

Is participation mandatory?

Virginia Governor Northam's Higher Education Reopening Guidance, June 11, 2020

- Section 1, last paragraph - campus plans must address following items:
- Section 3, part D, item 1 - pertaining used to monitor health of campus population.
- Should refer to subsequent tracking plans released by the Governor's Office

Is there an obligation to follow up with students who do not participate?

It was suggested universities have an obligation to follow up with students not participating, using Virginia Governor Northam's Higher Education Reopening Guidance, June 11, 2020 as the basis for the suggestion.

At what frequency are we required to follow-up?

Institutions should make this decision based on their capacity to manage the follow-up and the health of the campus community.

What consequences should we deliver for non-participation?

The effort will be compromised if students fail or refuse to participate. Each institution will have to decide for itself how best to obtain as much participation as possible under the circumstances. Like the UVA approach, I think that institutions should give public and individualized notice to students who plan to return to campus that as a condition of academic matriculation on campus (including residing in dormitories, using dining facilities, attending athletic events, etc.) that they will be required to participate in symptom monitoring and tracking through the app, or whatever tool that will be used. Institutions should use their best efforts to enforce the effort, and should consult with student affairs and institutional legal counsel to best determine how to enforce this, considering institutional and personnel resources available to help ensure compliance. There is no one size that fits all here.

Final thought on the matter: Institutions should consider making public their COVID-19 tracking and mitigation efforts through strong and clear communications with employees, faculty, parents and students this summer. Keeping our campuses safe is a shared responsibility. Compliance by students with tracking and monitoring should be required (consistent with the Governor's recommendations for colleges and universities) and failure to comply may subject them to institutional enforcement activity (whatever each school determines as appropriate).

If the public health emergency lifts, what happens?

Institutions should administratively manage the data and processes to comply with standards.

Comments on FERPA:

Refer to document STUDENT PRIVACY POLICY OFFICE FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs) March 2020 and general FERPA guidelines.

I was asked whether FERPA allowed the disclosure of students' personally identifiable information to contractors operating tools or apps that perform symptom tracking for colleges and universities. The question was asked because some smaller institutions might^[FC1] lack the internal staffing to do this work. The answer is yes, but ONLY IF the regulatory requirements highlighted below are met.

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1)

(i)

(A) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(B) A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party -

(1) Performs an institutional service or function for which the agency or institution would otherwise use employees;

(2) Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and

(3) Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.

(ii) An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement in paragraph (a)(1)(i)(A) of this section.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

Comments on HIPAA:

Covered entities under HIPAA include health plans, health care clearing houses and health providers that transmit health information in electronic form in connection with a covered transaction. Covered transactions are exchanges of electronic information between covered entities that relate to financial and administrative matters arising from healthcare given to

patients. The app or tool designed to be used by students to report fever or other potential COVID-19 symptoms directly to an administrative office at the universities does not constitute the provision of health care by a health care provider, and therefore HIPAA does not apply to such activity. FERPA, however, does apply to this activity for the reasons I have previously advised.

Comments on 4th Amendment:

Public universities are constrained by the US constitution. Relative to the 4th amendment, even if symptom monitoring is a "search", it is not unreasonable. Permissible administrative searches occur all the time. We equate this to administrative vs. criminal search. In light of global pandemic, the use of such a tool is not unreasonable.



JUNE 11, 2020

HIGHER EDUCATION REOPENING GUIDANCE

GUIDANCE OVERVIEW

This document provides guidance to Virginia institutions of higher education regarding their plans for offering in-person instruction and reopening their campuses in the 2020-21 academic year. The criteria outlined here, in consultation with the Virginia Department of Health, concern measures relating to COVID-19 that institutions should take for promoting and fostering the health and safety of students, faculty, staff, and surrounding communities as equitably as possible.

Additionally, it recognizes the widely varied missions and circumstances of the many different colleges and universities, public and private, across the Commonwealth. Institutions are asked to prepare campus plans specific to their unique constituencies and settings, for timely submission to the Commonwealth.

The Virginia Department of Health (VDH), the State Council of Higher Education for Virginia (SCHEV), and local health departments will serve as close partners to institutions throughout the duration of this pandemic, providing guidance, data, and assistance facilitating relationships with local health infrastructure as needed.

