legislation. Governors in many states have issued orders protecting employers from penalties. For example, Connecticut's governor ordered that COVID-19 unemployment claims would not increase experience ratings for unemployment insurance. <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7W.pdf?la=en>. The National Conference of State Legislatures is tracking state action on COVID-19 at <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>. It counts as many as 66 bills being considered by state legislatures that address liability in some way.

Consult with your state school boards association and school attorney member of COSA regarding applicable orders and statutes in your state.

That said, it is still uncertain how legal standards will evolve on this issue. At some point, school districts may become liable for damages if an employee can prove that he or she contracted COVID-19 at work. While the law develops, school districts should become familiar with recommendations from CDC, the Occupational Safety and Health Administration, and other state and local agencies that address disease control. Once you become familiar with such practices, implement them immediately. By doing that, you give your district a level of protection against claims filed by employees who might contract COVID-19 and allege that they contracted it while at work.

15. What about part-time coaching and other stipend staff?

Because social distancing procedures will be in place in most school districts when they reopen, they may dispense with activities for which teachers get a stipend like part-time coaching. If that happens, districts with collective bargaining agreements should develop MOUs that reflect the elimination of extra-duty stipends for athletics and other extra-duty activities for which teachers have been paid. School districts without collective bargaining agreements need to revise their policies and teacher contracts to eliminate or adjust language that addresses stipends while the activities have been suspended.

School District Operations

16. What steps should schools take to address legal concerns with transportation services?

School districts provide transportation to students directly, with their own bus fleets, or by contracting with outside companies. School districts with collective bargaining agreements and their own fleets will need to work with the bus drivers union as soon as possible. School leaders should develop MOUs that will address any reduction in hours during periods of online learning for students. Work with drivers unions to develop protocols for cleanliness, social distancing for students on buses, and the myriad of other issues associated with bus transportation.

Schools that contract with outside transportation providers may need to renegotiate those agreements to address cleanliness protocols, social distancing, and adjustments to the number of buses needed. Consider adding clauses in contracts that will allow your school district some flexibility in changing the terms as the pandemic evolves. The National School Transportation Association provides resources that may assist you as you address your transportation needs for the upcoming year: <http://www.yellowbuses.org/news-and-resources/covid-19-resources/>.

17. Will schools have to change how food is handled, packaged, and prepared due to the pandemic?

Yes, in some instances. Schools should be aware of recent changes to some of the rules for meal preparation and distribution due to the pandemic. On March 9, 2020, the U.S. Department of Agriculture's (USDA) Food and Nutrition Services (FNS) program began approving waivers enabling Summer Food Service Program (SFSP) and National School Lunch Program Seamless Summer Option (SSO) sponsors to serve meals in a non-congregate setting and at school sites during school closures related to the coronavirus. FNS also issued guidance on meal delivery using existing authorities in summer meal programs. This waiver was granted to all 50 states, Washington, D.C., Guam, Puerto Rico, and the Virgin Islands. In accordance with the Families First Coronavirus Response Act of 2020, FNS granted a nationwide waiver allowing parents or guardians to pick up meals for their children without the student needing to be present. FNS provides information and resources at <https://www.fns.usda.gov/disaster/pandemic/covid-19>. For a list of the COVID-19 waivers issued for your state in child nutrition programs, go to: <https://www.fns.usda.gov/sfsp/covid-19/covid-19-meal-delivery>.

NSBA's FAQ on the CARES Act provides information relative to those changes and potential waivers: <https://www.nsba.org/-/media/NSBA/File/cosa-families-first-coronavirus-response-act-faq-march-3-2020.pdf>. School districts should familiarize themselves with any new rules or regulations that are promulgated by the USDA to address student meals.

Any company that contracts with schools to provide student meals should be well-versed in new requirements for providing and distributing those meals. Contract provisions should require that those companies understand and follow federal rules and regulations as they relate to food service.

18. How should schools handle field trips and overnight trips?

Because of social distancing requirements and other issues related to numerous people being in close proximity, which vary among states and localities, you should contact your state school boards association and your COSA attorney to discuss whether it is advisable to schedule field trips and overnight trips during the coronavirus pandemic. Your attorney can assist you in interpreting and applying any force majeure or cancellation clauses in current contracts with educational trips and transportation companies.

19. Does the pandemic allow schools more latitude in providing information to the community and responding to open records requests?

Communication is crucial to quell uncertainty caused by the pandemic, especially for parents with questions about what school will look like for their children. A good communications plan must, at the least, inform students, parents, and stakeholders about the following:

- when school will start.
- when it will end.
- whether there will be spring, winter, and fall breaks.
- whether classes will be online, at school, or a combination of both.
- what type of cleaning protocols the school will use when in session.
- what kind of measures schools will put in place to address social distancing.
- how meals will be handled.
- any other issues of interest to the school community (for example, how transportation will be handled, whether and how athletics will occur).

