



## Legal considerations related to Ohio's school closure

March 13, 2020

(current as of March 13, 2020, 9:00 a.m.)

On Thursday, March 12, 2020, Governor DeWine announced that all K-12 schools in Ohio will be closed for a period of three weeks, from March 17, 2020, through April 3, 2020. The governor also stated that schools should work to provide education through alternative means and that "staff members should continue to report to work as directed by administrators." Guidance from the Ohio Department of Education is expected soon.

Based upon Governor DeWine's comments, as well as current circumstances, Bricker & Eckler's education attorneys have prepared the following preliminary guidance for Ohio public schools. Readers should understand that information is continually changing and that each school district has its own unique dynamics to consider. In addition, there will be secondary issues that arise as well as new issues when school resumes.

### GENERAL OPERATIONS

#### Overview

Extended closure of school due to communicable diseases may be a contingency for



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which your board has already adopted a policy to address. For example, districts may have the following policies that apply to portions of your response plan:

- Continuity of Organizational Operations Plan
- Crisis Intervention
- Control of Casual-Contact Communicable Diseases
- Direct Contact Communicable Diseases

Districts may wish to review applicable board policy and the accompanying administrative guidelines to ensure that the district's action plan coincides with established board policy.

The Ohio Department of Education (ODE) has committed to providing guidance and waiving some existing requirements. (Stay tuned for that guidance and relief in the coming days.)

Does the district have contact information for relevant emergency response agencies and other third parties vital to district operations?

The district may wish to have a written contingency plan and established contacts between designated administrators and local law enforcement, fire, EMS, the health department and those vendors necessary to continue district operations. In addition, a designated spokesperson to the school community and media is advisable. Some districts have developed social media or webpages dedicated to coronavirus-related updates.

#### STUDENT INSTRUCTION AND SPECIAL EDUCATION

How much instruction is a district required to provide?

Ohio law requires districts to be "open for instruction with pupils in attendance, including scheduled classes, supervised activities, and approved education options" each school year for a minimum of 455 hours for half-day kindergarten, 910 hours for all-day kindergarten and grades 1-6, and 1001 hours for grades 7-12 between July 1 and June 30 of each school year. Given the governor's statement that the closure is scheduled "at least" through April 3, it is certainly conceivable that the closures could be extended much longer. While most districts have a significant cushion in their scheduled school hours, the COVID-19 closure may impact whether districts are able to meet this ODE will be addressing issues such as a waiver of the minimum hour requirement, so stay tuned for updated guidance.

Are districts required to provide continued learning opportunities when schools are closed?

No. Districts are under no obligation to provide alternative learning opportunities when the school buildings are closed, as long as they meet the minimum hour requirements under the statute by the end of the school year. If a district ceases to provide services to slow or stop the spread of coronavirus and does not provide any



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educational services to the general student population, then it would not be required to provide services to students with disabilities during that same time period. (See <https://www2.ed.gov/policy/special-ed/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.) However, this may not be an option if closure is as long term as Governor DeWine has signaled might be a possibility. Ohio law does not adjust minimum hours for periods of calamity, so if schools remain closed for an extended period of time, districts will have to find alternative ways to deliver educational services, unless the minimum hours requirements are changed.

What options does a school district have for continued learning during the closure?

Districts certainly do not want to disrupt learning any more than absolutely necessary. Many districts are already moving toward offering alternative learning options in an effort to provide continuity to their students. In Governor DeWine's announcement, he expressed his appreciation to all administrators and educators for the "extraordinary efforts they will take to continue offering services during this time," which seems to suggest an expectation that districts will provide educational opportunities while schools are closed.