SECTION I: WHY SAFE AND SUSTAINABLE OFFERING OF IN-PERSON INSTRUCTION AND REOPENING OF HIGHER EDUCATION ARE CRUCIAL FOR VIRGINIA

Virginia's colleges and universities are anchor institutions for the Commonwealth, and Virginia is widely regarded as having the best array of public and private institutions of higher education in America, as well as powerful workforce development and credentialing programs. COVID-19 has put at risk the more than \$39.074 billion in annual economic impact higher education creates for the Commonwealth, and the 167,000 jobs tied directly or indirectly to Virginia colleges and universities. More fundamentally, COVID-19 has disrupted the education of the 525,335 total students at Virginia institutions this year – 51% of them from underrepresented populations.

To address this disruption, reopening higher education in Virginia in a safe and sustainable manner must be a statewide priority. While much can be achieved online, it is also true that the classroom environment, collaboration, and mentoring remain vital. Each of Virginia's colleges and universities has a distinct mission and unique circumstances, and that distinctiveness and autonomy will foster ingenuity in their approaches to this historic challenge.

Colleges and universities that have residential students have additional important considerations and challenges, and may take different precautions than those that may be largely or entirely nonresidential or part-time. Every institution must work to address the concerns of vulnerable populations, such as at-risk faculty and staff and at-risk members of local communities.

As institutions implement the guidance provided here, their campus plans are crucial and must address the following items: repopulating the campus; monitoring health conditions to detect infection; containing the disease when detected; and shutting down if necessary. The Virginia Department of Health will be a lead partner to help institutions open through providing best practice guidance on screening and testing and coordinating contact tracing.

SECTION II: PUBLIC HEALTH CONDITIONS AND CONSIDERATIONS FOR REOPENING CAMPUSES

The following are necessary conditions for campuses to reopen, and with these necessary conditions in place campus reopening may begin upon the Commonwealth, as well as the specific region of a given institution, having entered at least Phase II under the Forward Virginia Blueprint, unless directed otherwise by the Governor:

A. POSITIVE TRENDS IN PUBLIC HEALTH DATA

The COVID-19 pandemic is inherently unpredictable. The Commonwealth's Key Measures as outlined in the Forward Virginia Blueprint will continue to be updated with new information and guidance throughout the duration of the pandemic. It is anticipated that fall semester reopening of campuses would be most practicable in Phase Three of the Forward Virginia Blueprint, or with notably higher precautions in Phase Two. Executive Orders provide additional clarifying guidance for each phase of the Forward Virginia Blueprint and should be referenced and adhered to as campuses consider reopening. Institutions should consult with their local and regional health departments regarding questions about public health data.

B. SURGE HEALTH CARE CAPACITY

Hospital bed capacity in Virginia and hospitalization rates are presently stable. The continuation of this trend is vital for campuses to reopen. Adequate surge health care capacity must be available in nearby health care facilities for campuses to reopen – increasing the population size in their local community – and remain in operation. Institutions must work closely with local health departments and local and regional health care facilities to maintain awareness of preparedness.

C. CLIMATE OF ADHERENCE TO SOUND PUBLIC HEALTH PRINCIPLES

Institutions must foster a climate of adherence to sound public health principles among students, faculty, staff, and other constituencies. Following public health principles including social distancing, hygiene practices, quarantining, and wearing face coverings are most effective at preventing the spread of disease when all members of the institution participate in them. Therefore an institution must create a culture of compliance to encourage participation in the prescribed public health measures at all levels of the institution.

D. COVID-19 CAMPUS PREPAREDNESS PLANS DEVELOPED AND CONSISTENT WITH GUIDANCE SET FORTH BY THE COMMONWEALTH

Institutional campus plans must address COVID-19 preparedness on campus as it relates to each institution's unique conditions and setting. The plan must include considerations outlined in Section III regarding social distancing, hygiene practices, quarantining, face coverings, and PPE for staff in health services. Though the Virginia Department of Health will serve as a lead partner providing best practice guidance for testing and coordination for contact tracing (not to the exclusion of the role of academic medical centers for their universities or beyond), institutional plans must address these considerations, as would the planning of other governmental or private sectors. Plans should seek to implement actions that mitigate risk at each level of risk- low, more and high as described in [CDC COVID-19 Considerations for IHE](#).

According to the Centers for Disease Control and Prevention (CDC), the level of risk for COVID-19 transmission increases as follows:

- **Lowest Risk:** Faculty and students engage in virtual-only learning options, activities, and events.

- **More Risk:** Small in-person classes, activities, and events. Individuals remain spaced at least 6 feet apart and do not share objects (ie hybrid virtual & in-person class structures or staggered scheduling to accommodate smaller class sizes).
- **Highest Risk:** Full-sized in-person classes, activities and events. Students are not spaced apart, share classroom materials or supplies, live in campus housing, and mix between classes and activities.

