



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>March 27, 2020</p>	<p>No. I20-005 (R20-005)</p> <p>Re: Extent of permissible disclosure by government entities of COVID-19-related information to the public and county and state health officials</p>
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To: The Honorable Mark Finchem
Representative
Arizona House of Representatives

Question Presented

Is the government, including but not limited to public universities, prohibited from releasing information to the public concerning individuals who have tested positive for COVID-19, such as information about where they live and who could potentially be at risk? In addition, do those state organizations have a responsibility to notify county and/or state public health officials?

Summary Answer

Consistent with the confidentiality requirements of the Americans with Disabilities Act and other employment laws, state government employers may share non-identifying information regarding employees who test positive for COVID-19 with other potentially affected persons to mitigate against the further spread of the virus.

Generally, public universities may disclose information that is necessary to protect the health or safety of a student(s) or other individuals.¹ University officials are, however, prohibited from disclosing specific information that would directly or indirectly identify individuals who have tested positive for COVID-19. While health care providers and clinical laboratories must report COVID-19 cases to their local health authorities, public universities do not have a *mandatory* reporting requirement. There is, however, nothing prohibiting a university from disclosing additional information that may be useful so long as it complies with the framework outlined in this opinion. In times of crisis, government should favor transparency in the interest of protecting the public.

Analysis

I. The State As An Employer

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces various federal employment laws including the Americans with Disabilities Act (ADA), instructs that “[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments. . . . Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace on this information.” U.S. Equal Emp’t Opportunity Comm’n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (last updated Mar. 21, 2020), https://www.eeoc.gov/facts/pandemic_flu.html (last visited Mar. 27, 2020).

According to the Centers for Disease Control and Prevention (CDC), “[i]f an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality [of the identity of

¹ The Arizona Board of Regents oversees the university system. The Attorney General does not serve as the Board’s legal advisor on issues related to COVID-19. A.R.S. § 41-192(D)(4).

the infected employee] as required by the Americans with Disabilities Act. The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).” Centers for Disease Control and Prevention, *Interim Guidance for Businesses and Employers*, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited Mar. 27, 2020). Likewise, the EEOC instructs that even during a pandemic, “[e]mployers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.” *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, *supra* at 2.

The ADA implementing regulation regarding the confidentiality of employee medical information provides as follows:

Information obtained . . . regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

- (i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (iii) Government officials investigating compliance with [the ADA] shall be provided relevant information on request.

29 C.F.R. § 1630.14(c)(1). The ADA further provides that any information obtained “regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with” the ADA. *Id.* at § 1630.14(c)(2). Similarly, the Family & Medical Leave Act (FMLA), which provides job-protected leave to employees with serious health conditions, provides that records created for purposes of the FMLA—including medical histories of employees or employees’ family members—“shall be maintained as confidential medical records in separate files/records from the usual personnel files.” 29 C.F.R. § 825.500(g).

Thus, while an employer must not disclose information that would reveal an employee's identity or confidential medical information, the employer should take all necessary steps to ensure employees or other persons potentially affected are aware that an employee (or other individual) who has been physically present in the office has tested positive for COVID-19. The confidentiality provisions of the ADA and the FMLA do not expressly prohibit a State agency from providing its employees or other persons potentially in contact with an infected employee non-identifying information such as the infected employee's assigned state agency or work location, so long as doing so would not reveal the identity of the employee.

II. Public Universities

In most situations, Family Educational Rights and Privacy Act (FERPA), not the Health Insurance Portability and Accountability Act (HIPAA), governs schools' (including universities') disclosure of students' education records.² "Education records" are those that "contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). School health records are considered part of a student's educational record. *See Reddy & Vance, Student Privacy During the COVID-19 Pandemic* at 2 ("Students' health records maintained by a school—regardless of whether health care is provided to students on-campus or off-site—are considered part of students' education records and therefore are subject to FERPA."). Schools

² If a school's health services are "funded, administered and operated by or on behalf of public or private health, social services, or other non-educational agency or individual," then that school's health records are protected by HIPAA, not FERPA. *See Anisha Reddy & Amelia Vance, Student Privacy During the COVID-19 Pandemic*, The Sch. Superintendent's Assoc. at 2 (Mar. 20, 2020), <https://ferpasherpa.org/wp-content/uploads/2020/03/COVID-19-Student-Privacy-FAQs-03-20-2020-1.pdf>. Further, the U.S. Department of Education "has clarified that if a school's 'health care provider . . . delivers health services and engages in covered transactions, such as billing Medicaid for Medicaid-covered services in the school setting,' the resulting records are protected by HIPAA, not FERPA." *Id.* "Like FERPA, HIPAA has an emergency provision allowing the disclosure of protected health information in certain cases." *Id.*

are not prevented from disclosing de-identified or aggregate information. *See* 34 C.F.R. § 99.31(b)(1). Absent appropriate authorization³ or a recognized exception, however, schools are presumptively prohibited from disclosing educational records. 20 U.S.C. § 1232g(b).

