

Guidance on Flexibility and Waivers for SEAs, LEAs, Postsecondary Institutions, and Other Grantee and Program Participants in Responding to Pandemic Influenza (H1N1 Virus)

The U.S. Department of Education (Department) is issuing the following guidance to help prepare state educational agencies (SEAs), local educational agencies (LEAs), schools, and postsecondary institutions in the event of an outbreak of the H1N1 influenza virus during the 2009-2010 school year. In general, this document discusses waivers (and other forms of relief) from federal education requirements that may provide SEAs, LEAs, postsecondary institutions, and other grantee and program participants with the operational flexibility necessary to efficiently close schools and otherwise respond to the administrative challenges presented by an H1N1 outbreak such as prolonged school closures, excessive absenteeism, or other disruptions in the regular delivery of educational services to students for a prolonged period of time. It is important to emphasize that this guidance addresses only federal education requirements, and does not address the applicability of state and local education requirements, because those requirements can only be addressed by state and local officials.

This document is organized into the following sections:

- Part I – Elementary and secondary education issues;
- Part II – Adult education and career and technical education programs;
- Part III – Federal Student Aid (FSA) and other postsecondary education issues;
- Part IV – Grant administration requirements;
- Part V – Family Educational Rights and Privacy Act (FERPA) issues; and
- Part VI – Distribution of flu vaccines at school facilities.

Each section addresses the implications of a prolonged school closure or other disruptions in the regular educational services to students, addresses legal questions that may arise for school administrators when faced with an H1N1 outbreak, and discusses generally the possibility of waiving requirements or finding other flexibility in federal education laws and regulations.

For specific guidance on how to best respond to an H1N1 outbreak during the 2009-2010 school year, please visit the Center for Disease Control and Prevention’s (“CDC’s”) Web site:

<http://www.flu.gov/plan/school/schoolguidance.html>.

I. Elementary and Secondary Education Issues.

This section discusses potential legal issues that school administrators may face when considering whether to close a school or a district in response to an H1N1 outbreak and otherwise addresses disruption in educational services. Specifically, this section discusses waivers and other forms of relief from elementary and secondary (K-12) federal education requirements and other kinds of flexibility the Department may provide.

A. Requirements under the Elementary and Secondary Education Act (“ESEA”).

A-1. In the event of an H1N1 outbreak, will the Department provide flexibility to SEAs and LEAs with regard to federal K-12 requirements?

Yes, to the extent permissible under law, the Department may provide SEAs, LEAs, and schools with as much flexibility as necessary to appropriately address the impact an H1N1 outbreak may have upon the normal functioning or delivery of educational services. Section 9401 of the ESEA (20 U.S.C. § 7861) permits the Secretary to grant waivers of many ESEA requirements, such as assessment, accountability, and reporting requirements, to SEAs, LEAs, schools (through their LEAs), and Native American tribes that receive ESEA funds and that request such waivers. Specifically, if warranted by an H1N1 outbreak that impedes functioning or delivery of educational services in a state, LEA or in a school, the Department may, upon request by SEAs, LEAs, and Native American tribes, grant waivers of certain ESEA statutory and regulatory requirements, as it determines appropriate.

A-2. Who is responsible for requesting waivers (or other relief) related to federal K-12 requirements or deadlines?

While SEAs, LEAs, schools (through their LEAs), and Native American tribes that receive funds under a program authorized by the ESEA can request waivers, the Department strongly encourages SEAs to coordinate waiver requests. SEAs should provide guidance and a process for LEAs and schools to work with the state to request waivers from the Department. If an SEA believes a waiver may be needed, the SEA should immediately contact the Department to receive technical assistance in applying before the waiver is actually requested, if possible. An SEA should consider contacting the Department when contemplating a school closure, or when confronted with excessive absenteeism or other types of disruptions to the delivery of educational services. The Department may be able to assist the SEA in requesting a waiver.

As discussed in Section A of the Department's Non-Regulatory Guidance on Title I, Part A Waivers (July 2009) ("Title I Waiver Guidance"), which may be accessed at <http://www.ed.gov/programs/titleiparta/title-i-waiver.doc>, if the Secretary grants an SEA's request for a waiver, any LEA in the state interested in receiving the benefit of the waiver should then apply to the SEA, as appropriate, for approval to implement the waiver. The SEA should then review the LEA's request in order to ensure that the request contains all required information, and that the LEA plans to implement the waiver in accordance with the conditions of the waiver. An SEA may not deny a request from an LEA to implement the waiver if the waiver request includes all of the required information and meets all conditions in the SEA's waiver.

A-3. Does the ESEA allow for any flexibility without waiver approval?

Yes. Sections 1116(b)(7)(D) and 1116(c)(10)(F) of the ESEA contain "delay" provisions that provide flexibility to LEAs or schools when implementing the actions required for schools or LEAs in improvement, corrective action, or restructuring. These provisions provide flexibility to those LEAs and schools that do not make adequate yearly progress (AYP) because of

“exceptional or uncontrollable circumstances,” such as an H1N1 outbreak that seriously disrupts the functioning or delivery of educational services. Specifically, the delay provision allows the LEA or school to delay implementing the school or LEA improvement requirements for a period of one year. For example, if a school fails to make AYP during the school year due to administrative challenges caused by an H1N1 outbreak, the school may “delay” meeting school improvement requirements for a period not to exceed one year.