SECTION III: DEVELOPMENT OF CAMPUS PLANS FOR REOPENING

Referencing [CDC guidance](#) and other best practice guidelines, public institutions of higher education and specified degree-granting private institutions shall prepare campus plans for offering in-person instruction and reopening and submit them to the Commonwealth for purposes of documentation to the State Council of Higher Education (SCHEV) no later than July 6, 2020. The specified degree-granting private institutions shall include, subject to criteria established by SCHEV: (i) all those certified to operate by SCHEV and (ii) all those operating without the requirement of certification as per Code of Virginia §23.1-219(D).

SCHEV will review the plans in a form and manner prescribed by SCHEV to ensure each is compliant in containing the required components in this guidance document, which was developed in consultation with the Virginia Department of Health. Institutions are strongly encouraged to post their plans on their websites.

As they receive additional health guidance, institutions may update their plans, and any update should be reflected on institution websites. These plans do not supersede any relevant state or federal level guidance that is in place, and institutions must be in compliance with such guidance. At all times, institutions must remain in close contact with their local health departments.

Even in Phases Two and Three of the Forward Virginia Blueprint, it is likely that outbreaks of COVID-19 will continue, including on campuses. Therefore, the campus plans outlined in this section should consider various contingencies for continuing operations in the event of a campus outbreak. Institutions must report cases and outbreaks to their local health department, and consult with their respective local health department regarding management of outbreaks, dismissals or similar decisions such as a shutdown of campus activities.

At a minimum, campus plans must address the following considerations:

A. REPOPULATION OF THE CAMPUS

1. Establishment of a COVID-19 coordinator/campus team
2. Contact information and procedures for reaching the local health department.
3. Students' initial return to campus (such as initial screening, move-in)
4. Education/training of students: consider COVID-19 prevention education as part of student orientation. (hand washing, staying home if ill, etc.)
5. Physical Distancing, [according to CDC guidance](#):
 - a) Strategies to allow physical distancing in classrooms/learning environments. (e.g. occupancy, staggered schedules, classroom layouts, workspace distancing, etc.)
 - b) Social distancing considerations outside the classroom (e.g. limiting visitors, changes to dining services, extracurricular activities, sorority/fraternity life, etc.)
 - c) Restrict occupancy/stagger use of communal, shared spaces such as lounges, exercise rooms, dining halls, etc. to ensure physical distancing. Occupancy must be consistent with any active Executive Orders.
 - d) Limitations on size of gatherings and/or strict physical distancing to be in place during gatherings.
 - e) Strategies for food/dining services should be consistent with plans to optimize physical distancing. Plans regarding dining services should consider strategies such as requirements for face coverings, policies to encourage staff to stay home if ill, ensuring adequate hand hygiene, routine cleaning/disinfection, and health screenings for staff. Implement engineering controls including: limiting the number of diners or other methods of crowd control, appropriate spacing between tables, eliminating buffet-style or self-serve food, and take out/delivery options.
6. Hygiene practices and cleaning/disinfecting protocols.
 - a) Cleaning and disinfection protocols to include frequently touched surfaces; transport vehicles; schedules for increased cleaning, routine cleaning, and disinfection; ensuring adequate cleaning supplies and correct use/storage
 - b) Provisions for hand sanitizer/handwashing stations

- c) Minimize shared objects and ensure adequate supplies to minimize sharing to the extent possible (e.g. dedicated student supplies, lab equipment, computers, etc.).
- 7. Housing: it is difficult to maintain physical distancing in on-campus housing, even with modifications. Plans should consider strategies to decrease the risk such as requirements for face coverings in shared spaces, reminders of proper hand hygiene, enhanced cleaning, training for residential advisors/live in staff, restrictions on events/social activities in housing facilities, establishment of occupancy limits, restrictions on building access, etc. IHEs may want to require training and document training of certain staff.
- 8. Consideration of vulnerable individuals (e.g. 65 years or older, underlying health conditions):
 - a) Policy options to support those at higher risk for severe illness to mitigate their exposure risk (e.g. telework, modified job duties, virtual learning opportunities).
 - b) Implement flexible sick leave policies and practices that enable faculty, staff and students to stay home or self-isolate when they are sick or have been exposed.
 - c) Develop policies for return to class/work after COVID-19 illness.
- 9. International student considerations (e.g. COVID-19 travel health risks, CDC returning travelers guidelines, travel registry, etc.)
- 10. Partnership and communication/information sharing with the local community, health systems and other stakeholders.
- 11. Face coverings.
 - a) Plans submitted by each institution should include information on how it intends to teach/reinforce use of face coverings among students, faculty and staff.
 - b) For Faculty cloth face coverings should be worn in times when at least six feet physical distancing cannot be maintained. For example, an instructor standing in a classroom seven feet from students could teach without a face covering. During meetings or gatherings or in narrow hallways or other settings where physical distancing may not be easy to maintain, a face covering would be prudent to wear. Other considerations such as speaking loudly, singing, etc should be considered and may require additional distance.