One of the recognized exceptions is if “[t]he disclosure is in connection with a health or safety emergency.” 34 C.F.R. § 99.31(a)(10). Schools may disclose even personally identifiable information to “appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. § 99.36(a). When deciding what information to disclose, schools must base their decision on “the totality of the circumstances.” 34 C.F.R. § 99.36(c). This should be done on a case-by-case basis. *See* U.S. Dept. of Educ., *Privacy FAQ* at 3 (Mar. 2020), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf. If universities determine that there is “an articulable and significant threat to the health or safety of a student or other individuals,” then “it may disclose information from education records to [appropriate parties] whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. § 99.36(c). “Appropriate parties” for disclosure “are normally parties [not media] who provide specific medical or safety attention, such as public health and law enforcement officials.” *See* U.S. Dept. of Educ., *Privacy FAQ* at 5. At a minimum, the school must have a “rational basis” for its disclosure determination that is “based on the information available at the time of the determination.” 34 C.F.R. § 99.36(c). Notably, the United States Department of Education has commented that, “[i]f local public health

³ Regarding authorization, schools must obtain a parent’s written consent (or the student’s, if the student is at least eighteen years old) to disclose educational records. 20 U.S.C. § 1232g(b)(1), (d).

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.” See U.S. Dept. of Educ., *Privacy FAQ* at 3.

Given the current health emergency, universities should apply the FERPA/HIPAA exceptions and disclose sufficient information related to positive COVID-19 cases so those potentially affected students, staff, visitors, etc. can self-monitor and potentially self-quarantine. At a minimum, universities should disclose information identifying the campus attended by the infected student and buildings or dorms frequented by the infected student during the incubation period and/or while exhibiting symptoms. See, e.g., Reddy & Vance, *Student Privacy During the COVID-19 Pandemic* at 2. Further, warning other students, parents of students, school staff, and others about potential contact with an affected student is appropriate when, as here, those persons’ knowledge is “necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. § 99.36(c); see also Reddy & Vance, *Student Privacy During the COVID-19 Pandemic* at 4.

This approach is consistent with the CDC guidelines applicable to universities with positive COVID-19 cases. The CDC recommends universities work closely with local health departments to identify and notify individuals who are reasonably at risk from a person who has contracted COVID-19 and to manage the information shared. Centers for Disease Control and Prevention, *Guidance for Institutes of Higher Education*, <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/index.html> (last visited Mar. 26, 2020). Given the rapid and unpredictable spread of COVID-19 and the evolving nature of known symptoms and the risk to people who contract it, disclosing non-identifying information related to positive cases would

aid in protecting others and is not prevented by FERPA. *See* U.S. Dept. of Educ., *Privacy FAQ* at 4. Even if it was prevented, the type of information clearly qualifies as a “health or safety emergency” exception to FERPA’s limitations on disclosure of student information. 34 C.F.R. § 99.36(a).

III. Mandatory Reporting Requirements

In Arizona, there is a general duty to report any “contagious, epidemic or infectious disease” to “the appropriate board of health or health department.” A.R.S. § 36-621. Under A.R.S. § 36-136(I), the Arizona Department of Health Services (ADHS) is authorized to create rules mandating reporting requirements for communicable and preventable diseases. Under that statute, ADHS promulgated rules for disease reporting and control measures for preventable and communicable diseases. The rule establishing reporting requirements applicable to schools, including colleges and universities, is Arizona Administrative Code (A.A.C.) R9-6-203. That Rule sets mandatory reporting requirements for many diseases that can be commonly child-related and school-related. Those reportable diseases do not include the novel coronavirus, like COVID-19. A.A.C. R9-6-203 (tbl. 2.2). Thus, under Arizona law, a public university may report COVID-19 cases to local health authorities, but is not required to do so. However, cases of novel coronavirus, such as COVID-19, are required to be reported by health care providers and clinical laboratories.

Conclusion

Consistent with the confidentiality requirements of the ADA and other employment laws, state government employers may share non-identifying information regarding employees who test positive for COVID-19 with other potentially affected persons to mitigate against the further spread of the virus. In addition, public universities may disclose information that is necessary to

protect the health or safety of students or other individuals but may not disclose specific information that would identify individuals who have tested positive for COVID-19. Nothing, however, prohibits the universities from disclosing additional information, such as the campus, buildings or dorms frequented by the student during the incubation period and/or while exhibiting symptoms. Protecting the public is paramount during times of crisis, and transparency should be the rule rather than the exception.

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