

# EDUCATION PRACTICE COVID-19 UPDATE AND FAQ

*Hodgson Russ Education Alert*  
March 23, 2020

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As school district leaders continue to work through the unprecedented and ever-evolving impact of the COVID-19 pandemic, Hodgson Russ is dedicated to providing you with the most up-to-date legal analysis and practical guidance to assist you in making critical decisions for your school community. We have a team of attorneys dedicated to supporting school districts in making the critical decisions necessary to safe-guard the school community and protect the District's interests. We will continue to keep you apprised of legal developments relating to COVID-19 and its impact on school district operations. Below, in question/answer format, are some of the issues that have arisen over the past few days, with analysis that we hope will be useful to you. We will continue to add to this document and share information as it becomes available. Please feel free to email any member of our Education Practice team if you need additional information.

- **BOARD GOVERNANCE UPDATED 3/23/2020**

## BOARD GOVERNANCE

### **What legal authority is the Governor operating under?**

On March 7, 2020 Governor Cuomo signed Executive Order Number 202, declaring a State of Emergency in New York. This power provides the Governor the ability to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, of **any agency** if compliance would prevent, hinder, or delay action necessary to cope with this emergency.

### **When the school closes, what leave days must be used first?**

Pursuant to Executive Order Number 202, districts must first exhaust any available time including snow days and vacation days when closing.

### **Does the current Executive Order contain any other requirements applicable to schools?**

Yes, arrangements must be made to ensure meals to students in need, critical education supports, and distance learning options. In addition, Executive Order 202.4, issued 3/16/2020, requires that school districts develop a plan for alternative

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instructional options, distribution and availability of meals, and child care, with an emphasis on serving children of parents in the health care profession or first responders who are critical to the response effort. Districts must submit such a plan to SED for review, although no deadline date for submission is established in the Executive Order except for certain school districts in the greater New York City area. The expectation is that SED will provide further guidance on the scope and elements of such plans, including with regard to the child care component.

### **Must the school board still meet?**

During this pandemic, school boards must continue their governance and oversight roles, meeting at least once in each quarter. If your upcoming board meeting agenda does not contain critical items, the board may consider cancelling the meeting. However, at some point, the board will have to determine how future meetings will be conducted. Governor Cuomo issued Executive Order 202.1. Contained in that Order is a provision regarding Article 7 of the Public Officers Law which includes Open Meetings requirements. The Board is now permitted to meet and take such actions as authorized under law without permitting public in-person access to meetings. Additionally, these meetings may be held remotely by conference call or similar service. If you choose to conduct your meeting this way, the public must be able to view the meeting or listen to it. Furthermore, the meeting must be recorded and transcribed.

### **How quickly does the District need to respond to a request for information under the Freedom of Information Law (FOIL) during the Coronavirus outbreak?**

School districts generally must acknowledge receipt of a request for information within five business days and grant or deny access to the requested information within 20 business days. However, when a district knows that it will not be able to grant or deny access within 20 days, a district can extend the time for a response for a reasonable period of time in consideration of the surrounding circumstances—which would include consideration of the unprecedented obstacles facing local school districts over the next several weeks.

Thus, we recommend stating that, “Given schools are not in session and with the COVID-19 pandemic, we anticipate responding to this request by \_\_\_\_\_. This timetable may change given the current state of affairs. We will keep you apprised of any necessary changes.”

### **Should schools move forward with sending the required notices for the upcoming budget vote?**

In short, yes. This year, the annual budget vote and school board election is scheduled to occur on May 19, 2020. As a result, school districts must publish the first of four legal notices of the vote between March 31 and April 4. Neither the New York State Education Department nor the Governor has released any information regarding whether the timelines and strict requirements for this vote will be lifted given the ongoing state of emergency and school closures. Therefore, we recommend that schools continue to prepare the required notices unless specifically directed otherwise by the State Education Department and/or Executive Order.

We do note that the Governor has made modifications to the Election Law that apply to other types of elections. For example, a recent executive order allows voters to apply for an absentee ballot electronically and extends the deadline to apply. It also reduces the required number of signatures for petitions. Although these changes do not apply to the upcoming budget vote, they do shed light on possible modifications that may be made in the upcoming weeks.

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### **How do I notarize documents during the school closure if I am a certified notary?**

The Governor has authorized through Executive Order 202.7 that notarizations may be performed utilizing audio-video technology through April 18, 2020, provided the following conditions are met:

- The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;
- The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing);
- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;
- The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The Notary may repeat the notarization of the original signed document as of the date of execution provided the Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.