District communications should be sent to parents in their native languages explaining in detail how the school intends to operate during the pandemic period. Principals should hold online or telephonic live meetings with parents to discuss plans for the upcoming year and answer questions. The final step of a communication plan would be to provide statements to the media regarding the planned opening of school. It may be helpful for the superintendent to hold a press conference to discuss district plans.

Finally, some public agencies appear to be citing the pandemic as a basis for their decision not to comply with open records laws. <https://themarkup.org/coronavirus/2020/05/01/states-are-suspending-public-records-access-due-to-covid-19>. We recommend working with your state school boards association and COSA attorney to determine whether there have been changes in your state's open records laws related to the pandemic regarding the sharing of information. Remember that the open records laws are called "sunshine" laws because they are meant to shed light on what is going on in public agencies. The pandemic does not provide an excuse to skirt those laws.

Equity & Discrimination

20. Should schools be prepared to address inappropriate actions directed at students and staff of Asian descent?

Yes. Since the first cases of COVID-19 were identified in China, there has been an increase in news reports regarding harassment, stereotyping, avoidance, and exclusion targeted at individuals of Chinese and Asian descent. Bullying and harassment are never acceptable, but they can be especially damaging when certain students are particularly vulnerable. The U.S. Department of Education's Office for Civil Rights (OCR) spoke about bullying and harassment of students of Asian descent in a letter to education leaders on preventing and addressing potential discrimination associated with the coronavirus. The [letter](https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20200304-covid-19-outbreak-statement.pdf) reminds educators that "in some circumstances, Title VI of the Civil Rights Act of 1964 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." <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20200304-covid-19-outbreak-statement.pdf>.

Not only does school staff have a legal and ethical responsibility to uphold all students' civil rights, but they also must be vigilant in identifying and addressing potential discrimination. Staff must intervene when presented with abusive behaviors towards students. School leaders may need to review and update policies and procedures to ensure your district is committed to addressing these issues. Staff should be trained to respond appropriately. It may be helpful for schools to provide training on discrimination laws and district policies in back-to-school training sessions, and to make sure employees sign off indicating that they have received training.

As school leaders respond to evolving conditions related to the coronavirus, you should be mindful of the requirements of federal civil rights laws to ensure that all students are able to learn in a safe environment free from discrimination. For an additional resource from OCR, see its *Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>.

Tips for Educators to Counter Coronavirus Stigma and Racism from the National Association of School Psychologists:

1. Stop stigma by sharing accurate information and countering misinformation.
2. Avoid stereotyping people or countries.
3. Speak up if you hear, see, or read discriminatory comments made by students or staff.
4. Counter microaggressions with micro-affirmations.
5. Model compassion and acceptance of differences.
6. Provide useful information to students, families, and staff.
7. Stop any type of harassment or bullying immediately.
8. Empower students to seek help.
9. Ensure that staff are respected and protected as well.
10. Explore children's fears.
11. Emphasize positive, familiar images of diverse groups.
12. Identify "heroes" of varying backgrounds involved in response to crisis events.
13. Undertake projects to help those in need with people from diverse backgrounds.
14. Discuss historical instances of American prejudice.

Source: National Association of School Psychologists, *Countering Coronavirus Stigma and Racism: Tips for Teachers and Other Educators*, <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-climate-safety-and-crisis/health-crisis-resources/countering-coronavirus-stigma-and-racism-tips-for-teachers-and-other-educators>.

21. How should schools address the 'Homework Gap'? Are schools responsible for ensuring equitable access to online learning?

The school closures and the transition to remote learning have made the digital divide and homework gap more problematic, and more apparent, than ever. Many students simply do not have the connectivity they need to complete schoolwork at home. According to data from the National Center for Education Statistics, 14% of children do not have internet access at home. That means more than 9 million school children cannot complete online assignments at home. <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-climate-safety-and-crisis/health-crisis-resources/countering-coronavirus-stigma-and-racism-tips-for-teachers-and-other-educators>

A disproportionate share of those students are Black, Hispanic, live in rural areas, or come from low-income families. A survey conducted by *Education Week* during the spring of 2020 found that in school systems where more than 75% of students qualify for free or reduced-price lunches, educators reported that 59% of their students had to share digital devices with members of their household or friends to complete their schoolwork during the school building shutdowns. In systems with 25% or fewer of their

students living in poverty, the figure was fewer than half that amount. Bushweller, Kevin, "How COVID-29 Is Shaping Tech Use. What That Means When Schools Reopen," *Education Week*, June 3, 2020.