There are no guarantees that such efforts will satisfy the minimum hour requirements absent legislative action modifying or waiving the statutory mandates. Districts that are evaluating alternative learning opportunities will want to consider at home learning with "blizzard bag"-like options and/or digital/distance learning options, to the extent these options have not already been board approved. These options are not without additional challenges. If virtual learning is offered, a district will need to determine a reliable method of tracking student attendance and engagement. In addition, virtual learning may not be a viable option for some students who do not have devices or internet access. Even students who have access to virtual learning may have limitations on their ability to participate: some students may not have access to Wi-Fi at certain times of day; multiple students in one household may be sharing a single device; and/or parents may be using available technology to work from home. Districts may need to consider how these students will be able to access the curriculum and consider options like issuing devices to students, creating community hotspots so that Wi-Fi is available or using telephone conferencing.

If relief is not provided by the state on minimum hour requirements and if alternative learning options are not viable, districts may need to consider extending their school days or year once school is back in session.

#### Special Education Continuation Concerns

As referenced above, on March 12, 2020, ODE issued a Q&A document that provides answers related to the delivery of special education during the coronavirus outbreak. Additionally, it is useful to consult guidance from previous public health incidents, such as the H1N1 influenza outbreak.



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Are districts required to provide special education services and related services during a school closure caused by the outbreak?

The law does not specifically address this situation. However, if a district determines that it is going to continue instruction by offering alternative learning options, the district must ensure the instruction is provided in a way that does not discriminate against students with disabilities. During the school closure, similar to a snow day or other calamity, a district does not have to provide any special education services if the district is not providing instruction or education to other students. While this may be an unlikely option for many districts, it serves as a reminder that if a district is providing any form of instruction to students, it must do so in a manner that does not discriminate against disabled students. In other words, if a district elects to implement alternative learning options, administrators, intervention specialists, and other relevant employees must make sure that students with disabilities on IEPs and 504 Plans have equal access to that option in order to provide the student with the required free and appropriate public education.

Additionally, the USDOE guidance issued March 2020 provides: "IEP teams may, but are not required to, include distance learning plans in a child's IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingent provisions may include the provision of special education and related services at an alternate location or the provision of online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, and may identify which special education and related services, if any, could be provided at the child's home."

What does virtual special education look like?

The short answer is that this, like every other decision in special education, will not be a one-size-fits-all approach and must be individualized based on the identified needs of the student. Some services might be deliverable in a small group online format, via a one-to-one Skype session, or even an instructional conference call. Some modifications and accommodations, such as extended time for assignments, can be offered remotely. Other services, such as one-to-one tutoring or speech therapy could be delivered via video conferencing. However, it may not be possible to virtually deliver some services like "hand-over-hand" assistance, physical prompts, and related services like physical or occupational therapy. In the coming days, we may learn more from ODE about how to deliver these types of services.

What if a district simply cannot provide the appropriate services for a student with a disability?

It is important to remember that this situation is, unfortunately, not business as usual. That means some students with disabilities will not be able to receive the services provided on their IEPs or 504 plans. There is simply no way to replicate all services in a distance or virtual learning environment.

For this reason, districts will need to be aware of the standards for compensatory education. When a student with an IEP or 504 plan does not receive the required services, or when the student misses school for a period of time due to closure, the US DOE guidance of March 2020 provides “the child’s IEP/504 team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up any for any skills that may have been lost.” Services implemented upon returning to normal school operations might include additional tutoring during the school day, sessions before or after school, or an extended year program. During the shutdown, intervention specialists and others should monitor their students’ progress closely and identify which students are most likely to need compensatory education and what those services might look like. It is important to emphasize that, like IEP and 504 services generally, these services need to be determined on a case-by-case basis. A district cannot simply have all students on IEPs and 504 plans stay after school for an extra hour after the district reopens. If services are interrupted and the school is unwilling or unable to provide compensatory services themselves, parents can seek an award of services, or reimbursement for private services they obtain, through administrative and court processes. These awards can be costly for districts, but a proactive approach can minimize that cost.

Will my district need to amend all student IEPs?