### **Do you legally bind the district if you sign a document electronically?**

Yes. Under the Electronic Signatures Act, contracts and other documents signed electronically have the same weight as those executed on paper. This can be very helpful in situations where you need to sign a document and you may not be at the same location as one another. If you are going to execute a document using this method, we recommend indicating the following on the document: *The parties acknowledge this document is being signed electronically.*

## INSTRUCTIONAL SUPPORT

### **Are schools required to meet the 180-day instruction requirement?**

No. Governor Cuomo's suspension of the 180-day instruction requirement applies to all closures between now and April 1, 2020. As we approach April 1<sup>st</sup>, the state will reassess whether to extend the state-mandated closure and the suspension of the instruction requirements. Schools that choose to remain closed beyond any period of mandated closure will not be exempted from the 180-day rule.

### **Should districts forgo distance education programs for their general education students because they can't remove barriers for students with disabilities to participate?**

No. Districts must make their own decisions concerning the implementation of instruction that takes into consideration the health, safety, and well-being of students and staff. The Covid-19 outbreak has significantly disrupted building based instruction and OCR/OSERS recognize these exceptional circumstances. If a district chooses to offer distance education programs it may do so even if it can't remove all the barriers for students with disabilities to participate. However, be mindful to ensure students with disabilities receive meaningful instruction.

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### **May the 3-8 state assessments still be held?**

No. On March 20, 2020, the State Education Department announced that the elementary and intermediate level state assessments have been suspended for the remainder of the school year. The suspension applies to the following state testing programs:

- NYS Grades 3-8 English Language Arts Test;
- NYS Grades 3-8 Mathematics Test;
- NYS Grade 4 Elementary-Level Science Test;
- NYS Grade 8 Intermediate-Level Science Test;
- NYS English as a Second Language Achievement Test (NYSESLAT) – Grades K-12;
- NYS Alternate Assessment (NYSAA) for students with severe cognitive disabilities in Grades 3-8 and high school.

### **Are schools required to submit plans to the State Education Department relative to continuity of instruction and operations during the extended school closure?**

Yes. Schools were required to develop and submit to SED a plan with the following three components no later than 5:00 p. m. on March 19, 2020:

- Alternative instructional options for students (e.g. distance learning);
- Distribution and availability of meals to students;
- Child care, with an emphasis on serving children of parents in the health care profession or first responders (Schools are being encouraged to do the best they can with this component given the lack of concrete parameters. This issue is very unique and the Governor's Office has indicated that they are working with the Office of Child and Family Services in this regard. They are looking at school facilities and the appropriate staffing for these programs as well – perhaps even with school staff upon consultation with local unions – to ensure that critical healthcare providers and emergency responders in your area have access to childcare during this pandemic. We expect further guidance to be forthcoming).

These plans may be amended or modified by the State Education Department, in consultation with the Department of Health and Office of Children and Family Services at any time. Instructions for submission of plans can be found in the following memo recently released by the State Education Department:

<http://www.p12.nysed.gov/sss/schoolhealth/schoolhealthservices/coronavirus/nysed-covid-19-third-guidance-3-17-20.pdf>

### **What are the five critical elements to a continuity of instruction plan?**

Critical elements of a plan include 1. Equity and availability to all students 2. Designing for the unique needs of all students 3. Supporting system orientation/preparation 4. Accessibility for all students 5. Preparing for short and long term closures. NYSED has specific guidance in each of these areas at: <http://www.nysed.gov/edtech/continuity-learning>

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### **Will students still be able to take Regents' examinations upon school re-opening?**

Based on the preliminary conversations that we have had with the State Education Department, if and when school reopens this school year, the traditional seat time requirements may be waived for students, such that they are still able to take the necessary Regents' examinations.

### **What resources are available to ensure that students receive necessary mental health resources?**

In guidance issued on March 9, 2020, the NYSDOH and NYSED identified some of the following resources to help schools meet the mental health needs of students:

- School Mental Health and Training Center

<https://mhanys.org/programs/schools/>

- Coping with Stress During Infectious Disease Outbreaks

<https://store.samhsa.gov/system/files/sma14-4885.pdf>

- How Do You Talk to Children About Coronavirus? Stay Honest and Simple to Avoid Anxiety

<https://www.usatoday.com/story/news/health/2020/02/28/talking-children-coronavirus-keepsimple-avoid-stress/4906147002/>

## **PERSONNEL**

### **What percentage of your essential staff may be permitted to work at a school facility?**

According to Executive Order 202.4 (issued March 16, 2020), local governments/political subdivisions (including school districts) may operate at no more than a 50% capacity. Executive Order 202.8 (issued March 20, 2020), providing for a 100% workforce reduction for businesses and not-for-profit entities except those providing essential services, does not appear to apply to school districts and other local governments.