Importantly, these delay provisions are self-executing; in other words, the SEA, LEA, or school does not have to obtain prior approval from the Department.

A-4. What is the general process for applying for a waiver of ESEA requirements?

To obtain a waiver, an SEA, LEA, school (through its LEA), or Native American tribe must submit a request to the Assistant Secretary for Elementary and Secondary Education that contains the specific information identified in section 9401(b) of the ESEA. In general, an applicant should:

- Identify the federal program(s) affected by the requested waiver;
- List the statutory and/or regulatory requirements for which the applicant is seeking a waiver;
- Outline the circumstances that the applicant believes warrant a waiver (*e.g.*, the operational issues the applicant may be facing, such as excessive absenteeism, as a result of an influenza pandemic); and
- Describe how schools will continue to provide assistance to the same populations served by programs for which waivers are requested during the period the waiver applies.

An applicant may also describe what may occur if it does not receive a waiver. Note that there is additional information described in section 9401(b) of the ESEA that must be included in a waiver request. The Department encourages any SEA, LEA, school (through its LEA), or Native American tribe that intends to seek a waiver to review section 9401 of the ESEA, which may be accessed at the following Web address:

<http://www.ed.gov/policy/elsec/leg/esea02/pg110.html#sec9401>.

In addition, Section A of the Department’s Title I Waiver Guidance may be accessed at the following Web address:

<http://www.ed.gov/programs/titleiparta/title-i-waiver.doc>.

Section A of the Title I Waiver Guidance sets forth general information and requirements for any waiver sought pursuant to the authority in section 9401 of the ESEA, including a waiver related to an outbreak of the H1N1 virus. The appendices to the Title I Waiver Guidance also contain several examples of requests for waivers that may be useful in applying for waivers due to an outbreak of the H1N1 virus.

Finally, if an ESEA waiver request is made and granted, the Department nonetheless expects schools to maximize student achievement during a disruption of educational services or a school closure. For recommendations on continuing learning during an H1N1 outbreak, please visit the following Web address:

<http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/continuity-recs.pdf>.

Affected agencies or schools may also contact the Department's Office of Elementary and Secondary Education with questions about ESEA waivers by calling (202) 401-0113.

A-5. If an LEA is required to provide equitable services to private school students under an ESEA program, during an H1N1 outbreak, how will LEAs communicate with officials of these private schools?

LEAs should, during the required consultation process with private school representatives or officials under such provisions in section 9501(c) of the ESEA, establish procedures and strategies, including a communication process, that will be implemented in the event of an H1N1 outbreak. Planning for this effort may require establishing a backup strategy that will be operational in the event of an H1N1 outbreak. LEAs should coordinate such planning with appropriate private school officials to make sure that they have access to information related to equitable services for their eligible students.

B. Requirements under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act (ADA).

Elementary and secondary schools must ensure equal access to educational opportunities for students with disabilities, and provide a free appropriate public education ("FAPE"). The following questions primarily address the obligations of, and best practices for, SEAs, LEAs, and schools with regard to these requirements when planning for an H1N1 outbreak.¹

B-1. Must an LEA continue to provide FAPE to students with disabilities during a school closure caused by an H1N1 outbreak?

The IDEA, Section 504, and the ADA do not specifically address a situation in which elementary and secondary schools would be closed for an extended period of time because of exceptional circumstances; however, LEAs must be sure not to discriminate on the basis of disability when providing educational services.

¹ The questions in section I(B) primarily address the obligations of and best practices for states and LEAs when planning for an H1N1 outbreak; however, guidance related to accessibility to educational services provided during an H1N1 outbreak generally would apply to colleges, universities and other educational institutions.

If an LEA closes its schools because of an outbreak of H1N1 that disrupts the functioning or delivery of educational services, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, however, a subsequent individualized determination is required to decide whether a student with a disability requires compensatory education to make up for any skills that may have been lost because of the school closure or because the student did not receive an educational benefit.

If an LEA continues to provide educational opportunities to the general student population, then it must ensure that students with disabilities also have equal access to the same opportunities and to the provision of FAPE, where appropriate. SEAs and LEAs must ensure that, to the greatest extent possible, each student with a disability receives the special education and related services identified in the student's individualized education program (IEP) developed under IDEA, or a plan developed under Section 504.

B-2. In the event of a school closure, how might educational services be provided to students with disabilities?

As part of their H1N1 planning, SEAs and LEAs must consider ways of ensuring that continuing education activities (*i.e.*, services provided during a school closure) are accessible to students with disabilities. Technology provides unprecedented opportunities for all students, including students with disabilities, to have access to high-quality educational instruction during an H1N1 outbreak, especially when continuing education must be provided through distance learning. SEAs and LEAs should consider the accommodations (*e.g.*, educational materials in accessible formats or through the use of auxiliary aids and services) that must be provided in order for a student with a disability to have an equal opportunity to participate in a distance learning program.

For recommendations on how to continue learning during a flu outbreak, please visit the following Web address:

<http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/continuity-recs.pdf>.

B-3. What must a school do if it cannot provide services in accordance with a student's IEP or Section 504 plan because of an H1N1 outbreak or if a student opts to stay home because the student is at high-risk for contracting the virus?