- c) Students should be encouraged to wear cloth face coverings in times when at least six feet of physical distance cannot be maintained.
- d) Institutions should consider adopting relevant business-sector guidance for staff regarding the use of face coverings (e.g. fitness center, dining, student services, etc.). Face coverings should be worn in public facing areas and in office spaces where six feet of physical distance cannot be maintained.

12. Student Health Services (SHS):

- e) Assurance of provision of medical-grade PPE for health services staff
- f) Maintenance of typical (non-COVID-19) health services
- g) Mental health services
- h) SHS facility considerations such as waiting areas, signage, environmental management/cleaning, IT considerations, etc.
- i) SHS administrative/staff considerations such as PPE, employee health program protocols, education/training of staff, billing/charges, staff scheduling, etc.
- a) SHS patient care considerations such as online appointments, strategies to limit shared objects (e.g. pens, keypads), triage protocols, screening forms, patient screening procedures (e.g. for symptoms/temperature checks before entering the clinic).

13. Large events, including athletic events, and others such as ceremonies or performances

14. Communications strategy

15. Orientation and education/training, including anti-stigma training

B. MONITORING HEALTH CONDITIONS TO DETECT INFECTION

1. Daily health screening questions and/or other health monitoring approaches that can be used to monitor health of the campus population.
2. Campus level syndromic (disease) surveillance using electronic health record data or other disease surveillance methods as feasible.
3. Establishment of a testing strategy. Testing strategies should consider testing for all students, faculty or staff with symptoms and access to testing for close contacts of cases as recommended by public health. Institutions may consult with their local health department, local health systems and other relevant partners.

C. CONTAINMENT TO PREVENT SPREAD OF THE DISEASE WHEN DETECTED

1. Partnership with VDH for contact tracing
2. Quarantining and isolating (provision of housing, basic needs, medical case management)
3. Campus outbreak management
4. Partnership with local health systems to assure care for symptomatic individuals as needed. (e.g. a local health system representative could serve on the COVID-19 team)

D. SHUTDOWN CONSIDERATIONS IF NECESSITATED BY SEVERE CONDITIONS AND/OR PUBLIC HEALTH GUIDANCE

1. Plans regarding the criteria and process for campus dismissals or shutdowns. Decisions regarding dismissals and shutdowns should be made in consultation with local and state public health officials.
2. Nature of reduced campus activity in the event of severe conditions/public health direction or guidance.
3. Considerations regarding student health and safety on campus versus returning home.
4. Communications plan for dismissals/shutdowns.

SECTION IV: LICENSING AND REGULATORY FLEXIBILITY

In light of the unpredictable complexities to which COVID-19 may give rise, it is recommended that state agencies and boards responsible for professional licensing and/or educational programs explore initiating and/or continuing appropriate regulatory flexibilities. The flexibilities adopted should generally support the ability of educational institutions to continue to provide instruction and related activities in a manner consistent with state and federal guidance.

Agencies are urged to allow innovative solutions regarding the full range of educational activities, but especially clinical training, field experiences, student teaching, and similar endeavors. Relevant agencies include, but may not be limited, to the following agencies and their boards: State Council of Higher Education for Virginia, Virginia Department of Education, Virginia Department of Health, Virginia Board of Nursing, and the Virginia Department of Professional and Occupational Regulation.

CONCLUSION

Following development of robust plans, institutions are expected to implement and adhere to the plans in accordance with the latest public health guidance. One effect of the COVID-19 crisis has been a spirit of strong collaboration across the Commonwealth, across all of education in Virginia, and across higher education in particular. This guidance builds on that spirit of collaboration, putting health and safety foremost and emphasizing the critical importance of continuing to provide high quality education across the system, and especially the equity of in-person learning where possible.

