CAS
August 25, 2020

SHIPMAN & GOODWIN LLP
COUNSELORS AT LAW

# "A BRAVE NEW WORLD"

# OPENING SCHOOL IN THE TIME OF COVID

## A Legal Webinar

Andreana Bellach, Natalia Sieira Millan, and Thomas B. Mooney

Where did the summer go? It's time to open schools, and there are so many questions! The following questions and answers address many common concerns as school administrators, teachers students and parents for opening of school in 2020.

## QUESTION ONE

1. What should I do if a student shows up with a mask exemption? What about a staff member?

## ANSWER TO QUESTION ONE

**Health and safety are the first priority with reopening and providing in-person instruction.**

**Consider developing and publicizing mask protocols for students, including protocols to address mask exemption requests. Protocols should address procedures when students or staff members do not seek exemption in advance of their arrival of school.**

Relevant Requirements/Guidelines

- Adapt, Advance, Achieve (the "State Reopening Plan") Adapt, Advance, Achieve: Connecticut's Plan to Learn and Grow Together (Published June 29, 2020 and Updated August 3, 2020)

- Districts must require the use of face coverings for **all students and staff** when they are inside the school buildings.

- Exceptions (per State Reopening Plan) (pp. 20-21)

    - Anyone who has trouble breathing, or anyone who is unconscious, incapacitated or otherwise unable to remove the mask without assistance
    - Anyone who has a medical reason making it unsafe to wear a face covering

- State Reopening Plan also discusses that students with disabilities may be "unable to wear protective personal equipment, practice social distancing, or adhere to other CDC or CSDE guidelines." The Plan explains that districts should consult with local health department officials and consider (1) environmental modifications, (2) use of alternative face coverings, (3) reduction in class size, (4) assign staff to specific students/instructional environments to limit exposure, and (5) toileting/ADL protocols.

- CSDE FAQ Regarding Reopening K-12 Public Schools, Volume 2 (August 11, 2020), available at https://portal.ct.gov/SDE/COVID19/COVID-19-Resources-for-Families-and-Educators

    - As to the requirement for students to wear masks, the CSDE FAQ explains that schools should "prioritize measures to provide information and education about the importance of mitigation protocols such as mask wearing for students' protection before considering disciplinary measures."

    - The CSDE also explains that it is having "ongoing conversations about appropriate ways to address mask wearing and the securing of medical documentation for those students who request an exception for a medical reason. We will provide parameters before the first day of school."

    - Should a student require an exemption from wearing a mask, the FAQ advises schools "to prepare to engage even more diligent oversight on some of the other mitigating efforts where students have verifiable medical exemptions to the mask requirements."

- CDC - Considerations for Schools (Updated August 21, 2020) https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html#anchor_1597871545636

- Recommends teaching and reinforcing use of masks/face coverings.

- States that wearing masks may be "challenging" for some students and staff, including elementary school students (through 3rd grade), individuals with severe asthma or other breathing difficulties, and individuals with special educational or healthcare needs (examples include intellectual and developmental disabilities, mental health conditions, and sensory/tactile sensitivities).

- Suggests consideration of "adaptations and alternatives whenever possible" and further suggests possible consultation with healthcare providers about wearing cloth face coverings.

- Discusses possible use of face shields that wrap around the sides of the face and extend below the chin as well as hooded face shields.

- Advises against the use of masks with one-way valves or vents to allow air to be exhaled through a hole in the material.

- Executive Order 7-NNN (August 14, 2020) https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7NNN.pdf

  "Effective immediately, any person in a public place in Connecticut, whether indoors or outdoors, who does not maintain a safe social distance of approximately six feet from every other person shall cover their mouth and nose with a mask or cloth face-covering.

  . . .

  Nothing in this order shall require the use of a mask or cloth face covering by anyone for whom doing so would be contrary to his or her health or safety because of a medical condition, a child in a child care setting, or anyone under the age of 2 years. Any person who declines to wear a mask or face covering because of a medical condition shall be exempt from this order and any requirement to wear masks in Sector Rules or other rules issued by the Commissioner of the Department of Economic and Community Development (DECD), but only if such person provides written documentation that the person is qualified for the exemption from a licensed medical provider, the Department of Developmental Services or other state agency that provides or supports services for people with

emotional, intellectual or physical disabilities, or a person authorized by any such agency. Such documentation need not name or describe the condition that qualifies the person for the exemption."