If a school continues to provide instruction to the general school population during an H1N1 outbreak, but is not able to provide services to a student with a disability in accordance with the student's IEP, the student's IEP team determines which services can be provided to best meet the child's needs. The team may meet by teleconference or other means to determine if some, or all, of the identified services can be provided through alternate or additional methods such as through tutoring by phone, the Internet, or closed-circuit programming. Appropriate personnel under Section 504 must take similar actions regarding a student who has a Section 504

plan. Once school resumes, or the danger to a high-risk student has passed, a student's IEP team, or appropriate personnel under Section 504, must determine whether, and to what extent, compensatory services are needed to ensure that the student receives educational benefit.

B-4. In the event that a school is closed, would an IEP team be required to meet? Would an LEA be required to conduct an evaluation of a student with a disability?

IEP teams would not be required to meet in person while schools are closed. IEP teams, however, must continue to work with parents and students with disabilities during such school closures, including conducting informal assessments (*e.g.*, assessments developed by a child's teacher) or formal assessments of the student, including parent surveys and standardized reports, and offer advice, as needed. If an evaluation of a student with a disability requires a face-to-face meeting or observation, the evaluation would need to be delayed until school reopens. Evaluations and reevaluations that do not require face-to-face assessments or observations may take place while schools are closed, if the parent consents. These same principles apply to similar activities conducted by appropriate personnel for a student with a disability who has a plan developed under Section 504.

B-5. What steps must be taken to serve a student with a disability who may have lost skills as a result of a prolonged absence from school?

The student's IEP team (or appropriate personnel under Section 504) must make an individualized determination as to whether, and to what extent, it may be necessary to provide compensatory education to help the student regain skills that might have been lost during the period in which special education and related services were not provided.

If appropriate, compensatory education could be provided in a number of ways, such as providing extended school year services, extending the school day, providing tutoring before and after school, or providing additional services during regular school hours. All such compensatory services must be directly linked to the denial of educational benefit, including any decline in the student's skills that occurred as a result of a student not receiving services during an H1N1 outbreak.

The student's IEP team also must review the student's IEP and determine whether any other changes in the IEP are needed. An IEP team may consider using informal assessments to determine whether there have been changes in a student's performance. If changes have occurred, the IEP team must determine whether changes are needed in the services and supports currently provided to the student.

B-6. If an LEA is required to provide services to parentally placed private school students with disabilities during an H1N1 outbreak, how will the LEA communicate with these private schools?

LEAs should, during the required consultation process with private school officials under section 612(a)(10)(A)(iii) of the IDEA, establish procedures and strategies, including a

communication process, that will be implemented in the event of an H1N1 outbreak. Planning for this effort may require establishing a backup strategy that will be operational in the event of an H1N1 outbreak. LEAs should coordinate such planning with appropriate private school officials to make sure that they have access to information related to IDEA equitable services for their eligible students.

II. Adult Education and Career and Technical Education Programs.

A-1. May states receive a one-year waiver of their maintenance of effort (MOE) requirements for adult education and career and technical education programs if an outbreak of the H1N1 virus causes a disruption in services?

Yes. Section 241(b)(4) of the Adult Education and Family Literacy Act (AEFLA) authorizes the Secretary to waive a state's MOE requirement due to exceptional or uncontrollable circumstances, "if the Secretary determines that a waiver would be equitable due to exceptional or uncontrollable circumstances, such as a natural disaster." Similarly, section 311(b)(2) of the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV) allows the Secretary to waive a state's MOE requirement due to exceptional or uncontrollable circumstances (such as an H1N1 outbreak) that affect a state's ability to meet such requirements. An H1N1 outbreak would meet the definition of an "exceptional or uncontrollable circumstance."

A-2. May states and local recipients renegotiate their agreed-upon performance levels for adult and career and technical education programs if an H1N1 outbreak occurs?

Yes, if an H1N1 outbreak makes it excessively difficult to meet performance goals. section 212(b)(3)(A)(vi) of the AEFLA and section 113(b)(3)(A)(vii) of Perkins IV provide the Secretary with the authority to renegotiate annual performance goals if certain unanticipated circumstances arise. For the Perkins IV program, *see* the Office of Vocational and Adult Education's Questions and Answers Regarding Perkins IV Non-Regulatory Guidance, Version 3 (Questions B-40 through B-45):

<http://www.ed.gov/about/offices/list/ovae/pi/cte/perkins-iv-version3.pdf>.

For the AEFLA program, *see* the Office of Vocational and Adult Education's Program Memorandum, "Guidance for Revisions in State Performance Levels For Vocational and Adult Education" at the following Web address:

<http://www.ed.gov/policy/sectech/guid/cte/progmemo200201.html>.

III. Federal Student Aid (FSA) and Other Postsecondary Education Issues.

This section discusses the waivers and other forms of relief the Department may provide to postsecondary institutions and other postsecondary program participants (institutions)

regarding federal education requirements during an H1N1 outbreak that disrupts the functioning or delivery of educational services.

A. General Questions.

A-1. How should institutions prepare if an H1N1 outbreak disrupts the delivery of educational services?