ADDITIONAL RESOURCES FOR IHES

- ✓ Higher Education Reopening Guidance
<https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Higher-Education-Reopening-Guidance.pdf>
- ✓ VDH Higher Education Testing Guidance
<https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/index.html>
- ✓ VDH : Role of Public Health and Colleges/Universities in Preparedness and Response Efforts
<https://www.vdh.virginia.gov/content/uploads/sites/182/2020/06/COVID-and-Public-Health-CollegesUniversities.pdf>
- ✓ VDH Higher Education Contact Tracing Partnership
https://www.vdh.virginia.gov/content/uploads/sites/182/2020/06/VDH-IHE-and-Contact-Tracing_061720_final.pdf
- ✓ CDC Guidance for Institutions of Higher Education
<https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/index.html>
- ✓ ACHA
https://www.acha.org/documents/Resources/COVID_19/COVID-19_Testing_June-3-2020.pdf
- ✓ ACHA Considerations for Reopening for Higher Ed
https://www.acha.org/documents/resources/guidelines/ACHA_Considerations_for_Reopening_IHEs_in_the_COVID-19_Era_May2020.pdf



STUDENT PRIVACY POLICY OFFICE FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs) March 2020

Introduction

The United States (U.S.) Department of Education (Department) is issuing these Frequently Asked Questions (FAQs) regarding the Family Educational Rights and Privacy Act (FERPA) and the coronavirus disease 2019, abbreviated as “COVID-19” and more commonly referred to as “coronavirus.”¹ We are working with our Federal partners including the Centers for Disease Control and Prevention (CDC), which is leading the Federal effort to address coronavirus or COVID-19. The U.S. Department of Health and Human Services (HHS) issued on January 31, 2020, a declaration of a Public Health Emergency regarding coronavirus or COVID-19.²

The Department’s Student Privacy Policy Office (SPPO) prepared this document to assist school officials working with public health officials in managing public health issues related to COVID-19, while protecting the privacy of students’ education records. Understanding FERPA helps enable school officials to act quickly and with certainty when confronting challenges that affect the health or safety of students or other individuals.

Educational agencies and institutions, such as school districts, schools, colleges and universities, can play an important role in slowing the spread of COVID-19 in U.S. communities. Through information sharing and coordination with public health departments, educational agencies and institutions can help protect their schools and communities.

The purpose of this document is to assist school officials in protecting student privacy in the context of COVID-19 as they consider the disclosure of personally identifiable information (PII) from student education records to individuals and entities who may not already have access to that information. School officials should work with their State and local public health officials to determine the information needed to address this public health concern. Understanding how, what, and when information can be shared is a critical part of preparedness.

Background

FERPA is a Federal law that protects the privacy of student education records. (20 U.S.C. § 1232g; 34 C.F.R. Part 99) The law applies to all educational agencies and institutions that receive funds under any program administered by the Secretary of Education. The term “educational agencies and institutions” under FERPA generally includes school districts and public schools at the elementary and secondary levels, as well as private and public institutions of postsecondary

¹ Please note that this FERPA & Coronavirus Disease 2019 (COVID-19) FAQ document updates the Department’s 2009 FERPA & H1N1 document. Other than statutory and regulatory requirements included in the document, the contents of the guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. This document will be posted at <https://studentprivacy.ed.gov> and <https://www.ed.gov/coronavirus>.

² HHS declaration posted at <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

education. Private schools at the elementary and secondary levels generally do not receive funds from the Department and are, therefore, not subject to FERPA.

FERPA gives parents certain rights with respect to their children's education records at educational agencies and institutions to which FERPA applies. These rights transfer to the student when he or she reaches the age of 18 or attends an institution of postsecondary education at any age (thereby becoming an "eligible student"). 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.5(a)(1). Under FERPA, a parent or eligible student must provide a signed and dated written consent before an educational agency or institution discloses PII from education records, unless an exception to this general consent requirement applies. 34 C.F.R. § 99.30(a). Exceptions to the general consent requirement are set forth in 20 U.S.C. §§ 1232g(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (h), (i), and (j) and 34 C.F.R. § 99.31. The term "education records" is defined, with certain exceptions, as those records that are: (1) directly related to a student; and (2) maintained by an educational agency or institution, or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3, "Education records." Accordingly, immunization and other health records, as well as records on services provided to students under the Individuals with Disabilities Education Act (IDEA), which are directly related to a student and maintained by an educational agency or institution are "education records" under FERPA.³ The term "PII" refers to a student's name or identification number, as well as other information that can be used to distinguish or trace an individual's identity either directly or indirectly through linkages with other information. 34 C.F.R. § 99.3, "Personally identifiable information."

