

Keeping Students Academically Engaged During the Coronavirus Crisis - Part One

By David S. Clancy and Michael Sentance

The states and localities, not the federal government, primarily control and fund K–12 education. As a major source of revenue and with its historic role in our federal system, the states are the driving presence in most every education policy area. That is true in the current efforts to adjust our education programs to the Coronavirus disease (COVID-19) crisis. State leaders must assume main responsibility for setting policy and addressing student needs.

That said, clearer guidance on relevant federal law can be helpful to school officials, and also stakeholders, including parents who need to clearly understand relevant law as they develop and voice their own opinions on local plans to address the crisis. That is especially true when it comes to the ongoing transition to digital and online learning, where federal guidance and law can be seen as vague or contradictory.

Pioneer Institute calls on the U.S. Department of Education (USED) to quickly establish comprehensive but concise guidelines for federal law around school closures.

Because of the COVID-19 virus, schools have been closing rapidly around the nation, and they are trying to transition to alternative, largely online, learning programs. But schools nationwide have delayed or even foregone alternative learning programs, citing concerns about federal law—particularly as it relates to providing equitable educational opportunities for students with disabilities.

Yet, the transition to alternative learning programs has to some extent been impeded by concerns and confusion about federal law. A flashpoint has been the intersection between online learning and federal law concerning children with disabilities, who are entitled to equal learning opportunities under the Individuals With Disabilities Education Act (IDEA).¹

On March 16, the USED issued guidance that spurred some school districts to forego alternative learning programs altogether. The guidance included a statement that this requirement would simply not exist *if the school chose not to offer an alternative learning program at all*: “If a school district closes its schools and does not provide any educational services to the general student population, then a school would not be required to provide services to students with disabilities during that same period of time.”²

Pioneer Institute calls on the U.S. Department of Education (USED) to quickly establish comprehensive but concise guidelines for federal law around school closures.



PIONEER INSTITUTE
PUBLIC POLICY RESEARCH

David S. Clancy, a resident of Concord, Massachusetts, is a partner in the law firm Clancy & Shine LLC, which focuses on civil disputes. Mr. Clancy was previously partner at an international law firm, from which he retired after a 20-year career, also practicing civil litigation. Among other professional activities, Mr. Clancy served three terms on the Board of Editors of the *Boston Bar Journal*, and has published multiple articles in that and other legal publications.

Michael Sentance has worked to serve the interests of opportunity and justice for all students through improvements in schools on the local, state, and federal levels. He has served as the Secretary of Education in Massachusetts, the State Superintendent of Education in Alabama, and a senior official in the U.S. Department of Education. Sentance is a graduate of Georgetown University, Duquesne University, and Boston University.

Some school districts opted to do just that—including Philadelphia, whose superintendent cited the federal guidance specifically.³ Other districts reacted similarly. For example, *USA Today* reported that “Kentucky’s largest district, Jefferson County Public Schools, is specifically not moving to online learning because of equity concerns. The 98,000-student district wouldn’t be able to provide enough digital devices or ensure Internet access for its most disadvantaged students...”⁴

On March 21, USED offered a sharp “corrective” which stated: “To be clear: ensuring compliance with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.”⁵

Already, however, the new guidance has been interpreted by some to go too far in the opposite direction. *Forbes* published an article titled “Did the Department of Education Just Okay Ignoring IDEA During Coronavirus School Shutdowns?”⁶

That appears to be a misreading: while the March 21 USED guidance speaks of federal “flexibility” in how to provide alternative learning for students with disabilities, it clearly assumes that such instruction must occur, and offers some guidance for providing it. For example: “Consider practices such as distance instruction, teletherapy and tele-intervention, meetings held on online platforms, online options for digital tracking, and documentation.” Still, concern and confusion exists that ought to be resolved.

Importantly, though, this is just one area. Multiple federal laws are relevant to school closures, and—to the extent USED has offered COVID-19 related guidance—it has been a flow of issue-specific guidance, requiring state personnel to work through a complex and evolving set of federal statements.