The Secretary encourages institutions to develop alternatives for the delivery of educational programs in the event of an H1N1 outbreak. These alternatives could include creating or expanding distance learning opportunities, either through existing institutional capacity or through agreements with other institutions. Any written agreements with other institutions should be put in place as soon as possible so that they are available to address the needs of students, including students with disabilities. The requirements for these types of agreements for purposes of FSA programs can be found in 34 C.F.R. § 668.5 of the Student Assistance General Provisions regulations.

Because the ADA and Section 504 also prohibit discrimination on the basis of disability, institutions that receive federal financial assistance or that are covered by the ADA must ensure that students with disabilities have equal access to educational opportunities. This includes plans for distance learning. Institutions should prepare strategies to ensure that students with disabilities have equal access to these programs.

Institutions should have plans ready to serve all students residing on campus, or if the campus itself is used for other purposes by the state or local community. Institutions should prepare strategies in advance for such logistical issues in order to maintain operations to the maximum extent possible. Emergency preparedness and emergency response programs must also be accessible to individuals with disabilities. For additional information, *see* “An ADA Guide for Local Governments: Making Community Emergency Preparedness and Response Programs Accessible to People with Disabilities,” available at the following Web site:

<http://www.ada.gov/emergencyprepguide.htm>.

A-2. What should an institution do if it is unable to properly administer its federal student assistance programs under Title IV of the Higher Education Act of 1965 (HEA) due to an H1N1 outbreak?

If an institution determines that it is, or will be, unable to properly administer its Title IV programs (including continuation of its educational programs) as a result of an H1N1 outbreak, it should immediately contact for further guidance its FSA School Participation Team in the Department whose phone number can be found at the following Web address:

<http://ifap.ed.gov/ifap/helpContactInformationDetailedList.jsp?contactname=School%20Participation%20Teams>.

A-3. What steps should institutions take if incoming freshmen are unable to complete high school graduation requirements due to an H1N1 outbreak that disrupts the functioning or delivery of educational services?

Under institutional eligibility requirements for the Department's postsecondary education programs (34 C.F.R. §§ 600.4(a)(2), 600.5(a)(3), and 600.6(a)(2)), institutions must admit as regular students only persons who have a high school diploma, have the recognized equivalent of a high school diploma, or are beyond the age of compulsory school attendance in the state in which the institution is physically located. Accordingly, institutions are strongly encouraged to consult with the high school the student was attending to best address a plan for the student to receive the high school diploma or its equivalent. The Department recognizes this may be a difficult task, particularly for students attending high school in a different state from the state in which the institution is located; however, officials at the high school will be the most aware of any modifications or waivers provided by the SEA or LEA.

B. Accreditation and Institutional Eligibility.

B-1. What if an institution's accreditation is up for renewal during an H1N1 outbreak and the accrediting agency cannot complete its work on time?

The Secretary urges accrediting agencies to establish reasonable written policies to extend accreditation or pre-accreditation in the event of an H1N1 outbreak. Generally, the Department will consider policies granting six-month extensions of accreditation or pre-accreditation due to expire within three months of an H1N1 outbreak as reasonable and consistent with good practice. For institutional eligibility purposes, the Department will accept reasonable extensions of accreditation or pre-accreditation even if granted by an agency that lacks a plan for addressing an H1N1 outbreak.

B-2. What if an institution's certification to participate in the FSA program expires and cannot be submitted because of an H1N1 outbreak?

The Department will consider extending the institution's Program Participation Agreement for up to six months if it expires within three months of an H1N1 outbreak.

C. Administration of Federal Student Aid.

C-1. What if an institution closes for several weeks during an academic year and it is not possible to reschedule instructional time?

If, as a result of an H1N1 outbreak, institutions are temporarily closed for a period of time that impacts the length of their academic year, the Department, through the FSA School Participation Team, will assist such institutions to determine the continued eligibility of their programs and their students for HEA Title IV assistance. The Secretary may permit institutions

with academic years of 30 weeks or longer to shorten their academic years to not less than 26 weeks, on a case-by-case basis under section 481(a) of the HEA, and 34 C.F.R. § 668.3.

C-2. What can an institution do to mitigate the impact that an H1N1 outbreak may have on the financial aid that students receive?

To reduce the impact that an H1N1 outbreak may have on student financial aid, the Department suggests the following:

• **Professional Judgment:** Section 479A of the HEA specifically provides the financial aid administrator (FAA) the authority to use professional judgment to make adjustments to the cost of attendance or to the values of the items used in calculating the Expected Family Contribution (EFC) to reflect a student's special circumstances. The Secretary encourages FAAs to use professional judgment in order to reflect more accurately the financial need of students and families affected by an H1N1 outbreak. The use of professional judgment is discussed in the Department's FSA Handbook, which can be accessed at the following Web address:

<http://ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&awardyear=2008-2009>.

• **Refunds and Re-Enrollment:** The Department strongly encourages institutions to provide a full refund of tuition, fees, and other institutional charges, or to provide credit in a comparable amount against future charges, for students who withdraw from school as a direct result of an H1N1 outbreak. The Department also urges institutions to consider providing easy and flexible re-enrollment options to such students.

• **Satisfactory Academic Progress:** When a student fails to meet the institution's satisfactory academic progress standards due to an H1N1 outbreak, the institution may apply the "other special circumstances" exception provision in 34 C.F.R. § 668.34(c)(3) of the Department's Student Assistance General Provisions regulations.