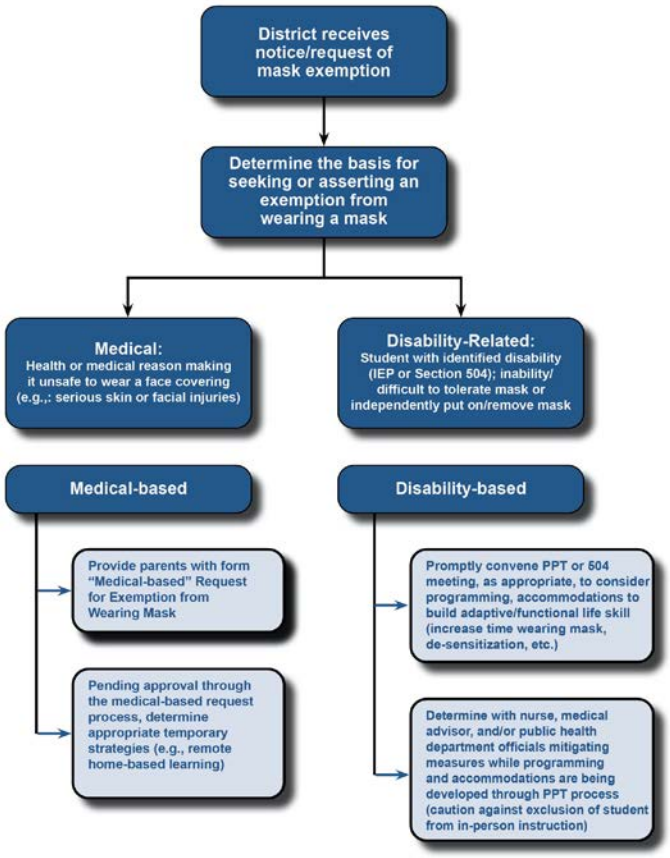
- Currently, there is not a standard form for healthcare or other providers to use in documenting exemptions pursuant to Executive Order 7-NNN.

Medical-Based Exemption Requests: Recent Highlights from DPH Webinar

- DPH Webinar on 8/17/20
  - Guidance from DPH on mask exemptions may be forthcoming.
  - "Generally, our message on exemptions is ***face coverings is going to be the whole ballgame for schools***. If you can't get every kid to wear face coverings then you're going to have a difficult time (emphasis added)."
  - "There are not too many true medical exemptions for not wearing a loose fitting mask. If people have those [true medical exemptions], they are going to have a tough time getting to school and we would recommend that they not be in school anyway because it is usually indicative of a severe respiratory condition.…"

Medical Exemptions vs. Skill-Based Exemption (IEP/Section 504)

- The State Reopening Plan, FAQ (Vol. 2) and CDC Considerations for Schools recognize that some students may request exemptions from universal mask wearing requirements for reasons other than "medical reasons." It is important for school districts to consider the basis for the mask exemption request. See sample decision tree below.




- In summary, school districts should develop mask protocols that address the use of masks on school grounds and at school-sponsored activities. The protocols should address mask exemption requests with consideration of the various aspects of school operations that may be affected by such requests (nursing/health department, pupil services, human resources, transportation, etc.).

## QUESTION TWO

2. Will employees still be able to claim special leave rights this fall as provided last spring by the Families First Coronavirus Response Act (FFCRA)?

## ANSWER TO QUESTION TWO

**It depends on the situation.**

- The Families First Coronavirus Response Act ("FFCRA") became effective on April 1, 2020 and provides for emergency paid leave in certain circumstances through December 31, 2020 (unless further extended). Consequently, Districts

must continue to consider whether leave is available to employees under the FFCRA.

- There are two types of leave available under the FFCRA:

  (1) the Emergency Paid Sick Leave Act ("EPSLA") and
  (2) the Emergency Family and Medical Leave Expansion Act ("FMLA+).

- Both leave provisions are available to employees unable to work or telework for a specific qualifying reason (discussed below).

**EPSLA**

- The EPSLA applies to employees regardless of the duration of their employment.

- Under the EPSLA, full-time employees who are unable to work or telework for the following coronavirus-related reasons are entitled to eighty (80) hours of paid sick leave (or a part-time employee's two-week equivalent):

  1. The employee is subject to federal, state or local quarantine or isolation order;
  2. The employee has been advised by a healthcare provider to self-quarantine;
  3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
  4. The employee is caring for an individual quarantined as described in (1) or (2);
  5. The employee is caring for his or her child whose school or place of care has been closed (or child care provider is unavailable) for reasons related to COVID-19; or
  6. The employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

- The EPSLA caps the daily and total amount of compensation available, depending on the reason for the leave.

- ***It is important to note the distinction between Reasons 1-3, which relate to self-care, and Reasons 4-6, which concern the care of others.***

- **Reasons 1-3 (<u>self-care</u>):** If an employee is eligible for EPSLA leave under Reasons 1-3, the employee must be paid one hundred percent (100%) of the employee's regular rate of pay or the state minimum wage up to payment caps of $511/day and $5,110 in total.