FERPA prohibits educational agencies (e.g., school districts) and institutions (i.e., schools) from disclosing PII from students' education record without the prior written consent of a parent or "eligible student," unless an exception to FERPA's general consent rule applies. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31. For instance, pursuant to one such exception, the "health or safety emergency" exception, educational agencies and institutions may disclose to a public health agency PII from student education records, without prior written consent in connection 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. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36.

For all other situations where an exception to FERPA's general consent requirement does not apply, educational agencies and institutions must obtain prior written consent of a parent or eligible student to disclose PII from student education records. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31. We have attached a model consent form at the end of this document. We have also listed the email and contact information for SPPO, the Department office responsible for implementing and enforcing FERPA, if school officials have questions that are not covered in this document.

³ Parts B and C of the IDEA contain separate privacy regulations that incorporate FERPA provisions and exceptions, including the health or safety emergency exception that is the primary subject of these FAQs. Where a student is placed in a private school for the provision of Individualized Education Program (IEP) services on behalf of a school or school district subject to FERPA, the education records of the privately placed student that are maintained by the private school are subject both to FERPA and to the confidentiality requirements under Part B of the IDEA.

Questions and Answers on the Applicability of FERPA to Disclosures Related to COVID-19 ("Coronavirus")

1. Do parents and eligible students have to provide consent before an educational agency or institution discloses PII from education records?

Generally, yes. A parent or eligible student must provide written consent before an educational agency or institution discloses PII from a student's education records, unless one of the exceptions to FERPA's general consent rule applies. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31. FERPA requires that a consent form be signed and dated by a parent or eligible student and (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. 34 C.F.R. § 99.30(a) and (b). At the conclusion of this document, we have included a sample FERPA consent form.

2. How does the health or safety emergency exception to FERPA's consent requirement permit an educational agency or institution to disclose PII from the education records of affected students?

Although educational agencies and institutions can often address threats to the health or safety of students or other individuals in a manner that does not identify a particular student, FERPA permits educational agencies and institutions to disclose, without prior written consent, PII from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36. This "health or safety emergency" exception to FERPA's general consent requirement is limited in time to the period of the emergency and generally does not allow for a blanket release of PII from student education records. Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom PII from education records may be disclosed under this FERPA exception.

For purposes of FERPA's health or safety emergency exception, the determination by an educational agency or institution that there is a specific emergency is not based on a generalized or distant threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in general emergency preparedness activities. If local public health authorities determine that a public health emergency, such as COVID-19, is a significant threat to students or other individuals in the community, an educational agency or institution in that community may determine that an emergency exists as well.

Under the FERPA health or safety emergency exception, an educational agency or institution is responsible for making a determination, on a case-by-case basis, whether to disclose PII from education records, and it may take into account the totality of the circumstances pertaining to the threat. *See* 34 C.F.R. § 99.36(c). If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of the student or another individual and that certain parties need the PII from education records, to protect the health or safety of the

student or another individual, it may disclose that information to such parties without consent. This is a flexible standard under which the Department will not substitute its judgment for that of the educational agency or institution so that the educational agency or institution may bring appropriate resources to bear on the situation, provided that, based on the information available at the time of the educational agency's or institution's determination, there is a rational basis for such determination. We note also that, within a reasonable period of time after a disclosure is made under this exception, an educational agency or institution must record in the student's education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed. 34 C.F.R. § 99.32(a)(5).

3. May student education records, such as health records, maintained by an educational agency or institution be disclosed, without consent, to public health departments if the educational agency or institution believes that the virus that causes COVID-19 poses a serious risk to the health or safety of an individual student in attendance at the educational agency or institution?

Yes. If an educational agency or institution, taking into account the totality of the circumstances, determines that an articulable and significant threat exists to the health or safety of a student in attendance at the agency or institution (or another individual at the agency or institution) as a result of the virus that causes COVID-19, it may disclose, without prior written consent, PII from student education records to appropriate officials at a public health department who need the information to protect the health or safety of the student (or another individual). Public health department officials may be considered "appropriate parties" by an educational agency or institution under FERPA's health or safety emergency exception, even in the absence of a formally declared health emergency. Typically, public health officials and trained medical personnel are among the types of appropriate parties to whom PII from education records, may be non-consensually disclosed under FERPA's health or safety emergency exception.

4. If an educational agency or institution learns that student(s) in attendance at the school are out sick due to COVID-19, may it disclose information about the student's illness under FERPA to other students and their parents in the school community without prior written parental or eligible student consent?