• **Return of Title IV Funds:** If a student withdraws from school because of an H1N1 outbreak, the institution must perform the return of Title IV funds calculations in accordance with 34 C.F.R. § 668.22, as it must for any student who withdraws (*see* Treatment and Return of Federal Student Aid (34 C.F.R. § 668.22)).

• **Late Disbursements:** The Department's disbursement regulations allow, under certain conditions and within certain timeframes, for a late disbursement of Title IV funds when the late disbursement was not the fault of the student. These regulations would permit a disbursement of Title IV funds to accommodate students affected by an H1N1 outbreak (*see* Late Disbursements (34 C.F.R. § 668.164(g))).

C-3: What relief from the requirements in the Student Assistance General Provisions regulations will the Department provide to institutions?

If appropriate, the Department may provide the following relief to institutions:

• **Cash Management:** The Secretary will work with institutions affected by an H1N1 outbreak to address specific problems arising from regulatory requirements regarding credit balances, notices and authorizations, excess cash, and the handling of Federal Family Education Loan Program Fund Proceeds (*see* Cash Management (34 C.F.R. part 668, subpart K)).

• **Campus Security Report and Equity in Athletics Disclosure Report:** If an institution is unable to provide the Department with its Annual Campus Security Report or its Equity in Athletics Disclosure Report by the established deadlines because its administrative capability is directly impacted by an H1N1 outbreak, the Department will consider adjusting the reporting deadlines (*see* Campus Security Reporting and Equity in Athletics Disclosures (34 C.F.R. § 668.41)). This also includes the dissemination of Campus Crime reporting to the school's community by October 1 of each year.

• **Student Status Confirmation Reports and Other Enrollment Reporting:** If an institution is unable to complete and return a Student Status Confirmation Report to the National Student Loan Data System (NSLDS) according to the established schedule as a direct result of an H1N1 outbreak, it must contact NSLDS Customer Service at 1-800-999-8219 to modify its reporting schedule.

C-4: What administrative relief can the Department provide to institutions regarding campus-based programs?

Section 413D(d) of the HEA penalizes institutions for underutilization of their campus-based funding. Section 413D(d)(2) of the HEA, however, authorizes the Secretary to waive this penalty for an institution if enforcing the reduction would be contrary to the interest of the program. The Secretary will consider the failure of an institution to expend funds due to an H1N1 outbreak as an appropriate basis for granting a waiver (*see* Allocation Reduction Due to Underutilization (34 C.F.R. § 673.4(d)(3))).

The HEA also requires an institution to use at least seven percent of the total amount of its Federal Work Study (FWS) allocation to compensate students employed in community service (42 U.S.C. 2753(b)(2)(B)). The Secretary may waive this requirement if the Secretary determines that enforcing it would cause a hardship for students at the institution. The Secretary will consider the failure of an institution to expend at least seven percent of its FWS allocation for community service due to an H1N1 outbreak that disrupts the functioning or delivery of educational services as an appropriate basis for a waiver (*see* Community Service Expenditure Requirement (34 C.F.R. § 675.18(g))).

In addition, the Secretary will consider extending the Fiscal Operations Report and Application to Participate reporting deadlines if an H1N1 outbreak affects an institution's ability to meet these required reporting deadlines.

C-5: What administrative relief can the Department provide to institutions and/or loan holders regarding enrollment reporting requirements?

The Secretary will consider that any borrower who maintains an "in-school" status but is unable to complete course requirements or enroll in classes because of an issue caused by an H1N1 outbreak will maintain his or her "in-school" status during the relevant period of nonattendance until the borrower withdraws or re-enrolls in the next regular enrollment period (whichever is earlier). The relevant period of nonattendance should not require a borrower to enter or use any of his or her grace period.

This guidance does not affect the way an institution should report a borrower's enrollment status on its Student Status Confirmation Report (SSCR).

C-6: What administrative relief will the Department provide to institutions regarding the Direct Loan program?

Generally, institutions are required to submit the Direct Loan promissory note, loan origination record, and initial disbursement record for a loan to the Secretary no later than 30 days following the date of the initial disbursement of the loan. In the event of an H1N1 outbreak, however, the Secretary, through the appropriate FSA School Participation Team, would take steps to address an institution's concerns about meeting these deadlines on a case-by-case basis (*see* Submission of Promissory Note, and Loan Origination and Disbursement Records (34 C.F.R. § 685.301(e))).

C-7: What administrative relief can the Department provide to institutions regarding the Federal Perkins Loan program?

In the event of an H1N1 outbreak, the Secretary, through the appropriate FSA School Participation Team, will consider addressing concerns about the billing and collection activities required on a case-by-case basis (*see* Borrowers in Default-Due Diligence (34 C.F.R. § 674, Subpart C)). If an institution contracts with a third party servicer for this activity, that billing and collecting service of prior year borrowers should continue. The Secretary, through the appropriate FSA School Participation Team, will also consider addressing, on a case-by-case basis, concerns about borrowers in initial and post-deferment grace periods (*see* Borrowers in Initial or Post-Deferment Grace Periods (34 C.F.R. § 674.42)).