- **Reasons 4-6 (<u>care of others</u>):** If an employee is eligible for EPSLA leave under Reasons 4-6, an employee must be paid two-thirds (2/3) the employee's regular rate of pay or the state minimum wage up to payment caps of $200/day and $2,000 in total.

- **Importantly, if an employee is eligible for EPSLA, an employer *may not require* that an employee use other paid leave before the employee uses his or her EPSLA leave.**

**FMLA+**

- The second element of the FFCRA, the FMLA+, expands portions of the traditional Family Medical Leave Act for employees who have been employed for at least thirty calendar days. While traditional qualifying reasons for FMLA remain unpaid, paid FMLA+ is available to employees for the following qualifying reason (only Reason 5 of the EPSLA):

  ***leave taken because the employee cannot work, or telework, because he or she needs to care for a minor child due to closure of the child's school or place of care (or unavailability of child care provider) due to COVID-19.***

- The first ten (10) days of leave taken for this qualifying reason are unpaid; the next ten weeks are paid out at two-thirds (2/3) of the eligible employee's regular rate of pay. There is a payment cap of $200 per day and $10,000 in the aggregate for emergency family and medical leave.

<u>Interaction Between FMLA+, EPSLA, and Otherwise Available Leave</u>

The regulations implementing the FFCRA and corresponding guidance from the United States Department of Labor contain several inconsistencies. We note that one of the issues of particular controversy is the interplay of FMLA+ and leave otherwise available to employees.

The spirit of the FFCRA is to provide employees enough flexibility to comply with public health measures necessary to combat the COVID-19 public health emergency. Accordingly, it is currently our recommendation that employers

allow employee discretion in whether to substitute or supplement FMLA+ leave with accrued leave otherwise available for such purpose.

*1. FMLA+: The First Two Weeks*

As previously noted, the first two weeks of leave taken under the FMLA+ are unpaid and the subsequent ten weeks are paid at two-thirds (2/3) of the eligible employee's regular rate of pay up to the statutory caps. However, employees may choose to use EPSLA leave (if they have not already exhausted such leave for other reasons) during the first two weeks (up to eighty hours) of FMLA+ leave taken for the care of a child whose school or place of care has closed due to COVID-19 reasons. If an employee decides to do so, benefits under EPSLA must run concurrently with the unpaid leave provided under the FMLA+.

An employee may also choose to use EPSLA leave (at two-thirds pay) and supplement such leave with leave the employee has otherwise accrued. The use of such leave must be consistent with the employer's leave policies and relevant collective bargaining agreement.

*2. FMLA+: The Subsequent Weeks*

After the first two weeks of FMLA+ leave, an employee may take up to ten additional weeks of FMLA+ leave and receive 2/3 pay up to the statutory caps. During this period, an employee may elect to have his or her accrued paid leave supplement the two-thirds FMLA+ pay provision in order to receive full pay.

**ADDITIONAL CONSIDERATIONS**

- As employees are integrated back into the workplace, there may be employees who feel uncomfortable returning to district buildings.

- Generally, employees who do not want to return to work due to a **generalized fear** of exposure to COVID-19 will not be entitled to paid or unpaid federal leave.

- However, while an employee may not be eligible for leave under federal law, an employee exhibiting generalized fear may be entitled to use any accrued leave that is otherwise available to him or her, if it is available for such purposes under the District's leave policies, relevant collective bargaining agreement, or under the American with Disabilities Act.

- Districts may also have employees who are unable to work because **they *are caring for* an individual who has been subject to a federal, state, or local quarantine or isolation order or advised by a healthcare provider to self-quarantine**. These employees may be entitled to up to eighty (80) hours of paid sick leave under the Families First Coronavirus Response Act.

- When responding to these requests, it is important to remember that the individual requiring care *must actually depend on the employee for care* and could be an immediate family member, an individual who regularly resides in the employee's home, or an individual for whom the employee's relationship creates an expectation that the employee would care for the individual in a quarantine or self-quarantine situation, when the individual actually depends on the employee for care during quarantine or self-quarantine.

- Districts may also have employees who need to **care for their spouse, child or parent because they have a serious health condition**, as defined under the Family and Medical Leave Act ("FMLA"). These employees may be entitled to leave under the traditional FMLA and thus the regular FMLA process should be followed in answering these requests.

- Lastly, districts may wish to explore practical alternatives when discussing available leaves with employees. For example, in responding to employee requests for FMLA+ ***because the employee cannot work, or telework, because he or she needs to care for a minor child due to closure of the child's school or place of care (or unavailability of child care provider) due to COVID-19,*** districts may want to explore options offered by the Office of Early Childhood, such as their recently published Child Care Referral Support for Teachers and Board of Education Employees.

## QUESTION THREE

3. Some parents have expressed privacy concerns over live streaming. Is live streaming classroom instruction a FERPA violation? Either way, can parents opt out?

