



## Legal Update: Public Records Request and Arizona Attorney General Opinion

We know you are all very busy right now, but we wanted to call your attention to two new matters that you may have encountered or might encounter soon.

**Public Records Request.** First, yesterday several of our charter school clients received a public records request from Maria Polletta, a reporter for the Arizona Center for Investigative Reporting. The request asks for "Discipline and Absence Data" for the past five school years, broken down by demographic subgroups. If you have received this request, know that you are not alone; it appears to have been sent to most school districts and charter schools. Although you do need to respond to the request, we wanted to remind you of a few things to guide your response:

- Prompt Response:** Arizona's public records law requires you to respond "promptly," but whether a response is prompt or not is situation specific and depends on the other demands being placed on your school staff. We suspect that given the other issues you are facing right now, it may take you some time – at least one month, and perhaps longer – to gather, review, and redact the requested document for five school years. But again, what is "prompt" for your school may be different from another school.
- No Document Creation:** You do not have to create documents to respond to the request. You only need to provide the documents that you already have. If you do not have data that is "broken down by demographic subgroup," as Ms. Polletta has requested, you do not need to create it.
- FERPA Issues:** It is likely that your documents will contain student information. You therefore must redact all student personally identifiable information from the documents pursuant to FERPA and Arizona law. To redact the information, you may simply black it out, but make certain that you do so in a way that does not allow Ms. Polletta or others to "undo" your work and see the information.
- Costs:** Because the request is for a noncommercial purpose, you cannot seek reimbursement for your staff time to gather, review and

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redact the documents. If you provide “hard copies” of documents, you can charge a nominal fee (typically 25 cents per page) for the documents. However, Ms. Polletta has requested electronic copies of the documents, so if you can provide them in that format, you should.

If you are a firm client, we have prepared a draft initial response to the public records request that you can use to acknowledge the request. In addition, we are going to work with school district lawyers in the coming weeks to determine whether we can jointly request revisions to narrow the request. Please let us know if you are interested in our initial response, if you would like to be informed about any joint request to narrow the records request, and/or if you would like our assistance with other issues related to the records request.

**Arizona Attorney General’s Opinion.** Second, on December 17, 2021, the Arizona Attorney General issued a new opinion relating to due process protections for students who are excluded from school after exposure to COVID-19. Ariz. Att’y Gen. Op. 121-009. The Opinion addresses rights of individuals who are subject to a quarantine order issued by a local health department, which are outlined in A.R.S. § 36-789 and include being provided with an attorney at “state expense.” State Senator Kelly Townsend asked the Attorney General for an opinion regarding whether “the requirement to appoint counsel appl[ies] to quarantined or isolated students sent home from a school due to potential exposure to COVID-19[.]”

The Opinion notes that many school districts have been using a form letter provided by local county health departments to exclude students from campus when they have been exposed to COVID-19. The Attorney General determined that if a school uses one of these letters or otherwise relies on an isolation or quarantine protocol established by a county health department pursuant to A.R.S. §§ 36-788 and -789 to quarantine a student and the student challenges the quarantine order, then A.R.S. § 36-789(M) requires that a court appoint counsel for the student/the student’s parents at “state expense.”

The Opinion does not specify what “state” entity would be responsible for the cost of the attorney, and thus, it is unclear whether public schools – either school districts or charter schools – would be considered the “state” in this context. However, we believe that there are good arguments that the county health department would bear the responsibility for providing any due process that is required for quarantined individuals, including the right to an attorney at state expense. However, because the language of the Opinion and the question prompting it are vague, parents may try to argue that the school has taken on the due process responsibilities by acting on behalf of the health department.

Instead of relying on the county health department’s quarantine authority, you may instead consider relying upon your school’s health and safety policy that would apply to any situation in which a student is or may be ill at school. Actions under such policies typically exclude ill or potentially ill students from campus, but they do not require students to isolate in their homes, which is authority given to a local health department. In addition, if your governing board has approved an Instructional Time Model, consider whether you can offer students remote instruction while they are excluded from campus. Each of these actions may provide you with additional facts to rebuff an attempt by a parent to require you to pay for their attorney if they challenge a request to keep their child home because of COVID exposure.

Of course, what to do in a given situation can be very fact specific. Please contact us if you encounter this issue, or if you have any questions regarding what the Opinion means for your school.