### **Who determines which employees are essential and are required to report to or perform work?**

Executive Order 202.4 specifies that the local government (i.e., school district) makes this determination, and there is no contemplation of any bargaining obligation with any union representing affected employees. Accordingly, the Superintendent of Schools should make this determination based on the district's specific needs. Many employee unions are insisting on a memorandum of agreement with regard to this subject. School districts should carefully weigh whether there is any obligation to negotiate an agreement based on the district's staffing decisions, and in any event any such agreement must provide for sufficient flexibility for the district to respond to ever-changing circumstances. Please contact one of the attorneys in our Education group should you need assistance in making this determination.

### **Are teachers or other staff entitled to work from home during a state of emergency?**

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Possibly. As stated above, school districts are only permitted to operate at a 50% capacity currently. While telework is not generally required by law, the CDC and NYS Department of Health are encouraging employers to be flexible and consider telework arrangements to the extent possible as an outbreak control mechanism.

In addition, employees who have underlying medical conditions (i.e., respiratory conditions, immune system disorders, etc.) that make them more susceptible to Coronavirus infection, or increase the likelihood of complications from such an infection, may request significant social distancing or isolation at school or telework. These requests should be processed as requests for reasonable accommodation, and the District should engage in the interactive process. Except where the existence of a disability and need for accommodation are obvious, the District can likely request medical documentation from the employee to support the accommodation request.

### **What accommodations may be necessary for teachers working from home?**

If a teacher requested and was granted an accommodation prior to the recent outbreak of coronavirus, that accommodation should continue to be provided while the teacher is working from home.

Any new requests for accommodations while working from home should be reviewed and evaluated in the same manner the district used prior to the current closure. Such requests may include, but are not limited to, requests for additional equipment or frequent breaks, if offering virtual instruction, for instance.

### **How should the District handle employees who report fear or anxiety related to acquiring COVID-19 at school?**

Although non-essential staff must be permitted to work from home, those employees who are required to report to work may express fear and anxiety related to acquiring COVID-19. If the employee's fear/anxiety is related to a medical condition that renders the employee more susceptible to infection or complications, the matter should be processed as a reasonable accommodation request.

If the employee's fear and anxiety is not related to a medical condition, the district should educate staff on Coronavirus transmission, encourage frequent handwashing and respiratory etiquette, implement social distancing measures, and make cleaning supplies readily available for all employees to use. These efforts should hopefully help reduce staff anxiety levels.

Districts should keep in mind that if an employee refuses to engage in certain work functions (e.g., engaging in large in-person meetings), this could be protected activity for purposes of the Public Employee Health & Safety Act. Districts should take caution before taking adverse action against an employee for this kind of refusal.

### **What protections apply to absences related to the Coronavirus**

Absences related to COVID-19 may be covered by the Family and Medical Leave Act ("FMLA") and new paid sick leave laws. Likewise, if the District has opted in to the New York Paid Family Leave ("NYPFL") law, absences to care for a covered family member with COVID-19 would be protected by that law.

#### FMLA

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Starting April 2, 2020, FMLA leave will be available where the employee or a covered family member has a “serious health condition” related to COVID-19, and when the employee needs leave to care for his or her minor child because the child’s school or place of care has been closed, or the child’s child care provider is unavailable, because an emergency has been declared by a federal, state, or local authority with respect to COVID-19. If FMLA leave is taken to care for the employee’s minor child, the first 10 days of the leave can be unpaid, but the remainder of the leave must be paid in amount equal to two-thirds of the employee’s regular rate of pay.

### **Should schools count the days of school closure during an employee’s FMLA leave?**

At the current time, if the employee would be in a classification that is not doing any work, we would not recommend that schools count the days toward FMLA entitlement. However, if for example, an employee on FMLA leave is a teacher and other teachers are still required to report to provide instruction and/or are working from home in some capacity, schools should count the time toward the FMLA entitlement.

### Federal Paid Sick Leave

The new federal legislation also requires districts to provide two weeks of paid sick leave related to COVID-19. Specifically, sick leave is available when an employee is unable to work (or telework) because:

- The employee is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
- The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is caring for his or her son or daughter (as defined under the FMLA) if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
- “The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.”