## ANSWER TO QUESTION THREE

**Live streaming does not violate FERPA. Parents cannot "opt out" of having their child's class live streamed to remote or hybrid learners.**

- Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy of student education records. 20 U.S.C. § 1232g; 34 C.F.R. Part 99).

- FERPA prohibits educational agencies (*e.g.*, school districts) and institutions (*i.e.*, schools) from disclosing PII from students' education record without the prior written consent of a parent or "eligible student," unless an exception to FERPA's general consent rule applies. 20 U.S.C. §§ 1232g(b)(1) and (b)(2); 34 C.F.R. §§ 99.30 and 99.31

- Student Privacy Policy Office (SPPO) FERPA and Virtual Learning Webinar, March 2020 https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf

  - FERPA protects from disclosure to third parties personally identifiable information from student educational records. Third party visitors (parents, caregivers) could be present/observing the virtual lesson without running afoul of FERPA so long as PII from educational records is not disclosed during the virtual lesson.

  - In addition, the directory information exception to FERPA (annual disclosure to parents of the identifiable information that may be disclosed without parental consent) permits certain PII from education records to be disclosed during classroom instruction to students in the virtual class.

  - Notably, SPPO states that "the directory information exception may not be used to opt out of disclosures of a student's name, identifier, or institutional email address in a class in which the student is enrolled."

  - SPPO recommends, as a best practice, that school districts discourage visitors/non-students from observing virtual classes.

  - Schools may wish to consider establishing rules for student participation in virtual learning, including prohibitions on the recording or sharing of PII, absent the express permission of the school district (for example, authorization by the PPT or Section 504 team).

- Additional SPPO Virtual Learning Resources:

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20%20Virtual%20Learning%20032020_FINAL.pdf

  - SPPO identified existing guidance that applies to distance learning, including Letter to Mamas. https://studentprivacy.ed.gov/sites/default/files/resource_document/file/Letter%20to%20Mamas%28Recreated%29v508.pdf

- "FERPA does not specifically prohibit a parent or professional working with the parent from observing the parent' s child in the classroom."

- "FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records."

**QUESTION FOUR**

4. The State Plan provides that parents "may also voluntarily choose for students to temporarily engage in learning from home for a variety of other reasons." What is "temporary" and what educational services do we have to provide? Can such students play sports?

**ANSWER TO QUESTION FOUR**

Overview

- Addendum 1 to Adapt, Advance, Achieve: Connecticut's Plan to Learn and Grow Together (Updated August 3, 2020) (the "State Plan") outlines the requirements for voluntary remote learning (Addendum 1 begins on page 48).

- The State Plan now requires that school districts provide temporary remote learning opportunities for those parents and students voluntarily opting into remote learning programming while other students attend in-person instruction.

- Addendum 1 to the State Plan emphasizes that the voluntary remote learning option is not the same as, and must be considered separately from, both homebound/hospitalization instruction and home instruction obligations under other applicable laws.

- The voluntary remote learning option "is not intended to be the same as the opportunities provided when classes are cancelled for a broader population, should public health data require it."

"Temporary"

- Temporary refers to the option being available to families on a temporary basis due to the public health circumstances. School districts are expected to advise families that the voluntary remote learning option may not be available for the whole school year, and Addendum 1 (at page 49) states, "Should public health

data support a changed approach, the policy directives from CSDE related to the provision of this option may change to determine there is no longer a need for this temporary option."

Attendance and Parental Supervision Requirements

- Students remain enrolled in their local public school under the voluntary remote learning option. These students are not homeschooled students.

- Schools must take attendance to ensure that students attend for at least half of the regular school day.

- The State Plan indicates that there will be future guidance to school districts on how to take/measure attendance -- stay tuned!

- The State Plan explains that "parents who decide to opt into voluntary remote learning will also be expected to supervise and engage their children to fully and effectively access the remote learning programming that is offered through the public school district."

Educational opportunities/Curriculum

- School districts must continue to provide students with the opportunity to access 177 days of school and 900 hours of instruction should be fulfilled.

- School districts are expected to offer remote learning educational opportunities "in line with the district expectations, because students will transition back into in-person classes after this temporary option is no longer available."

- The State Plan advises districts "[t]o the extent possible, curriculum and grade progression should be made accessible."

- There is not any waiver of requirements under Conn. Gen. Stat. Sections 10-16b (prescribed courses of study) and 10-221a (high school graduation requirements).

- The CSDE issued further guidance to school districts regarding implementation of IEP services to students with IEPs who opt into voluntary remote learning instruction in Addendum 6 to the State's Reopening Plan.

- Districts are not required to offer an "a la carte" model.

Assessments

- Students participating in voluntary remote learning are expected to access statewide assessments in-person, unless the assessments are available remotely.