The Secretary will consider authorizing the institution to grant forbearance, for a period not to exceed three months, to a borrower who is in repayment, but is unable to continue to repay the loan due to the pandemic. A borrower may request this forbearance orally, or in writing, and would not be required to submit documentation to be considered eligible for this forbearance. This period of forbearance would be counted toward the three-year maximum limit on the number of years of forbearance that may be granted to a borrower. In order to receive forbearance beyond the three-month period, the borrower would have to make a written request to the institution and provide supporting documentation (*see* Borrowers in Repayment (34 C.F.R. § 674.33)).

C-8: What administrative relief can the Department provide to institutions and/or loan holders regarding enrollment status requirements for Federal Family Education Loan (FFEL) and Direct Loan borrowers?

In accordance with the Department's regulations, loan holders may grant an administrative forbearance to borrowers who have been adversely affected by an H1N1 outbreak. The holder may grant forbearance for up to three months and must document the reasons why it granted the forbearance, but does not need to obtain supporting documentation or a signed written agreement from the borrower (*see* Administrative Forbearance (34 C.F.R. §§ 682.211(f)(11) and 685.205(b))). The Secretary believes that it is in the best interest of the student loan programs to consider each Federal Stafford or PLUS loan that is in an "in-school" or in an "in-school" deferment status on the date the borrower's attendance at the institution was interrupted due to an H1N1 outbreak to be in an "in-school" status. Each loan should continue in that status until the borrower withdraws or re-enrolls in the next regular enrollment period, whichever is earlier. This period of pandemic flu-related nonattendance should not result in a borrower entering or using any of his or her grace period on the loan (*see* Converting the Borrower to Repayment (34 C.F.R. §§ 682.209(a) and 682.210)).

The Secretary will treat Direct Loan borrowers in accordance with the administrative forbearance guidance provided in the FFEL section above.

C-9: What should guaranty agencies and lenders do with loan proceeds that have not been disbursed?

The Secretary authorizes lenders not to disburse loan proceeds to institutions affected by an H1N1 outbreak, according to the originally established disbursement schedules, if the lenders have been informed that an institution has delayed opening for a scheduled term or has ceased operations for an undetermined period of time. Lenders should wait for revised disbursement schedules from the affected institutions. Institutions also are urged to request revised disbursement dates.

The Secretary will instruct guaranty agencies and lenders to revise information on loan periods, graduation dates, and so forth, on the loan records related to these disbursements as the information becomes available. This instruction means that a borrower need not reapply for the loan. This will allow a student to receive his or her loan proceeds according to a schedule that fits the institution's adjusted academic schedule.

C-10: What administrative relief can the Department provide institutions regarding the Federal Pell Grant, Academic Competitiveness Grant, and National SMART (Science and Mathematics Access to Retain Talent) Grant disbursement records?

Normally, an institution must submit to the Department a Federal Pell Grant, Academic Competitiveness Grant, and National SMART Grant disbursement record for a student not later than 30 calendar days after the institution makes a payment to the student. In addition, if the institution becomes aware that a previously reported payment or expected payment for a student is no longer accurate, the institution must submit an accurate disbursement record for that student to the Department not later than 30 calendar days after becoming aware of the need to make the

change. The Secretary will consider revising these deadlines in the event of an H1N1 outbreak (*see* Deadline for Reporting Disbursement Records (34 C.F.R. §§ 690.83 and 691.83)).

IV. Administrative Grant Requirements.

This section discusses the waivers and other forms of relief that the Department may provide to states, SEAs, LEAs, postsecondary institutions, and other grantees regarding federal grant requirements in the event of an H1N1 outbreak.

A. General Questions Regarding Grants.

A-1. How will the Department communicate with the grants community during an H1N1 outbreak?

In the event of an H1N1 outbreak, grantees should review the Department's Web site (<http://www.ed.gov>) to obtain information related to the programs under which they have awards, as well as information about procedures the Department has implemented to streamline the grants application, operation, and revision process. Grantees may also seek guidance from their Department project officers, but should recognize that these individuals may not be available during an H1N1 outbreak. The Department's Web site will provide general contact information for grantees that are unable to reach their project officer.

A-2. Will the Department continue to award grant funds?

To the extent practicable, and as resources permit, the Department will continue to award grant funds during an H1N1 outbreak. The Department will make every effort to continue operations as usual, while affording grantees the maximum allowable flexibility in applying for and operating grants.

A-3. How will the Department provide flexibility to entities applying for discretionary grants?

If appropriate and permissible under the law, the Department will consider postponing discretionary grant competitions and extending application and other filing deadlines to address the effects of an H1N1 outbreak. Most funds, however, are made available for a specific period of time and, in most cases, the Department will not have the authority to extend that period of time. Additionally, appropriations acts generally provide funds for specific programs, purposes, and activities. The Department has very limited authority to redirect funds appropriated for one program or purpose to another program or purpose. As conditions warrant, in the event of an H1N1 outbreak, the Department will:

- Ensure that any funds that have been authorized for pandemic relief efforts are awarded to eligible recipients; and
- Determine on a program-by-program basis whether the regular grant competition schedule should be suspended.

A-4. How will an H1N1 outbreak affect a grantee's receipt of funds?

Until a Department official has obligated federal education program funds to a grantee, no binding commitment exists with regard to these funds. If delays in federal obligations are caused by an outbreak of H1N1, the Department staff will work with grantees on the obligations to the extent permitted by law, and warranted by the conditions and effects of an H1N1 outbreak, and consider using the "pre-award period" to negotiate a delay of the grant start-up date, and to authorize pre-award costs.