It depends, but generally yes, but only if that information is in a non-personally identifiable form. Specifically, the educational agency or institution must make a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. *See* 34 C.F.R. § 99.31(b)(1). If an educational agency or institution discloses information about students in non-personally identifiable form, then consent by the parents or eligible students is not needed under FERPA. For example, if an educational agency or institution releases the fact that individuals are absent due to COVID-19 (but does not disclose their identities), this would generally not be considered personally identifiable to the absent students under FERPA as long as there are other individuals at the educational agency or institution who are absent for other reasons. However, we caution educational agencies or institutions to ensure that in releasing such facts, they do so in a manner that does not disclose other information that, alone or in combination, would allow a reasonable

person in the school community to identify the students who are absent due to COVID-19 with reasonable certainty.

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

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

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

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

6. If an educational agency or institution determines that a health or safety emergency exists, may it disclose, without consent, PII from student education records to the media?

No. As explained previously, FERPA only permits nonconsensual disclosures of PII from students' education records under the health or safety emergency exception to "appropriate parties" (such as public health officials) whose knowledge of the information is necessary to protect the health or safety of students or other individuals. While the media may have a role in alerting the community of an outbreak, they are not "appropriate parties" under FERPA's health or safety emergency exception because they generally do not have a role in protecting individual students or other individuals at the educational agency or institution. "Appropriate parties" in this context are normally parties who provide specific medical or safety attention, such as public health and law enforcement officials.

7. May the school identify a particular student, a teacher, or other school official as having COVID-19 to parents of other students in the school?

In most cases, it is sufficient to report the fact that an individual in the school has been determined to have COVID-19, rather than specifically identifying the student who is infected. School notification is an effective method of informing parents and eligible students of an illness

in the school. For settings in which parents are primarily doing drop-offs and pick-ups, posting signs on the doors may be effective. In other settings, sending home or e-mailing a notification may also be effective. These methods serve to notify parents and eligible students of a potential risk, which may be particularly important for students who may be more susceptible to infection or to developing severe complications from an infection, and to alert parents to look for symptoms in their own children and eligible students to more closely monitor themselves for symptoms.

Nothing in FERPA prevents schools from telling parents and students that a specific teacher or other school official has COVID-19 because FERPA applies to students' education records, not records on school officials. However, there may be State laws that apply in these situations.

There may be a rare situation during a health or safety emergency, however, in which schools may determine (in conjunction with health, law enforcement, or other such officials) that parents of students or eligible students are appropriate parties to whom to disclose identifiable information about a student with COVID-19. For example, school officials may determine that it is appropriate to disclose identifiable information about a student with COVID-19 to parents of other students if parents need to know this information to take appropriate action to protect the health or safety of their children. For example if a student with COVID-19 is a wrestler and has been in direct and close contact with other students who are on the team or who are in the school and have higher health risks, school officials may determine it necessary to disclose the identity of the diagnosed student to the parents of the other students. In these limited situations, parents and eligible students may need to be aware of this information in order to take appropriate precautions or other actions to ensure the health or safety of their child or themselves, especially if their child or they may have a higher risk of susceptibility to COVID-19 or of developing severe complications from COVID-19.⁴ School officials should make the determination on a case-by-case basis whether a disclosure of the student's name is absolutely necessary to protect the health or safety of students or other individuals or whether a general notice is sufficient, taking into account the totality of the circumstances, including the needs of such students or other individuals to have such information in order to take appropriate protective action(s) and the risks presented to the health or safety of such students or other individuals.

8. May an educational agency or institution disclose PII from an eligible student's education records to the student's parents if the eligible student has been determined to have COVID-19?

Yes, for dependent students and generally yes, but see below. Under FERPA, an educational agency or institution, including an institution of postsecondary education, may disclose, without the eligible student's written consent, PII from an eligible student's education records to his or her parents under certain conditions. For example, a university physician treating an eligible student for COVID-19 might determine that the student's treatment records should be disclosed to the student's parents. This disclosure may be made, without consent of the eligible student, if the parents claim the eligible student as a dependent under section 152 of the Internal Revenue Code of

⁴ For helpful information on risk, please see the Centers for Disease Control and Prevention's current risk assessment, which is available at: <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/children-faq.html>.

1986. 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8). If the parents do not claim the eligible student as a dependent, then the disclosure may be made to the parents, without the eligible student's written consent, if the disclosure is in connection with a health or safety emergency provided certain conditions are satisfied (as discussed in the response to question two above). 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 36.