To help narrow the homework gap, some districts have created short-term solutions. According to the Center on Reinventing Education's online database of districts' coronavirus responses, more than 80% of districts report providing technology assistance to families, including the distribution of Wi-Fi hotspots, computers, and smartphones. <https://usafacts.org/articles/internet-access-students-at-home/#>. Some states created websites that provide information and links to internet service providers offering free or discounted internet services for students impacted by school closures. America's public television stations formed public media education partnerships with school districts, governments, and education agencies in at least 34 states. Other districts are using low-tech solutions like worksheet packet drop-offs and PBS broadcasts. These options are accessible without an internet connection, but they do not simulate a classroom environment as well as the virtual learning opportunities available to connected students.

In addition to the CARES Act stimulus package that offers formula grants to states that could be used for purchasing educational technology for online learning, the Distance Learning and Telemedicine and Broadband Program received \$25 million to support rural telecommunications access.

The Federal Communication Commission (FCC) has taken some steps to ensure students' internet access by temporarily granting additional spectrum authority to internet service providers and getting guarantees from hundreds of internet companies not to terminate service due to an inability to pay during the pandemic. The FCC also extended the E-Rate application deadline and temporarily waived gift rules to allow schools and libraries to accept donations from internet providers during the pandemic. However, the FCC has not yet taken action to address E-Rate's biggest shortcoming: It does not offer funds for in-home internet access.

Schools providing online learning to students should endeavor to do so equitably for all students. This will be difficult, but education leaders are rising to the challenge. Schools should remain mindful of policies and practices that might exclude students from having access to the tools needed for their education. If a school's practices affect students differently based on race, sex, disability, or other protected class, it may be subject to constitutional claims. The Supreme Court's words, now half a century old, remain a powerful reminder of schools' responsibility: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

22. What if there is an uneven reopening and or closing of schools, and how will it affect populations?

The uneven reopening and closing of schools may affect some populations more than others. If schools are closed, parents face the continued burden of providing or arranging childcare. Students without computers or tablets continue to depend on what districts provide. Students requiring special education services and English learners would almost certainly go without some of the support they would have received in person. At least one study has projected that school closures will harm student academic achievement. https://www.nwea.org/content/uploads/2020/04/KAP5122-Collaborative-Brief_Covid19-Slide-APR20_FW.pdf. This can create inequities in student learning if some schools are closed and others remain open.

Reports say the coronavirus is likely to hit regional pockets in waves and could create disruptions in school activities in a nonuniform fashion. Districts need to prepare for how to adapt and keep their students current if schools are closed, while also trying to keep pace with the rest of the state, which may be able to maintain in-person student learning. Districts should plan for multiple possible scenarios if they need to continue distance learning or return to distance learning the following school year, developing operational plans and cost estimates for each.

Education for Students with Disabilities

23. What are schools' legal obligations to students with disabilities during the pandemic?

Under federal anti-discrimination laws (Title II of the ADA, 42 U.S.C. §12131 *et seq.*, 28 C.F.R. Part 35, and the Rehabilitation Act, known as “Section 504,” 29 U.S.C. § 794, 34 C.F.R. Part 104), schools must accommodate students with disabilities so they can access the education program. Under the more specific IDEA (20 U.S.C. §1400 *et seq.*, 34 C.F.R. Part 300), students determined to be eligible for special education and related services are entitled to a free appropriate public education (FAPE) provided through an individualized education program (IEP). These students have procedural protections, including a right to request a due process hearing to challenge their educational program. The federal regulations implementing Section 504 also require FAPE for students with disabilities, blurring the line somewhat on what is required under each statute. With state law adding even more specific requirements and procedures, public schools are accustomed to providing students disability-related services and accommodations in a heavily regulated environment even in “normal” times.

School leaders have faced particularly challenging obstacles as they serve students with disabilities during school closures caused by the pandemic, leading to questions about legal liability. Many school-based services require in-person, close contact between staff and students. Those services include occupational and speech therapy, handwashing and toileting, nursing services, and one-to-one support for academic tasks provided by individual aids. These services do not translate well to online education. When school buildings closed in early 2020, families and educators adapted students' education plans as best they could under the circumstances, providing some services through online platforms. But many students with disabilities, like their non-disabled peers, are not able to receive the education they received prior to the pandemic when services move online.

It is unlikely that a court would hold an LEA to a pre-pandemic standard for providing access and special education services during school closures under federal law. However, it is unclear what legal standard will apply if claims are filed against schools for failing to serve students with disabilities adequately during this extraordinary time. Guidance issued by the U.S. Department of Education sheds light on how it will interpret schools' responsibilities, which likely will be given some weight by hearing officers and federal courts. The department has made it clear in this guidance that it expects schools to provide students with disabilities the same opportunities for access to education provided to general education students.

As schools serve students with disabilities through new, remote, and socially distanced means, school leaders can draw from best practices informed by current legal standards. Schools can maintain active and honest lines of communication with families of students with disabilities about how services can be provided safely during the pandemic. This communication can help schools preserve the trust of their communities and avoid unnecessary claims in the future.