- Other district assessments that are not mandated by federal or state laws/regulations are subject to local decision, depending upon whether those assessments are available online and can be administered remotely

Transitioning to In-Person Instruction

- The State Plan explains that school districts may "request" notice for reasonable preparation time before students change from remote learning to in-person learning. Such notice ensures that districts have adequate time to plan for the student's return to the school building (for example, cohort placement).

- CSDE FAQ Volume 2 (see full title of the FAQ in question 1 above) explains that the CSDE recommends that "schools request reasonable notice from families so that proper safety measures can be engaged before a student transitions back into in-person schooling. Normally, this would be enough notice to allow the school to notify the teacher and arrange for the return in line with health and safety protocols. If schools wish to request families voluntarily provide longer periods of time that would not be prohibited. However, excluding students for a longer period without specific health and safety reasons, is not appropriate."

Required Notice to Families/Students

- The State Plan outlines the importance of providing families with notifications of the right to choose voluntary remote instruction as well as the implications of such a choice.

**QUESTION FIVE**

5. If an employee has to travel out of state to pick up his or her child from a college that shut down due to COVID, can I dock his or her pay during their fourteen days of quarantine?

**ANSWER TO QUESTION FIVE**

- Effective July 14, 2020, Executive Order No. 7III mandates that all travelers entering Connecticut from states with a high COVID-19 infection rate to **self-**

**quarantine for** a period of 14 days from the time of the last contact with the identified state.

- Importantly, Executive Order No. 7III defines an "Affected Traveler" as a person who has spent twenty-four hours or longer in an "Affected State" within fourteen days prior to arriving in Connecticut.

- Presently, the list includes 31 locations and continues to be updated every Tuesday **as the situation develops.**

- Thus, if an employee returns from picking up his or her child from a college that shut down due to COVID in one of these 31 locations, Districts should, in the first instance, confirm whether the employee spent 24 hours or longer in the affected state.

- If the employee spent 24 hours or more in one of the 35 affected locations **and** that employee has not already used their EPSLA leave **and** the district has no telework available for them, he or she may be entitled to EPSLA leave because he or she is subject to a state quarantine order.

- Employees who are subject to a federal, state or local quarantine order may be entitled to emergency paid sick leave as provided in the Emergency Paid Sick Leave Act (EPSLA).

- A shelter-in-place or stay-at-home order issued by any state government authority that causes the employee to miss work qualifies as a quarantine order under the EPSLA. If an employee subject to such a stay-at-home order has not already exhausted leave under the EPSLA and there is no telework available for the employee, such employee is entitled to up to eighty (80) hours of EPSLA leave (or a part-time employee's two week equivalent) and must be paid his or her regular rate of pay up to payment caps of $511/day and $5,110 in total.

- Importantly, if an employee is eligible for EPSLA, an employer *may not require* that an employee use other paid leave before the employee uses his or her EPSLA leave.

- The district cannot require such employees to use their sick time and must, instead, pay them at their regular rate of pay.

- One thing to note is that, if these employees have exhausted their EPSLA leave and later present another qualifying reason for EPSLA leave, they will not be entitled to such emergency paid leave again, whether it is for the same or a different qualifying reason.

- Interestingly, Executive Order 7III exempts certain individuals as follows:

B) Exempted Travel. Workers traveling from Affected States to Connecticut who work in critical infrastructure as designated by the Cybersecurity and Infrastructure Security Agency, including students in exempt health care professions, are exempted from this self-quarantine requirement ***when such travel is related to their work in Connecticut***. This includes any state, local, and federal officials and employees traveling in their official capacities on government business. ***If such worker was in an Affected State for a reason other than Connecticut-related work (e.g., vacation), such worker shall self-quarantine and complete the Travel Health Form in accordance with this subsection***

- On August 18th, 2020, the Cybersecurity and Infrastructure Security Agency (CISA) issued Guidance specifically including "Workers who support the education of pre-school, K-12, college, university, career and technical education, and adult education students, including professors, teachers, teacher aides, special education and special needs teachers, ESOL teachers, para-educators, apprenticeship supervisors, and specialists" in the definition of critical infrastructure workers.

- While teachers would be exempted from mandatory self-quarantine when traveling to an Affected State is related to the employee's official capacities (on government business), teachers will still be subject to a mandatory self-quarantine of 14 days if they travel to an affected state for any other reason (e.g. vacation) for 24 hours or more.

**QUESTION SIX**

6. What can we do with children who will not masks or otherwise engage in dangerous behavior? What about students who act up during remote learning? Is blocking student access to the live classroom considered a suspension?"

**ANSWER TO QUESTION SIX**

**Though we are in a pandemic, normal rules of discipline apply. In the first instance, however, the emphasis should be on compliance, not punishment.**

- Students who do not comply with the requirement that they wear masks pose a safety risk for staff and other students. In the first instance, it is a classroom management issues, and teachers should direct students to comply with safety protocols.