9. What if a parent of a student who is not an eligible student refuses to provide written consent to permit the release of PII contained in student education records to the public health department?

FERPA permits educational agencies and institutions to release information from education records without consent after the removal of all PII, provided that the agency or institution has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. 34 C.F.R. § 99.31(b)(1). Thus, it would be problematic to disclose that every student in a particular class or grade level is absent if there is, for instance, a directory with the names of every student in that class or grade. Therefore, it is prudent that educational agencies or institutions obtain written consent to permit the disclosure of PII from students' education records to the public health department. If the parent or eligible student will not provide written consent for the disclosure of the PII, then the educational agency or institution may not make the disclosure unless it has determined that there is an applicable exception to the general requirement of consent that permits the disclosure, such as if a health or safety emergency exists and the PII is disclosed to an appropriate party whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

10. Is an educational agency or institution required to record disclosures of PII from student education records submitted to the public health department or other outside parties, even in connection with a health or safety emergency?

Yes. FERPA generally requires educational agencies and institutions to maintain a record of each request for access to and each disclosure of PII from the education records of each student. 34 C.F.R. § 99.32(a)(1). Moreover, when making a disclosure under the health or safety emergency provision in FERPA, educational agencies and institutions are specifically required to record the articulable and significant threat to the health or safety of a student or other individual that formed the basis for the disclosure and the parties to whom the agency or institution disclosed the information. 34 C.F.R. § 99.32(a)(5). The record of each request for access to and each disclosure of PII from student education records must be maintained with the education records of each student as long as the records are maintained. 34 C.F.R. § 99.32(a)(2). This requirement enables parents and eligible students who do not provide written consent for disclosure of education records to see the circumstances under which and the parties to whom their information was disclosed. However, educational agencies and institutions are not required to record disclosures for which the parent or eligible student has provided written consent. 34 C.F.R. § 99.32(d)(3).

The Department's Student Privacy Policy Office or SPPO is the office that administers FERPA. SPPO is available to respond to questions school officials may have about FERPA. School officials may e-mail questions to SPPO at FERPA@ed.gov. You may also call us at (202) 260-3887. Additional information and guidance on FERPA is available on SPPO's website at: <https://studentprivacy.ed.gov/>.

The Department has a list of resources regarding COVID-19 (coronavirus) on our website at <https://www.ed.gov/coronavirus>. Questions related to the coronavirus may be emailed to the Department at COVID-19@ed.gov.

In December 2019, the U.S. Department of Education, along with HHS, issued guidance on the applicability of FERPA and the HIPAA to student health records, the "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." See https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf. This 2019 document updated the Department's 2008 guidance and explained that the HIPAA Privacy Rule does not apply to education records that are protected by FERPA. Student health records that are maintained by a public elementary and secondary educational agency or institution or by a party acting for the agency or institution are "education records" subject to FERPA, and school officials must follow the requirements of FERPA in making any disclosures of the PII from these records. At the postsecondary level, FERPA applies to most public and private institutions of postsecondary education and to the student health records that they maintain. Such student health records may either constitute "education records" or "treatment records," if certain conditions are met, but in either case they are subject to FERPA and not the HIPAA Privacy Rule.

For more information on the HIPAA Privacy Rule, please visit HHS' HIPAA Privacy Rule website at: <http://www.hhs.gov/ocr/privacy/>. The website offers a wide range of helpful information about the HIPAA Privacy Rule, including frequently asked questions.

[Sample FERPA Consent Form]

**Disclosure of Information Protected by the Family Educational Rights and Privacy Act
by _____ [Name of School/School District] to [Name of Appropriate Authority]**

Pursuant to the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 C.F.R. part 99), the written consent of a parent or eligible student is required before the education records of a student, or personally identifiable information contained therein, may be disclosed to a third party, unless an exception to this general requirement of written consent applies. If a student is age 18 years or older, or is enrolled in an institution of postsecondary education, he or she is an “eligible student” and must provide written consent for the disclosure of his or her education records or personally identifiable information contained therein.

I, _____, hereby agree to allow _____
[SCHOOL OR DISTRICT NAME] to disclose the following personally identifiable information
or education records:

_____ [Specify education records or personally identifiable
information that may be disclosed] on _____
[Name of Student] to _____ [Name of Appropriate Authority] for the
purpose of [State purpose of disclosure] _____.

You may withdraw your consent to share this information at any time. A request to withdraw your consent should be submitted in writing and signed.

Signature of Parent, Guardian, or Eligible Student

Date: _____