24. Are schools required to meet the timelines required by law for identification, evaluation, annual reviews, notice, and the like?

Many timelines required by the IDEA must still be met if possible, although most can be adjusted by agreement of the school district and the parents of a student with a disability. The department issued guidance in March and June of 2020, saying the following about IDEA timelines:

- **State complaints**—A state may be able to extend the 60-day timeline for complaint resolution if “exceptional circumstances” exist, including staff unavailability during the COVID-19 pandemic. A state’s decision to extend the state complaint timeline must be made only on a case-by-case basis. A state may not categorically decide not to process state complaints during the pandemic based solely on the assumption that the pandemic is an exceptional circumstance that warrants an extension.
- **Due process hearings**—The parties may mutually agree to extend the 30-day timeline for resolution of a due process complaint before the hearing. A hearing officer may extend the 45-day deadline for a hearing decision after the 30-day resolution period at the request of either party. The seven-day resolution meeting timeline and the 15-day resolution period for expedited due process complaints that address disputes about disciplinary removals of students with disabilities may not be extended.
- **IEPs**—IEP teams must meet and develop an initial IEP within 30 days of a determination that the child needs special education and related services. They must review the child’s IEP annually. The parents and the IEP team may agree to conduct these meetings via remote means, including telephone calls. The parent and the school district may agree not to convene a meeting and instead develop a written document to amend or modify the child’s IEP.
- **Initial eligibility determination**—An initial evaluation must be conducted within 60 days of receiving parental consent under IDEA or within the state-established timeline. However, there is no explicit timeline for making the eligibility determination.
- **Reevaluations**—Reevaluations of each child must take place every three years unless the parents and the school district agree that the reevaluation is unnecessary. When appropriate, a reevaluation may be conducted through a review of existing evaluation data. This review may occur without a meeting and without parental consent unless additional assessments are needed.

U.S. Department of Education, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, March 21, 2020, <https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/>.

U.S. Department of Education, *IDEA Part B Dispute Resolution Procedures*, June 22, 2020, <https://sites.ed.gov/idea/files/qa-dispute-resolution-procedures-part-b.pdf>.

School leaders should consult with their SEA, state school boards association, and COSA attorney to determine what flexibility is available in your state for timelines that may be difficult, unsafe, or impossible to meet during pandemic-related disruptions, such as the 60-day deadline for initial evaluations. A best practice is to have a written agreement with the child's parent about what efforts will be made to meet the deadlines, while still abiding by state and local health guidelines and orders.

25. Should schools convene IEP meetings to address amendments/revisions for each student?

Yes, if possible. Schools should make every effort to convene IEP and Section 504 team meetings for each student with a disability when necessary to determine adjustments in goals or services provided. When the school provides services remotely, there may not be a need for convening the whole IEP team if exceptional circumstances—such as school closures or schedule/spacing adjustments due to the pandemic—affect only *how* a particular service is provided. This may be a methodology change that does not require the convening of the IEP team, depending on your state's interpretation. Many state educational agencies have issued guidance on how IEP or Section 504 plans should be discussed and adjusted as necessary to reflect the realities of the pandemic. We urge school leaders to confer with your SEA.

Here are some practical approaches to address IEP adjustments:

- If a student's parent is not able to be reached to schedule a remote IEP meeting after several attempts, consider holding the meeting as the team normally would to address the needs of the student. Remain as close as possible to federal and state timelines for annual reviews, evaluations, and the like. Provide prior written notice of the decisions made at that meeting and an opportunity for the parent to provide input. Meet again to review those determinations.
- Consider developing a "distance" or "continual" learning plan to be attached to a student's IEP or Section 504 plan, in consultation with the child's parents. The plan will reflect how the school will provide services during school closures or periods of remote instruction. This distance learning plan would specify what the child's "stay put" placement will be if a due process complaint is filed during a period of remote instruction. The department has indicated that IEP teams may include such distance-learning plans in a child's IEP.
- The department has noted that any changes to an IEP made after an annual review may be made by agreement of the parent and the school district through a written amendment to the IEP, without an IEP meeting. 34 C.F.R. §300.324(a)(4)(i).

U.S. Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, March 2020, <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>. See also, Center for Parent Information and Resources (U.S. Department of Education Office of Special Education Programs grant), *Sample Virtual IEP Meeting Agenda*, https://www.parentcenterhub.org/wp-content/uploads/repo_items/sample-agenda.pdf.

26. Are schools required to provide “compensatory services” to all students with disabilities who did not receive the services listed in their IEPs during school closures?