- Young children and children with special needs may not be capable of following all safety protocols, and they must be educated irrespective of their inability to

follow such protocols. In such cases, measures must be taken to protect the other students, and additional PPE may be required for staff members working in-person with such students.

- If students are recalcitrant and repeatedly refuse to follow safety protocols, it is appropriate to refer the matter to administration. If compliance continues to be a problem, such student may be assigned to remote instruction.

  QUERY: Is that a suspension or expulsion?

  - Most such actions will be with parent agreement.

  - NOTE: Conn. Gen. Stat. § 10-233f(b) provides:

  (b) A local or regional board of education may reassign a pupil to a regular classroom program in a different school in the school district and such reassignment shall not constitute a suspension pursuant to section 10-233c, or an expulsion pursuant to section 10-233d.

  Dare to be great or move to expel?

  Conn. Gen. Stat. § 10-233a(e) defines expulsion as

  (e) "Expulsion" means an exclusion from school privileges for more than ten consecutive school days and shall be deemed to include, but not be limited to, ***exclusion from the school to which such pupil was assigned at the time such disciplinary action was taken***, provided such exclusion shall not extend beyond a period of one calendar year.

- Students who are learning remotely are also subject to discipline. Disruptive behavior can lead to suspension of the remote learning privilege or even expulsion.

  NOTE: There was at least one expulsion last year of a student who engaged in Zoom bombing.

  QUERY: What would be an appropriate alternative educational opportunity?

## QUESTION SEVEN

7. I am getting used to these Zoom meetings. Can we continue to run PPT meetings remotely?

## ANSWER TO QUESTION SEVEN

**Generally, yes, schools districts may hold PPT meetings remotely (telephone, videoconference).**

- The State Reopening Plan issued on June 29, 2020, states that school districts should consider "limiting or restricting nonessential volunteers and visitors."

- The Plan encourages school districts to have "a clear policy defining essential building access for parents, such as PPT meetings, or consider virtual meetings when possible."

- Addendum 6 (August 12, 2020) states that meetings may be held in person or through virtual means.

- PPTs must be scheduled at a mutually convenient time for the school and family.

- School teams should consider protocols or norms governing virtual PPT meetings, including, but not limited to, confidentiality of the PPT meeting/discussions and recording of the virtual meeting. The United States Department of Education Office of Special Education Programs produced a resource guide for families and school districts, which is available at https://www.parentcenterhub.org/wp-content/uploads/repo_items/virtual-iep-meeting-tipsheets.pdf

## QUESTION EIGHT

8. We are bound to learn that one or more students or staff members in my school tested positive for COVID-19. What should I say to others who may have been exposed?

## ANSWER TO QUESTION EIGHT

- As to students, districts remain subject to FERPA, and according any personally-identifiable information about a student's medical status, including whether the student tested positive for COVID-19, is information protected by FERPA.

- The United States Student Privacy Policy Office (SPPO) specifically addressed this question in a March 2020 Frequently Asked Questions publication.

    - According to the SPPO, "[i]n most cases, it is sufficient to report the fact that an individual in the school has been determined to have COVID-19, rather than specifically identifying the student who is infected. School notification is an effective method of informing parents and eligible students of an illness in the school."

    - The publication further clarifies that the purpose of providing notice is to "inform parents and eligible students of a potential risk, which may be particularly important for students who may be more susceptible to infection or to developing severe complications from an infection, and to alert parents to look for symptoms in their own children and eligible students to more closely monitor themselves for symptoms."

    - The SPPO FAQ explains that there may be circumstances in which disclosure of personally identifiable information regarding a student may be necessary "to protect the health or safety of students or other individuals." (There is a health and safety exception permitting the disclosure of identifiable information, without parent consent, to third parties.)

    - School officials must make any such determination on an individualized basis "taking into account the totality of the circumstances, including the needs of such students or other individuals to have such information in order to take appropriate protective action(s) and the risks presented to the health or safety of such students or other individuals."

- As to employees, districts remain obligated to maintain the confidentiality of medical information in accordance with the ADA.

- While the federal law does not prohibit an employer from disclosing to co-workers and others that they may have been exposed to COVID-19, the ADA protects the identity of an employee who has been diagnosed with COVID-19.

- Notwithstanding, the employer can ask the employee if the employer may share the symptoms or positive diagnosis with co-workers or third parties. For example, the employer can require the employee to disclose the identities of those in close contact with the employee for contact tracing purposes. In such an instance, the employer can notify those people that they may have been exposed without disclosing the identity.

- The employee may also consent to the disclosure of the employee's identity to co-workers or third parties.

- In any event, when district officials learn that a student or staff member has tested positive for COVID-19, it is permissible (and necessary) to disclose that information to local public health officials.