A-5. Will a grantee be able to draw grant funds to pay for grant activities during an H1N1 outbreak?

The Department is committed to making every effort to have its existing electronic infrastructure available so that grantees can continue to draw funds for allowable grant expenditures that are consistent with their progress on the project. Grantees are cautioned that they should draw down grant funds only at the rate that they are able to carry out grant activities. Grantees should refer to 34 C.F.R. §§ 74.22 and 80.21 for further information.

A-6. What if a grantee has difficulty fulfilling grant activities because it is affected by an H1N1 outbreak?

During an H1N1 outbreak, grantees are expected to notify the relevant Department program office as soon as they are aware of any delays or interruptions of grant project work occurring as a result of an H1N1 outbreak. The Department is committed to working with its grantees to provide them with the maximum flexibility in making changes to project activities that might become necessary as a result of an H1N1 outbreak. Additionally, with regard to formula grant programs, LEAs should work through their SEAs to renegotiate and/or redirect the scope of their work plans, as needed. Grantees should refer to 34 C.F.R. §§ 74.25 and 80.30 for further guidance.

A-7. Generally, is another entity allowed to perform activities related to a grantee's project, if the grantee is unable to do so?

Generally, yes, but such an arrangement would require approval by the Department. As a part of their planning for an H1N1 outbreak, grantees are encouraged to develop a backup plan for the operation of their grants that includes sharing project responsibilities and activities with other entities in the event that the grantee is not able to perform them. When the backup plan needs to be invoked, the grantee should seek approval from the Department to revise the grant in accordance with 34 C.F.R. §§ 74.25 and 80.30. Grant backup plans might include, for example:

- Entering into arrangements and agreements with other organizations in the region to ensure the continuity of grant operations during an H1N1 outbreak, including sharing or loaning of staff, facilities, space, materials, and supplies (contracting work to a third party must receive approval from the Department);

- Shifting various activities and responsibilities to other members of an already approved partnership or consortium; or

- Transferring an entire grant to another entity (such a transfer must be approved and implemented according to Department policies).

For more specific information regarding the transfer of state-administered grants and discretionary grants, see questions A-8 and A-9 below.

A-8. For state-administered grants, is another entity allowed to perform activities related to a grantee's project, if the grantee is unable to do so?

Yes, but states and their subgrantees would continue to be legally responsible for the administration of the grants and subgrants. States have some discretion to make changes to their grants without prior approval by the Department under 34 C.F.R. § 80.30. If a change requires prior approval, however, 34 C.F.R. § 80.30 sets forth the procedures states would need to follow to request prior approval from the Department. The Department will consider these requests on an expedited basis and will generally approve those that are consistent with the state plan or application that was filed and approved by the Department and reasonable in light of the circumstances of the H1N1 outbreak.

A-9. For discretionary grants, is another entity allowed to perform activities related to a grantee's project, if the grantee is unable to do so?

Yes, in limited circumstances a discretionary grant may be transferred from one entity to another. The transfer, however, requires formal approval by the Department, and the grantee must follow procedures to ensure that the grant continues to serve the same or a very similar population, and is of the same scope and meets the objectives as approved by the Department. To ensure that proposed changes are within the scope and objectives of the grant as approved, amendments to grant awards require formal approval by the Department under 34 C.F.R. § 74.25.

A-10. Must a grantee follow the various administrative requirements related to a grant (e.g., meeting reporting deadlines and obtaining administrative approvals) if it is affected by an H1N1 outbreak?

Generally yes, but the Department understands that grantees may need to make administrative changes to grant projects during an H1N1 outbreak. Grantees should be aware that they have flexibility under 34 C.F.R. §§ 74.25 and 75.261 to make some changes without Department approval. Any relief from regulatory requirements provided to all applicants during an H1N1 outbreak will be posted on the Department's Web site.

A-11. In the event that grant-related activities are not being implemented because schools have been closed or staffing resources are not available, will the Department provide relief from meeting evaluation requirements?

Yes, in such cases, the Department would consider modifying the project evaluation requirements, if appropriate; however, once grant activities resume, a proper evaluation of the project must be completed.

A-12. If a grantee is required to provide services to partners, how can these partners receive grant management and grant administrative information needed to maintain their grant-related activities?

Grantees are encouraged to establish communication systems with partner organizations, such as contractors and consortium members, in advance of an H1N1 outbreak. Such planning may require establishing a backup strategy that will be operational in the event of an H1N1 outbreak. Grantees should coordinate such planning with their partners to make sure all affected entities have equitable access to grant-related information.

Grantees can view examples of local plans at the following Web address:

<http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/sampleplans/index.html>.

In addition, grantees also are encouraged to visit federal grant-related Web sites that provide information that may assist a grantee's advance planning efforts, such as:

- The Department of Health and Human Services flu Web site at the following Web address:

<http://www.flu.gov>.

A-13. If a grantee is required to provide equitable services to private school students and teachers, how will private schools be notified of the availability and delivery of such services during an H1N1 outbreak?