It is unclear, though unlikely. School leaders should endeavor to provide FAPE to the extent possible. It’s unlikely that a court would find a school district liable for “compensatory services” in the traditional sense if the failure to provide specific services listed in a child’s IEP or Section 504 plan is due to pandemic-related disruptions. However, schools will be held responsible for providing FAPE in some form. The department has said, “during this national emergency, schools may not be able to provide all services in the same manner they are typically provided.... FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.” U.S. Department of Education, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, March 21, 2020, <https://sites.ed.gov/idea/idea-files/supplemental-fact-sheet-addressing-risk-covid-19-preschool-elementary-secondary-schools-serving-children-disabilities-march-21-2020/>.

The concept of “compensatory services” traditionally has referred to court- or hearing officer-ordered services for a school’s failure to provide FAPE to a student who was entitled to one. The concept grew out of federal courts’ authority in IDEA cases to “grant such relief as the court determines is appropriate.” 20 U.S.C. §1415 (i)(2)(C)(3). Courts in different federal jurisdictions have used various standards to determine what compensatory services are due in a given case. Zirkel, Perry, “The Competing Approaches for Calculating Compensatory Education under the IDEA: An Update,” 2017, <https://perryzirkel.files.wordpress.com/2017/05/calculation-of-comped-article.pdf>. As states reveal their reopening plans, several have indicated a focus on “recovery” rather than “compensatory” services. This suggests that a holistic approach to determining legal responsibilities of LEAs during the pandemic may be on the horizon.

Once school resumes in-person, or via a hybrid model of remote and in-person instruction, the LEA should make every effort to implement each student’s IEP or Section 504 plan as it existed before the COVID-19 closures, or as agreed to by the parents and the IEP team. While the department has recognized that pandemic-related operational disruptions “may affect how all educational and related services and supports are provided,” it has also advised, “If a child does not receive services after an extended period of time, a school 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.” U.S. Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, March 2020, <https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf>, p. 3.

An LEA should communicate with the families of children with disabilities to explain how it plans to conduct such meetings and to determine whether and what services will be provided. As noted earlier, schools need to be careful about conducting meetings and determining “compensatory services,” if needed, consistent with the applicable law in your jurisdiction. We urge you to consult with your COSA attorney and state school boards association to determine how these standards may affect your back-to-school efforts.

27. How should schools determine whether to provide extended school year (ESY) services?

Schools should continue to use their established procedures and standards to determine whether a student with disabilities will need ESY services, taking into account the child's specific circumstances.

Federal regulations define ESY services as special education and related services meeting state standards that are provided "beyond the normal school year...in accordance with a child's IEP... at no cost to the parents of the child..." Schools must provide ESY services when a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 C.F.R. §300.309(b). Generally, under federal law, a child is eligible for ESY services if he or she will not be able to continue to make meaningful educational progress during the school year without them. Some states and federal appellate circuits apply more specific criteria, including:

- whether critical life skills are affected by the summer break.
- likelihood of summer regression is more significant than what would be expected for students without disabilities.
- fall recoupment period is likely to be more than what would be expected for students without disabilities.
- nature and severity of disability.
- rate of progress.
- emerging skills/breakthrough opportunities.
- interfering behaviors.
- special circumstances.

Your school district's established procedures for determining the necessity of ESY services for a particular child are based on the applicable law in your state and federal judicial circuit. Without a change in federal or state law on the ESY requirement, those procedures will remain valid. It is important not to confuse the necessity of providing ESY services with any perceived obligation to provide "compensatory services" (described above) to an individual child. Compensatory services are provided when the school fails to provide FAPE as indicated on a child's IEP. ESY services are part of the services provided on an IEP, using an individualized process.

Serving English Learners

28. How should schools serve English learners during and after school closures?

The U.S. Department of Education issued guidance in May 2020 urging school districts to screen and serve English learners (EL) as otherwise required by law to the extent possible, but recognizing that “schools may not be able to provide all services in the same manner they are typically provided.” Below are some of the department’s recommendations for local and state educational agencies (LEAs and SEAs).

- **Screening**—If a school is closed, it does not have an obligation to screen new students for EL status. But if the LEA is providing remote learning, it must screen new students to determine EL status “to the extent possible.” Federal law requires students to be identified for EL status within 30 days of enrollment. Parents must receive notice within two weeks of a student being placed in language instruction if the student enrolls after the beginning of the school year. Schools are encouraged to contact the family by email or by phone. SEAs and LEAs could apply temporary entrance procedures that permit the presumption of EL identification based on a home survey, with follow-up discussions to provide needed language services, if the alternative is to provide no services at all.
- **English language proficiency (ELP) assessments**—The department waived the requirements of federal law regarding English language proficiency assessments for all SEAs for the 2019-20 school year. All SEAs unable to complete assessments for all ELs in that year do not need to administer assessments to the remaining ELs who were not assessed that year. But, as of spring 2020, all states are required to administer assessments for the 2020-21 school year.
- **EL services**—If an LEA is providing remote learning, it must provide language instruction services to ELs, which could be online or via telephone. If an LEA is required to provide language accommodations for ELs in content classes, it must do so for classes that are held remotely. This can be done through a range of methods, including hard copy packets.
- **ELs in private schools**—LEAs must continue to provide equitable services to eligible private school ELs as agreed during the consultation process. Additional consultation may be required to discuss barriers to students receiving services during school closures.