    - The EEOC has advised that it is permissible to disclose such information to public health officials:

        > B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? (4/9/20)
        >
        > Yes.

        U.S. Equal Employment Opportunity Commission, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," (June 17, 2020).

    - The Office of Student Privacy has advised that it is permissible to disclose the name of a student who has tested positive for COVID-19 to an appropriate public health official:

        > Although educational agencies and institutions can often address threats to the health or safety of students or other individuals in a manner that does not identify a particular student, FERPA permits educational agencies and institutions to disclose, without prior written consent, PII from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10) and 99.36.

        Student Privacy Policy Office, "FERPA & Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions (FAQs)" (March 2020)

        A positive test and a finding that the student exposed others to the disease would justify such disclosure, but only to an appropriate public health official and others with an educational need to know.

- Once the information has been shared with the appropriate public health official, districts should provide such information and take such remedial steps as directed by public health officials.

## QUESTION NINE

9. Teachers in my school are all nervous about being evaluated in this challenging time, and the teachers' union is demanding that we forego the evaluation process altogether this year. Can we?

## ANSWER TO QUESTION NINE

**Teacher evaluation is still required this year in accordance with Conn. Gen. Stat. § 10-151b. However, the Commissioner announced new flexibilities earlier this month.**

- Teacher evaluation is not subject to collective bargaining:

  [School districts must negotiate over wage, hours and conditions of employment, but Conn. Gen. Stat. § 10-153d(b) provides that] "other conditions of employment" shall not include the establishment or provisions of any retirement incentive plan authorized by section 10-183jj or the development or adoption of teacher evaluation and support programs, pursuant to section 10-151b."

  Such evaluation issues are properly the responsibility of the Professional Development and Evaluation Committee (PDEC) that each district must create.

- On August 11, 2020, Commissioner Cardona announced "Flexibilities for Implementing the CT Guidelines for Educator Evaluation 2017 for the 2020-2021 School Year."

  - These flexibilities include a waiver of summative ratings for the 2020-2021 school year and other changes in the requirements.

  - These flexibilities are not automatic. Rather, first mutual agreement is required between the Professional Development and Evaluation Committee.

  - If these flexibilities are adopted, the district must notify the Bureau of Educator Effectiveness and Professional Learning by October 1, 2020.

## QUESTION TEN

10. With all of these health and safety protocols in place, we need to provide additional training to all district employees, so I sent a notice out advising all employees directing them to report back to work one day earlier than scheduled. But several of our union presidents objected. Do I really need to bargain with the respective unions before I can call all employees in for training?

## ANSWER TO QUESTION TEN

- Training and additional professional development are critically important this year. District reopening plans include a number of safety protocols, and teachers will be expected to undertake new approaches to teaching, often working with children who are in-person and others who are remote.

- Adapt, Advance, Achieve: Connecticut's Plan to Learn and Grow Together (Updated August 3, 2020) now includes a significant number of training requirements concerning safety protocols. Table 2, "Training Plan" following Addendum 3, "Fall Reopening Resource Document for Students with High Needs" (July 28, 2020), sets out the various trainings that are advisable, and these training requirements apply more generally to school district personnel who have contact with students. Districts must carefully consider the trainings listed in Table 2 to determine which staff members must attend which trainings.

- While additional training professional development will be necessary, that fact does not absolve the district of its duty to bargain. The work year for employees constitutes a mandatory subject of bargaining. For certified employees, while the district has the right to determine the student school year (subject to impact bargaining), the non-instructional portion of the work year is subject to collective bargaining.

- In each case, it will be important to first review the collective bargaining agreements for each of the affected bargaining units. Many contracts identify the specific number of days in the work year. In those cases, unless the contract expressly permits the district to lengthen the work year, the district will be required to negotiate over the extension of the work year with the union. In the rare case in which the contract grants the district the right to increase the work year without bargaining, the employer will be able to do so, but we caution that the district should be certain of its rights in that regard before unilaterally implementing a change in the work year.

- We also note that at its meeting on July 14, 2020, the State Board of Education adopted the following resolution:

  ***RESOLVED**, that the State Board of Education temporarily authorizes for Local and Regional Boards of Education, the Connecticut Technical Education Career System, approved state charter schools, and other similarly situated districts ("School District" or "School Districts"), a waiver of up to a maximum of 3 days from the 180-day requirement set forth in C.G.S. Section 10-15 for unavoidable emergency, limited to instances where the School District uses the days prior to*

*the beginning of the 2020-2021 school year to provide staff and families with additional time to build capacity to safely transition back to in-person services, including but not limited to for the following: (1) additional training and professional development days, beyond any typically scheduled days, to adjust to and educate on new requirements or policies related to health and safety in the context of the COVID-19 pandemic; (2) time for educators and staff to plan classroom set-up and consider changes to facilities required to maximize safety measures; and/or (3) provision of social-emotional services to staff, and training to prepare them to provide that support to students as the community transitions back into school buildings*.