It will be important to review each student’s IEP carefully to determine what amendments might be necessary and consider additional amendments if school closures extend more than three weeks. For example, if the length of the 2019-2020 school year is significantly shortened, the team should consider questions like: Are dated benchmarks appropriate? Will the student actually be able to meet the benchmark if the amount of specially designed instruction is less than anticipated at the time the IEP was drafted or delivered in a different format? Will an amendment for extended school year services be needed to address the regression of skills?

Another current unknown is whether a district will need to consider amending the section of the IEP that describes the student’s least restrictive environment (LRE). For most students, their LRE does not contemplate homebound or virtual learning, and we are hopeful that ODE will issue additional guidance on whether a change to virtual learning at home for all students will constitute a change of placement for students with disabilities.

What about all of these upcoming IEP/ETR deadlines?

When school districts faced the H1N1 pandemic in 2009, the US DOE issued guidance in which it stated it would not waive requirements for school districts to evaluate and assess students during school closures. So far, there has been no indication that the US DOE will be waiving the requirements to timely complete IEPs and ETBs.

IEP teams should plan to continue working with parents and students during the school closure, including the completion of necessary assessments. In the case of an ETR, districts may wish to consider if it is possible and appropriate to complete a record review for an ETR.

As for IEP development, under the IDEA, IEP teams are not required to meet face-to-face. Therefore, school districts should evaluate their ability to use teleconferencing and videoconferencing in their efforts to timely complete IEPs. Additionally, it should be remembered that a member of an IEP team is not required to attend a meeting if a district and the parent agree in writing that the person can be excused because the member's area of curriculum or related services is not being modified or discussed. A required team member may also be excused if the parent and the district agree and the team member submits written input into the development of the IEP prior to the meeting. (See 34 CFR 300.)

The district has a facilitated IEP meeting or mediation with an ODE mediator scheduled. Is that still happening?

ODE has indicated that its facilitators and mediators are still conducting these meetings, but they have been instructed not to conduct them in a face-to-face setting through April 10.

#### MEAL SERVICE FOR STUDENTS

Are school districts required to provide meals during the school closure?

No. School districts are not required to provide meal service during school closures.

Given the strict laws and regulations regarding school lunches, what kind of flexibility can schools expect during a closure?

Due to the spread of the coronavirus, the USDA is accepting waiver requests from states that will allow students to pick up their meals from a designated site, such as their local school or another off-campus location, and then take it home. The State Superintendent of Public Instruction announced on March 12, 2020, that the USDA granted ODE's request for schools to provide meals for students to be picked up at school buildings and taken off site. The State Superintendent said, "we're also hoping that they'll approve our ability to deliver meals directly to other locations." More information regarding the waiver is forthcoming from ODE.

What options should districts consider if they choose to provide meals?

Districts in Ohio now have several options, including:

- Implementing strategies to avoid distribution in settings where people might gather in a group or crowd (i.e., drive-through pick up of food)
- Having a limited number of staff prepare "grab-and-go" bagged breakfasts or lunches

- Providing an email or hotline number for parents to call with questions about the meals

In addition, if a further waiver is granted by the USDA, schools may also consider providing meal delivery to students. ODE will update schools regarding this additional waiver with further guidance for schools.

If a district decides to provide meals, must all schools served be in low income areas?

Guidance from the USDA states that “for dismissed schools with 50 percent or more of their enrolled students certified eligible for free or reduced price meals, Schools may develop meal distribution methods in which meals are available to all families with children enrolled in that school, with a focus on serving low income children. For dismissed schools with less than 50 percent free or reduced price enrollment, meal disruption methods must more directly target the households of enrolled children who are eligible for free or reduced price meals. Schools should use current free/reduced price certification information or, if necessary, depending on the timing of the school dismissals, immediate prior year eligibility certifications.” (See USDA Questions and Answers re: Child Nutrition Program Meal Service during COVID-19 Outbreaks, available at [USDA policy memo SP 08-2020](#).)