- **Title III funds**—An LEA may use Title III funds for teacher training, to supplement basic instruction, and for hardware/software, but only if they are specific to ELs and their needs. Otherwise, those expenditures would violate the supplement-not-supplant requirement of the Elementary and Secondary Education Act, (Section 3114(g), P.L. 89-10, most recently comprehensively amended and reauthorized by the Every Student Succeeds Act, P.L. 114-95).
- **Exit procedures**—Schools should closely monitor each EL to determine whether he or she needs additional EL supports after school closures and may try to complete English language proficiency testing for exit purposes in the fall of 2020 when possible. SEAs were permitted to adjust their statewide exit procedures for the 2019-20 school year to eliminate criteria beyond the ELP assessment.
- **Parent communication**—SEAs and LEAs must ensure meaningful communication with parents of ELs, which may include translated mailings and recorded understandable telephone calls. SEAs and LEAs generally may use CARES Act funding for these communication efforts.
U.S. Department of Education, *Fact Sheet: Providing Services to English Learners During the COVID-19 Outbreak* (May 18, 2020), <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf>.

For a comparison of state policies on ELs, see Education Commission of the States, *50-State Comparison: English Learner Policies* (May 27, 2020), <https://www.ecs.org/50-state-comparison-english-learner-policies/>.

Virtual Platforms and Student Data Privacy

29. What are schools' overarching legal concerns associated with online learning?

When public schools across the nation rapidly closed school buildings and deployed online education in the spring of 2020, certain legal challenges presented themselves right away. Those challenges included susceptibility of certain platforms to infiltration (“Zoom-bombing”);¹ privacy concerns associated with technology-enabled peepholes into student and staff homes, and equity concerns including the “homework gap” discussed earlier. Through much trial and error, and some guidance from federal agencies, we have answers to some of those questions. The law will continue to evolve more slowly than the technology, however, and schools will continue to use online education tools at much higher rates than ever before.

Until the COVID-19 crisis is over and schools return to in-person instruction, and perhaps even beyond that time, school districts will deploy and re-deploy online platforms. These platforms enable teaching, learning, and working remotely as needed to meet the needs of the district, its students, and staff. “The classroom” and “the workplace” will become more fluid concepts as educators continue to find innovative ways to deliver students what they need to learn in a remote context.

Schools will be in a better position from a liability standpoint if they can accommodate students and staff with disabilities by allowing remote participation, if the remote environments have reasonable privacy and security measures, and if instruction and other educational services are provided equitably to all. For an in-depth introduction to the legal issues associated with student data privacy and security, school leaders should refer to the NSBA [Data in the Cloud](#) and [Data Security](#) guides listed below. Consult with your state school boards association and COSA school attorney about how federal and state laws apply in your jurisdiction.

30. May schools use online teleconferencing, discussion, and video conferencing platforms to provide remote education to students?

Yes, but schools should train staff to use district-vetted platforms only and to be aware of any exchanges or maintenance of student education records or personally identifiable information (PII). Federal law requires a baseline of privacy protections for education records and PII contained in them; state data privacy laws provide even more protections.

¹“Zoom-bombing” involves a hacker obtaining the meeting link for an online interaction, and displaying lewd, inappropriate, and offensive language or images during the meeting.

If a teacher deploys an online learning tool, the school district may be required to follow FERPA requirements (20 U.S.C. §1232g, 34 C.F.R. Part 99) if the data that is exchanged through the platform is an education record or PII contained in one. It must be “directly related” to the student and “maintained” by the school to be an education record. So if a teacher asks for students to disclose PII from education records, and the application stores that information and the teacher has access to it (so the district “maintains” it), the student’s data may be protected by FERPA.

The Department of Education’s Student Privacy Policy Office has advised that schools using online learning tools generally should follow the “school official” exception to FERPA’s general prohibition on disclosure of student educational records and PII contained in them. This exception allows educational institutions to disclose student data to outsource services or functions that would otherwise be done by staff to “school officials,” including an online service provider, with certain limitations:

1. The provider must perform an institutional service or function for which the school would otherwise use its own employees.
2. The provider must have been determined to meet the criteria listed in the school’s annual notification of FERPA rights for being a “school official” with a legitimate educational interest in the education records or PII.
3. The provider must be under the direct control of the school with respect to the use and maintenance of education records or PII.
4. The provider must use the education records or PII only for authorized purposes and may not redisclose the education records or PII to other parties unless it has specific authorization from the school and is otherwise permitted by FERPA.

A school that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective. It must remain in compliance with the legitimate educational interest requirement. 34 CFR §99.31(a)(1)(i).