Further guidance concerning such training and professional development may be forthcoming from the State Department of Education.

**QUESTION ELEVEN**

11. As If I didn't have enough to worry about, a number of employees are demanding medical grade PPE and all sorts of plexiglass. What do I have to provide?

**ANSWER TO QUESTION ELEVEN**

**It depends.**

- While some districts are being inundated with requests for leave, others are receiving employee requests for additional PPE or medical grade PPE.

- Adapt, Advance, Achieve: Connecticut's Plan to Learn and Grow Together (Updated August 3, 2020) (the "State Plan") requires school districts to ***"adopt policies requiring use of face coverings for all students and staff when they are inside the school building, with certain exceptions listed below."*** Interestingly, while the Plan does not formally require that school districts provide masks to staff in the first instance, school districts are required to "***be prepared to provide a mask to any student or staff member who does not have one.***"

- Along with that requirement, the State Plan further suggests that school districts provide training to reinforce the use of cloth face coverings and on the removal and washing of cloth face coverings.

- While it may be tempting to dismiss concerns about PPE in light of the many other things to worry about, failure to provide masks to staff members (or students) who do not have one may find themselves in violation of the State Plan.

Moreover, unions can raise the questions of who provides the masks as an impact bargaining issue.

**So what type of PPE is required…**

- Addendum 3 (Fall Reopening Resource Document for Students with High Needs) to Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020) (the State Plan) includes two important tables related to personal protective equipment (PPE) and training requirements.

- Table 1 outlines the required PPE needed for specific settings and/or tasks ("PPE Table").

- The PPE Table provides that pupil personnel staff, crisis intervention teams and nursing staff are expected to need additional PPE. Additionally, Dr. Anthony Fauci recently suggested during a fireside chat with the AFT that teachers should wear face shields or goggles, if available, to protect their eyes from COVID-19 infection. (August 3, 2020 Podcasts with Journal of American Medicine, available at https://www.niaid.nih.gov/news-events/director-in-the-news)

- In addition to the PPE requirements set forth in Table 1, school districts should plan with their medical advisor(s) and local health departments for the PPE needs of staff and students, particularly for additional PPE and training required when social distancing and/or face coverings cannot be maintained.

**OTHER CONSIDERATIONS**

- While the general rules set forth in the State Plan may apply to most, some employees may require additional PPE or medical grade PPE as an ADA accommodation.

- Consistent with the requirements of the ADA, employers will need to engage employees claiming a disability in an informal, interactive process to determine whether the individual in fact has a disability under the ADA, and, if so, what accommodation(s) would be appropriate. That individualized analysis will turn on both the employee's disability and related restrictions, as well as the essential functions of the employee's position.

- In response to the COVID-19 pandemic and in accordance with state rules for reopening, school districts have been implementing changes that reduce contact with others for all employees (*e.g.,* physical distancing and personal protective equipment). Additional accommodations that may be considered include one-way hallways or plexi-glass barriers around an employee's desk.

## (BONUS) QUESTION TWELVE

12. Do the phrases "All Lives Matter" or "Blue Lives Matter" on students' masks or shirts or other articles of clothing fall under the students' constitutional rights to freedom of speech and expression?

## ANSWER TO QUESTION TWELVE

**The established constitutional principles apply to all student communications, and school officials can regulate student speech (1) if there is a reasonable forecast of substantial disruption or material interference with the educational process, or if the speech violates the rights of others, (2) if the speech is vulgar, and (3) if the speech can be interpreted to advocate the illegal use of drugs.**

- The threshold question is whether the district has allowed a forum for speech. If there is a dress code disallowing T-shirts, students cannot wear a T-shirt with a message for or against anything. As to masks, the First Amendment principles will apply if districts permit students (or staff) to use masks for personal expression.

- *Tinker v. Des Moines Independent School District* (U.S. 1969) establishes the basic rule:

  "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

  However, school is a place of business, and student free speech rights must yield when school administrators forecast that student speech will substantially disrupt or materially interfere with the educational process.

  This standard is fact-based, and what is or is not disruptive will differ from place to place. Whether on a mask or a T-shirt, "All Lives Matter" may be disruptive based on the specific circumstances in that school district at that time.

  Note: the United States Supreme Court included adjectives, and forecast of mere disruption is not the standard, "substantial" disruption is.

- *Bethel School District v. Fraser* (U.S. 1986)

  Vulgar messages need not be tolerated, irrespective of disruption.

- *Morse v. Frederick* (U.S. 2007)

Messages advocating drug or alcohol use need not be tolerated, irrespective of disruption.

**ADDITIONAL QUESTIONS AND ANSWERS?**