### New York State Paid Sick Leave

Under similar state legislation, school districts must provide at least 14 days of paid sick leave during a quarantine/isolation order, paid at the employee’s “regular rate of pay for those regular hours during which [he or she] is absent from work.”

### New York Paid Family Leave (NYPFL)

The qualifying circumstances for PFL have been expanded to include leave taken to “care for a minor or dependent child of the employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.”

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For more information about the new federal and state legislation enacted to address paid sick time and other leave related to COVID-19, please see our prior client alert available at: <https://www.hodgsonruss.com/newsroom-publications-11644.html>

Even if an employee is not covered by or has exhausted FMLA and NYPFL leave, absences related to an employee's own COVID-19 diagnosis or underlying medical condition may be protected as a reasonable accommodation.

It is also important to keep in mind that employees may be entitled to use accrued sick time or other accruals or leave for Coronavirus-related absences or issues, depending on the terms of the District's policies and CBAs.

### **Who will bear the financial burden of providing paid leave?**

While private employers will be reimbursed for 100% of the costs of providing sick leave wages through a tax credit by the federal government, the United States, state governments and local governments are specifically excluded from the tax credit. Currently, there is nothing in place to provide federal, state and local governments, including school districts, with any reimbursement for the cost of the additional paid leave required by the legislation and/or changes discussed above.

Our attorneys in the Education group are ready to assist you with any issues related to an employee's request for leave, reasonable accommodation or any other issues related to personnel matters. However, we encourage you to also carefully consider your Board-adopted policies and relevant CBAs in any decision-making processes.

## **SPECIAL EDUCATION**

### **What accommodations or modifications are schools required to provide to students with disabilities during the period of closure?**

If the school is providing education to its general student population during the period of closure, then it must do so for its students with disabilities, including the provision of a free appropriate public education ("FAPE"). For students with identified needs, the school should make an effort to modify their educational materials to the extent practicable and safe during this crisis.

### **Must the CSE continue to conduct annual reviews?**

Yes. This State of Emergency was announced during the unusually busy Annual Review Period. While this process must continue, we do anticipate a disruption in operation. Our state regulations do not currently allow for alternate participation by the entire CSE, however we suggest you seek written consent of the parent(s) to conduct meetings using alternate technology (i.e. Skype, telephone conference).

### **Is the School required to continue to conduct Evaluations, Assessments of Students?**

To the degree that evaluations or assessments of students are able to be conducted using distance technologies, the School must continue moving forward in conducting these evaluations. However, if an evaluation can only be conducted in person, then the school is not required to perform it at this time.



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### **Is the School required to provide related services to students with disabilities?**

If a school is able to provide related services by telephone or through distance technologies, then there should be an effort to continue providing these services. For example, a speech therapist may be able to provide services by telephone. However, the Department of Education recognizes that some related services, such as physical therapy, where services are tactile and in face therapy, may not be feasible.

### **Upon return to school after closure, what are the school's obligations relative to students with disabilities?**

Generally, schools will be required to make individualized determinations upon reopening as to whether compensatory services for students are necessary, including to make up for any skills that may have been lost. This may require the school to convene additional meetings, evaluations and/or assessments. However, this may not be required if the school is able to provide the special education and related services identified in the student's individualized education program ("IEP") during the extended closure.

### **Have the timelines for an impartial hearing been adjusted?**

Somewhat, the State Education Department has reminded impartial hearing officers about requests for extension of the timelines and how those are handled. Additionally, the Department reviewed alternative methods for participation in the hearing process.

### **What if any on-going obligation to provide dual enrollment special education (IESP services) exists for students where a non-public school is closed?**

During school closures caused by the Coronavirus outbreak, in providing continuity of learning, school districts have a responsibility to ensure that students with disabilities have both equal access to the educational opportunities provided all students and access to free appropriate public education. School districts must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's individualized education program (IEP). Students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents must be provided special education services pursuant to an individualized education services program (IESP) by the district of location, to the greatest extent possible, on an equitable basis as compared to other students with disabilities enrolled in the public school with an IEP.

**Do Districts of Location remain responsible for providing IESP services when non-public schools are closed? Yes**

**Alternatively are students expected to reenroll and be serviced by their District of Residence? No**

Hodgson Russ remains on top of these circumstances as they develop. Our attorneys are working remotely, and ready, willing, and able to address the needs of our clients, so do not hesitate to contact us (attorney directory). **Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.**

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If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications.html>.