The “direct control” requirement can be difficult to meet, especially when the online application has been developed for general audiences or workplaces, and not with student privacy laws in mind. For this reason, among others, a school district should develop a central vetting procedure for all online tools used by staff and deployed to students. This is so the district can ensure that data privacy and security protections required by state and federal law are in place. The school district’s attorney and district officials should review a platform’s terms of service to ensure that “direct control” has been properly established. The department points to two guidance documents that provide best practices for establishing “direct control” as required by FERPA for schools to employ the “school official” exception, *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices* (2014), <https://studentprivacy.ed.gov/resources/protecting-student-privacy-while-using-online-educational-services-requirements-and-best>, and *Protecting Student Privacy While Using Online Educational Services: Model Terms of Service* (2015), <https://studentprivacy.ed.gov/resources/protecting-student-privacy-while-using-online-educational-services-model-terms-service>.

When a school district deploys online learning consistently, with district-wide policies and staff training, it is much more likely to be protected from liability, as the platform(s) in use will be preapproved and “directly controlled” by the district.

31. Does FERPA always apply when a school provides instruction online?

No, not always. Generally, a child’s participation in an online classroom is not likely to implicate FERPA unless student data is exchanged. In 2003, the department said that FERPA does not specifically prohibit a parent from observing the parent’s child in the classroom because FERPA does not protect the confidentiality of information in general. Rather, FERPA applies to the disclosure of education records and of information derived from them. Now, the department has clarified that this guidance applies to virtual classrooms. A school would not be violating FERPA simply by providing online instruction, which may be seen or heard by others in the student’s household. It points to a little-known provision in the FERPA regulations that parents and eligible students cannot opt out of the exchange of the child’s name, identifier, or institutional email address in a class in which the student is enrolled. 34 C.F.R. §99.37(c)(1).

It should be noted that the department believes public-facing platforms like Facebook Live, TikTok, and other video communication applications do not meet the requirements of FERPA. Schools should avoid such platforms for any use in which student records or PII are exchanged.

32. What if a teacher records a lecture or class discussion for students to view later?

A school may record classes for those unable to attend. However, a recorded class that is maintained by the school and has information directly related to the student likely is an education record under FERPA. The school would have to obtain parental consent to disclose the recording or apply a FERPA exception allowing disclosure without consent. It would also have to allow parent access to the recording. If the recording contains personal information of multiple students, the FERPA implications would be quite complicated.

Schools generally should avoid recording classes if student information is exchanged. Schools should have policies that establish parameters for educators regarding recording lessons and classes, including:*

- Where recordings will be stored. It is a good idea to store these recordings centrally, and ensure they are deleted in a timely manner. It could be a security risk for individual staff to have these recordings stored separately on their computers or accounts.
- To whom recordings will be accessible. The recording should only be accessible to students in that class.
- Which portions of the lesson may be recorded and kept. Will it only be the “presentation” part of the lesson? Will the settings for the recording only show the presentation, not the participant videos, names, or a recording of the “chat box”?
- What data retention policies the online tool must have in place.

- Rules of engagement for teachers and students using these platforms. Students and parents should be informed about recordings, how long the recording will be stored, who has access to the recording, and opt-out options.
- When in doubt, obtain written consent.

*Thank you to Amelia Vance of the Future of Privacy Forum, <https://fpf.org/>, for insights offered through COSA programming.

33. Must a school get parental consent for students to use online learning platforms?

A school does not need parental consent to deploy online learning platforms using FERPA's school official exception, provided it meets the requirements. But online providers are required to ask for parental consent before permitting a child under 13 to use the application to meet their obligations under the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §6501 *et seq.* And a school must use FERPA's school official exception with fidelity or risk a FERPA violation.

The department issued a letter in 2017 indicating that an online school had violated FERPA by requiring parents to consent to its learning platform's terms of use because the platform redisclosed student data contrary to the requirements of the "school official" exception. The department determined that the school had essentially allowed "near-universal use and distribution by [the platform] and various third-party affiliates and licensees of information that could have constituted [the] child's PII from education records." The licensing agreement allowed the platform to distribute and post student data to any third party to be used for any purpose, and to future employers of the student, without consent. This, in effect, required the parent to forfeit her rights under FERPA to protect against the unauthorized disclosure of PII from her child's education records that were posted or submitted to the platform. https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Agora%20Findings%20letter%20FINAL%2011.2.17.pdf.

Online platforms may still request parental consent before allowing use by students under 13. The Federal Trade Commission (FTC) has indicated that, as before the pandemic, "schools can consent on behalf of parents to the collection of student personal information—but only if such information is used for a school-authorized educational purpose and for no other commercial purpose. This is true whether the learning takes place in the classroom or at home at the direction of the school." The FTC encourages schools to give parents notice of the websites and online services whose collection of student data they have consented to on behalf of the parent. In deciding which online technologies to use with students, a school should understand how an operator will collect, use, and disclose personal information from its students. https://www.ftc.gov/news-events/blogs/business-blog/2020/04/coppa-guidance-ed-tech-companies-schools-during-coronavirus?utm_source=govdelivery.