#### STAFF ISSUES

How do we work with our unions?

Immediately schedule meetings with union leadership, if you haven't already. There needs to be ongoing communication and collaboration. Including union leadership in the discussion early may enhance cooperation. However, you do not want to give the impression that you are negotiating or need to reach mutual agreement.

May we require teaching and nonteaching employees to work?

In his announcement on March 12, 2020, Governor DeWine indicated that staff members “should continue to report to school as directed by administrators.” Unless further orders from the Ohio Department of Health restrict employees' travel or work, it is reasonable to expect that employees can be required to work. Negotiated agreements should be reviewed for any particular restrictions or provisions regarding the topic, and those provisions may need to be discussed with your union representative.

Districts will want to prepare a tentative plan on what needs to be done in the district within in the next week or two, when it will need to be done, and how many staff members or work hours will be required. Districts will want to engage in discussion with unions about who should report and the nature of the work to be performed. Districts may need to make certain decisions without agreement from the union to protect the health and safety of students and/or staff and/or to meet legal requirements for the provision of instruction and services to students, including

special education students. Districts need to be clear and realistic in their expectations and provide employees as much notice as possible. Districts should also try to equalize work load and comply with collective bargaining agreements to the greatest extent possible.

If employees are not required to work during closure, do they have to be paid?

Unless some form of relief is provided, yes. Under Ohio law, teachers must be paid for all time lost when their school is closed due to epidemic or other public calamity and for time lost due to illness for not less than five days annually, as authorized by board policy. Whether teachers are paid for more than five days or have to make the days up is determined at the local level through board regulation and collective bargaining agreements. Similarly, Ohio law mandates that nonteaching employees must be paid for all time lost when their school is closed owing to an epidemic or other public calamity. Again, the number of paid calamity days that do not need to be made up are determined through board policy and collective bargaining agreements. Consistent with any relief or guidance from ODE or the legislature, districts will need to make a decision about whether and how many days to make up.

Who are “essential employees”?

Districts will want to quickly identify employees who are critical to school operations once buildings are closed. “Essential employees” may already be defined in collective bargaining agreements or board policies. If essential employees have not been defined, the district should determine which employees are critical to school operations, including teachers who may need to report to their school building to implement distance learning plans. Staff, whether essential or not, may be reminded of the governor’s proclamation that “all staff should report as directed by administration.”

How do we address employees who must stay home (and cannot report to work) to take care of young, healthy kids who are now home from school?

Districts will want to take the same approach as any other day when teachers/employees are expected to report. However, if possible, districts may want to permit employees to trade shifts or responsibilities to ease the burden of family responsibilities.

Should I be concerned about approaching employment and evaluation deadlines?

Potentially. At this time, neither the legislature nor the governor has announced any relief from the statutory deadlines for evaluations and nonrenewal for staff and administrators. In the near term, districts should examine any applicable collective bargaining agreement and/or board policy which has an evaluation or employment notice deadline and determine if there is an alternative way to meet that deadline/requirement without a staff member being physically present in the school building. Should the district seek to meet a deadline in a collective bargaining

agreement or board policy by alternative means, the district should consult with legal counsel.

What about OTES?

Districts should focus first on those teachers being considered for non-renewal. For non-renewal to be effective, you need to comply with the evaluation requirements. For other teachers, evaluators should try to complete as much of the evaluation process as possible. Hopefully, ODE and/or the legislature will provide some relief from the compliance obligations.

What do we do about contract negotiations?

At the present time, there is no prohibition on meeting for negotiations. Districts will want to adhere to the recommendations from the health department, including practicing good "social distancing," and meeting in rooms large enough for people to not have to be in close proximity. Districts will also want to have hand sanitizer available. For current negotiations, districts might consider whether the immediate downturn in the economy affects the monetary authority previously given, and whether an agreeable delay in negotiations is appropriate.