For example: The Elementary and Secondary Education Act of 1965 includes assessment requirements, and USED has offered a waiver program for those requirements. That program is described in a stand-alone document on the USED website, separate from the multiple controversial items of guidance about disability law.⁷

Another example: a 2014 “Dear Colleague” letter cautioned schools about general federal discrimination law in relation to allocation of resources, including technology.⁸ Logically, states need to worry about this aspect of federal law as they structure alternative learning programs—within a school district, there could be great variation in household access to the internet. But there does not appear to be any specific guidance on the interaction between this 2014 letter and the development of alternative learning programs in the current emergency. (The March 16 guidance did address discrimination in general, but in terms

of such matters as harassment and bullying; it did not address this topic in regard to potential inequities in resources.)

Even granting the primacy of state and local governments in providing education to young people, fragmented guidance from the federal government is unhelpful and unnecessary. State education personnel ought to have a single go-to resource on how federal law impacts their efforts. Nor are they the only relevant constituency: legislators, parents and guardians, and citizens in general must be able to evaluate state-level decisions and plans in real time. For example, where a school district decides to forego (or substantially limit) online learning citing concerns about federal law, there is no realistic way for others in the relevant community to evaluate the merit of that rationale. Explanation of how federal law applies to the current crisis must be understandable by people outside of the education profession, who nonetheless have a stake in the issue, and little time or background expertise to develop and voice their opinions. Otherwise, the democratic process itself is impeded on the crucial issue of education.

On March 20, USED hosted a conference call among “K–12 education leaders”, and then posted a written “read-out” summarizing the call and providing links to various materials.⁹ This is a good step toward a comprehensive resource, but Pioneer calls on the federal government to quickly release a single paper, not a further collection of materials, which:

1. Comprehensively identifies which federal laws are relevant to the topic of school closure, and/or the transition to alternative learning programs.
2. Identifies which aspects of those laws—precise statutory provisions and regulations—matter.
3. For each, provides maximally concrete guidance on how schools can comply in the coming weeks, stressing constructive guidance rather than articulating general principles and references to enforcement (both of which are prominent in a seven-minute “webinar” recently released by USED¹⁰).

Clearly, federal law is only one subject area relevant to school closure. Deciding how to effect closures, and how to educate students alternatively, requires consideration of a multitude of factors, both legal (state and local laws) and practical. That federal law is just one piece of the mosaic only strengthens the need for clarity at that level: there is so much for states to and localities to address and consider that the federal government should work overtime on its domain, distilling and explaining the intersection of federal law and school closures to the broad audience that is inherently relevant to democratic decision-making. To use educational terms, a primer is needed, and currently it is absent.

Deciding how to effect closures, and how to educate students alternatively, requires consideration of a multitude of factors, both legal (state and local laws) and practical.

Endnotes

- 1 “About IDEA,” Dep’t of Education website, <https://sites.ed.gov/idea/about-idea/>
- 2 “Addressing the Risk of Covid-19 In Schools While Protecting the Civil Rights of Students,” March 16, 2020, <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>
- 3 <https://www.phillyvoice.com/philadelphia-school-district-coronavirus-online-learning-remote-instruction-guidelines/>
- 4 “Is Online School Illegal? With Schools Closing Due to Coronavirus, Special Education Concerns Give Districts Pause.” March 19, 2020, <https://www.usatoday.com/story/news/education/2020/03/19/coronavirus-online-school-closing-special-education-teacher-distance-learning/2863503001/>
- 5 <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>
- 6 <https://www.forbes.com/sites/petergreene/2020/03/22/did-used-just-okay-ignoring-idea-during-coronavirus-school-shutdowns/#3ad2616b547d>
- 7 <https://www.ed.gov/news/press-releases/helping-students-adversely-affected-school-closures-secretary-devos-announces-broad-flexibilities-states-cancel-testing-during-national-emergency>
- 8 <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>. See pp. 18-19 in particular, section titled “Technology”.
- 9 <https://www.ed.gov/news/press-releases/readout-us-department-educations-covid-19-conference-call-k-12-stakeholders>
- 10 https://www.youtube.com/watch?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=&v=DCMLk4cES6A.