Schools should also keep in mind that IDEA regulations require that schools safeguard eligible students' records and the personally identifiable information in them and that schools destroy PII when requested by the parent (except that certain information such as name, address, phone number, attendance records, and grade may be maintained without a time limitation). 34 CFR § 300.624.

Sources

American Academy of Pediatrics, *COVID-19 Planning Considerations: Guidance for School Reentry*, <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

John P. Bailey and Frederick M. Hess, *A Blueprint for Back to School*, American Enterprise Institute (2020), *3, *6, <https://www.aei.org/wp-content/uploads/2020/05/A-Blueprint-for-Back-to-School.pdf>.

Sarah Fujiwara, MD, *Is Mandatory Vaccination Legal in Time of Epidemic?*, AMA Journal of Ethics (2006), <https://journalofethics.ama-assn.org/article/mandatory-vaccination-legal-time-epidemic/2006-04>.

National Association of School Nurses, *Interim Guidance: Role of the School Nurse in Return to School Planning*, May 6, 2020, https://higherlogicdownload.s3.amazonaws.com/NASN/3870c72d-fff9-4ed7-833f-215de278d256/UploadedImages/PDFs/COVID-19_Interim_Guidance_Role_of_the_School_Nurse_in_Return_to_School_Planning.pdf.

National Labor Management Partnership, *Collaborating in a Crisis: Working Together to Safely Reopen Our School Buildings* (June 3, 2020) <http://myschoolmyvoice.nea.org/wp-content/uploads/2020/06/NLMP-ReOpening-June-3-2020.pdf>.

National School Boards Association, *Data in the Cloud: A Legal and Policy Guide for School Boards on Student Data Privacy in the Cloud Computing Era* (April 2014), <https://www.nsba.org/-/media/NSBA/File/legal-data-in-the-cloud-guide.pdf>.

National School Boards Association, *Data Security for Schools: A Legal Guide for School Boards* (September 2019), <https://www.nsba.org/-/media/NSBA/File/nsba-data-security-for-schools-2019.pdf>.

UNICEF, *Key Messages and Actions for COVID-19 Prevention and Control in Schools*, (Mar. 2020), https://www.who.int/docs/default-source/coronaviruse/key-messages-and-actions-for-covid-19-prevention-and-control-in-schools-march-2020.pdf?sfvrsn=baf81d52_4&gclid=EAlaIqObChMIOL3l1ZHD6QIVhLLICh14IwcnEAAAYASAAEgLLh_D_BwE.

U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *CDC Activities and Initiatives Supporting COVID-19 Response and the President's Plan for Opening America Up Again* (May 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>.

U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *Guidance for Cleaning & Disinfecting: Public Spaces, Workplaces, Businesses, Schools, and Homes* (last visited May 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf.

U.S. Department of Education Student Privacy Policy Office, <https://studentprivacy.ed.gov>.

- Webinar Recording: <https://studentprivacy.ed.gov/training/ferpa-and-virtual-learning-during-covid-19-webinar-recording>
- Webinar Slide Deck: <https://studentprivacy.ed.gov/resources/ferpa-and-virtual-learning-during-covid-19>
- FERPA & Aprendizaje Virtual Durante COVID-19: <https://studentprivacy.ed.gov/resources/ferpa-aprendizaje-virtual-durante-covid-19>
- FERPA & COVID-19 FAQs: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf
- FERPA & COVID-19 FAQs (Esp): <https://studentprivacy.ed.gov/resources/ferpa-and-coronavirus-disease-2019-covid-19-spanish>
- FERPA & Virtual Learning Resource List: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20%20Virtual%20Learning%20032020_FINAL.pdf

ABOUT NSBA

The National School Boards Association (NSBA) is the leading advocate for public education. For 80 years, we have been leading the effort to support and enhance public education. We are succeeding in creating the best possible environment in which students can realize their dreams.

NSBA is a federation of 49 state associations and the U.S. territory of the Virgin Islands, representing their more than 90,000 school board officials. These local officials govern more than 13,600 local school districts serving more than 50 million public school students. Working with and through our state associations, and serving as their Washington, D.C., office, NSBA advocates for equity and excellence in public education through school board governance.

We believe public education is America's most vital institution. It is a civil right necessary to the dignity and freedom of the American people, and all children deserve equal access to an education that allows them to reach their potential.

In pursuit of these beliefs, NSBA and our members will continue to lead the national conversation about public education, advocate for public policies that ensure all students everywhere have access to a great public education where they live, create a better understanding of the importance of school boards and the benefits of local governance, and enhance the effectiveness of school boards.



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