Grantees should, during the required consultation process with private school officials under sections 1120(b), 5142(a)(1), and 9501(c) of the ESEA, establish procedures and strategies, including a communication process, that the entity will implement in the event of an H1N1 outbreak. Planning for this effort may require establishing a backup strategy that will be operational in the event of an H1N1 outbreak. Grantees should coordinate such planning with private school officials to make sure that all appropriate private schools have access to information related to federal education equitable services to their private school students and teachers.

A-14. Grantees have specific performance targets that are approved in their applications. Will the Department renegotiate performance targets due to delays in project implementation, school closings, or reduced staff capacity?

Yes. In general, the Department expects grantees to strive to achieve performance targets as stated in their approved grant applications; however, the Department understands that grantees

may experience delays in achieving performance targets due to circumstances beyond their control as a result of an H1N1 outbreak. If necessary, grantees may request approval from the Department to adjust project timelines so that approved performance targets can be met, but at a later date than originally planned. In addition, grantees may exercise the administrative flexibility in 34 C.F.R. §§ 74.25 and 75.261 and initiate a one-time extension of up to one year without prior approval to complete unfinished project activities, and thereby meet approved performance targets in accordance with revised project timelines.

A-15. What does the Department expect with regard to the treatment of institutional employees who are supported by federal higher education grants or other employees paid with federal education program funds?

Institutional employees who are supported with federal grants awarded by the Department, including grants authorized by Titles II, III, IV, V, VI, and VII of the HEA, and the other programs discussed in this guidance such as Title I of ESEA, and IDEA, should be treated the same as similarly situated employees of the institution. In the case of programs serving K-12, federally-funded employees should be treated the same as similarly situated state and locally-funded employees. This means that if the institution's policy or state and local law and policies provide for similarly situated employees to be paid during an H1N1 outbreak, those supported with federal grants would also be paid. These employees should return to the duties for which the grant funds were provided as soon as possible, and to the extent practicable, should work on project activities during the time the school is closed. Employees supported with federal grant funds who are intended to provide direct services to students may maintain contact with students during the period of an H1N1 outbreak using alternative, appropriate methods such as telephone, videophone, and e-mail.

V. FERPA Requirements.

A. Will LEAs and Postsecondary Institutions be permitted to disclose information on affected students to local and state authorities in the case of an H1N1 outbreak?

Yes. FERPA permits school officials to disclose, without consent, education records, or personally identifiable information from education records, to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of the students or other individuals. *See* 34 C.F.R. §§ 99.31(a)(10) and 99.36. This exception to FERPA's general rule of consent is limited to the period of the emergency and generally does not allow for a blanket release of personally identifiable information from a student's education records. Typically, law enforcement officials, public health officials, and trained medical personnel are the types of parties to whom information may be disclosed under this exception to FERPA.

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 individuals that formed the basis for

the disclosure and the parties to whom the school disclosed the information. The record must be maintained with the education records of each student as long as the records are maintained. This requirement enables parents and eligible students who do not provide consent for disclosure of education records to see the circumstances under which and the parties to whom their information was disclosed. *See* 34 C.F.R. § 99.32(a)(5).

The educational agency or institution has the responsibility to make the initial, case-by-case determination of whether an articulable and significant threat to the health or safety of students or other individuals exists, such that the disclosure of personally identifiable information is necessary to protect the health or safety of students or other individuals. However, the Department is available to work with institutions to assist them in making such decisions in order to ensure that the disclosure falls within the exception to FERPA's requirement of prior written consent.

The Department plans to issue additional, more specific guidance regarding FERPA-related issues that may arise during an H1N1 outbreak. School officials may also contact the Family Policy Compliance Office with any additional questions about FERPA by calling (202) 260-3887 or by emailing FERPA@ed.gov.

VI. Distribution of Flu Vaccine at School Facilities.

A. General Questions.

A-1. Can LEAs or school officials be held liable if an injury occurs while the flu vaccine is administered on school property?

In general, no. The Public Readiness and Emergency Preparedness Act (the "PREP Act") authorizes the Secretary of the Department of Health and Human Services (the "HHS Secretary") to issue a declaration that generally provides LEAs and its employees, among others, immunity from legal (*i.e.*, tort) liability for claims that result from administration of the flu vaccine on school property. However, as discussed in the response to question A-2 below, an LEA or school official can be liable for "willful misconduct."

On June 15, 2009, the HHS Secretary declared that the 2009 H1N1 influenza (and resulting disease) constituted a public health emergency under the PREP Act. This declaration will provide immunity (except with regard to willful misconduct) to LEAs and their employees that allow their school facilities to be used as vaccine administration sites.

A-2. Are there any limitations on immunity from liability?

Yes, but only where death or serious physical injury (the basis of the lawsuit) is caused by an LEA or its employees' "willful misconduct." For this purpose, a serious physical injury is life-threatening, or results in or requires medical or surgical intervention to preclude permanent impairment of a body function or permanent damage to a body structure.

The LEA and an individual employee, such as a school official, who would ordinarily be protected under the PREP Act can be sued and held liable if he or she intentionally causes death or a serious physical injury to another person while the vaccine is being administered on school property. In order for there to be “willful misconduct,” all three of the following conditions must exist: the LEA or school official acts (1) intentionally to achieve a wrongful purpose; (2) without justification; and (3) in disregard of a known risk that was so great as to make it highly probable that the harm would outweigh any possible benefit.