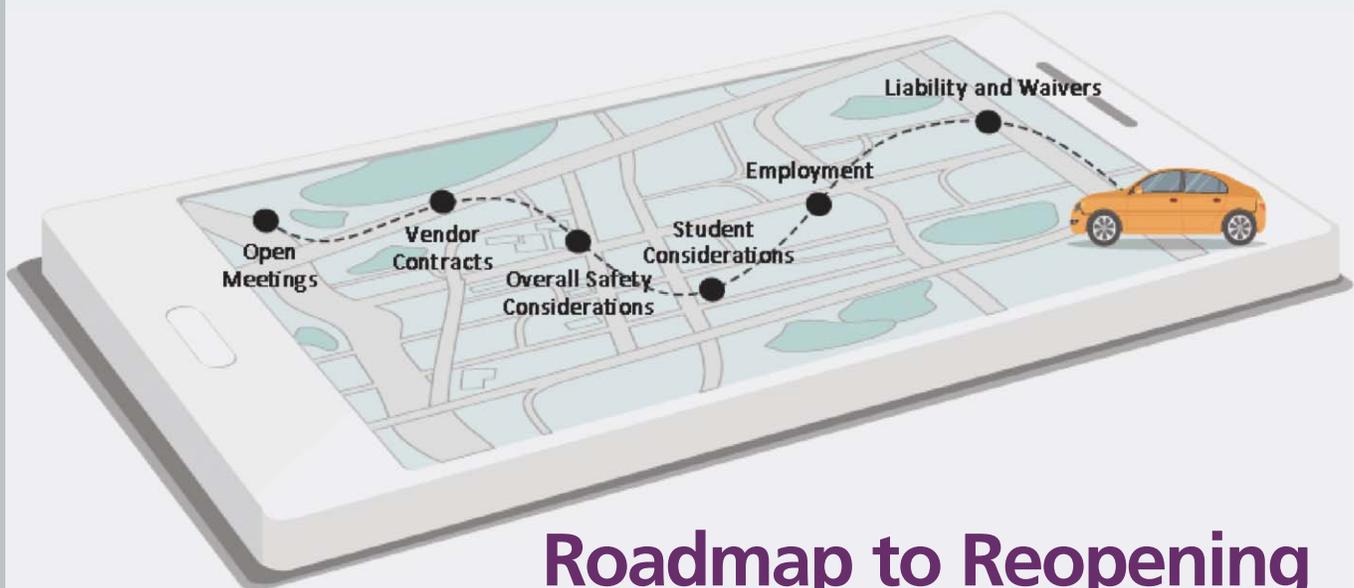


# Destination: Back to School



## Roadmap to Reopening School 2020-2021

Directions provided by:  
von Briesen's School Law Section  
[vonbriesen.com/school](http://vonbriesen.com/school)

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# Roadmap to Reopening School 2020-2021

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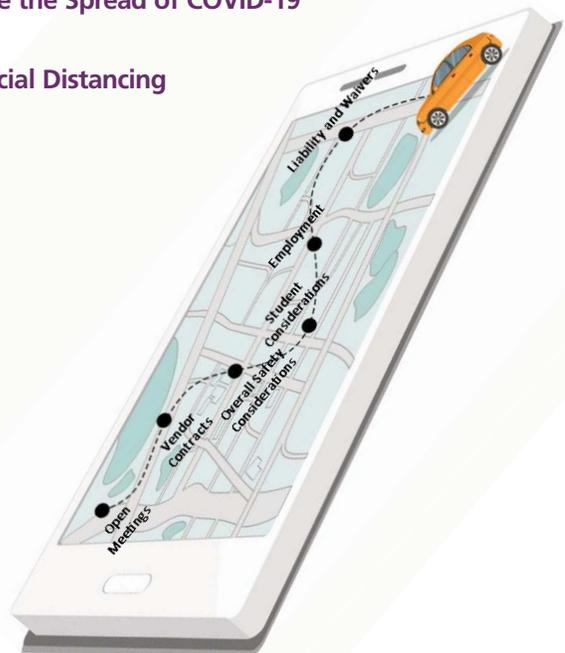
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## **Roadmap to Reopening School 2020-2021**

For the past months, school districts across the state have confronted unprecedented challenges in delivering meaningful educational benefit to our children. As the 2019-2020 school year came to a close, all of us were hopeful that the Fall of 2020 would bring back some semblance of normalcy. Unfortunately, the COVID-19 pandemic refused to subside. As a result, schools are faced with the prospect of starting the 2020-2021 school year in an environment where the pandemic continues to spread, our state's leaders cannot agree on a uniform approach in combatting the spread of the pandemic and very few have provided guidance as to how the schools are supposed to arrive at their desired destination in a safe and efficient manner. It is out of these circumstances that the Roadmap to Reopening was conceived.

The Roadmap contains six separate "journeys" that school districts will inevitably travel as they move to the desired destination – a safe return to school. These six journeys include: (1) liability considerations and exculpatory agreements; (2) general labor and employment considerations; (3) welcoming students back to school buildings; (4) overall safety considerations; (5) considerations for negotiating vendor contracts; and (6) open meetings law compliance and virtual meetings. All journeys within the Roadmap to Reopening end with a concise presentation of action items. The action items may not be fully implemented and that is just fine. In the end, it is important that school district feel comfort in knowing that they are making informed decisions about how to prepare for the 2020-2021 school year.

Not all school districts will follow the same route to reopening. Nor should they. Local conditions vary across the state and the considerations surrounding safety are equally as diverse. For this reason, the Roadmap to Reopening is designed to provide a framework for the decision-making process, as well as offering substantive foundational support. We look forward to learning where your journeys take you!



# Stop 1: Liability and Waivers

## Stop 1: Liability Considerations and Exculpatory Agreements (Waivers)

It is difficult to predict where liability exposure exists in an environment where a global pandemic has completely upended normal operations. Nonetheless, while the unique scenario of operating school districts during the COVID-19 global pandemic presents uncharted territory, the below considerations will help schools navigate their potential liability exposure as decisions are made on how to best protect students and staff in individual school communities.

### A. Potential Claims

Subject to specific notice requirements and limitations on damages, Section 893.80 of the Wisconsin Statutes allows for claims to be brought against governmental bodies, officers, agents, or employees, including school districts. Claims may also be brought for constitutional deprivations, generally alleging due process or equal protection violations. Although the operation of school districts during the COVID-19 pandemic presents a novel situation, below are some of the potential claims that may be asserted against a school district in the event a student or staff member contracts COVID-19 while attending school or within the course and scope of employment.

- **Negligence**
  - In Wisconsin, “a person is negligent if the person, without intending to cause harm either acts affirmatively or fails to act in a way that a reasonable person would recognize as causing an unreasonable risk of injury.” *Megal v. Green Bay Visitor & Convention Bureau, Inc.*, 2004 WI 98, ¶ 25.
  - A school district could be found to be negligent in its operations if it fails to exercise a degree of care as would be exercised by a reasonable person in similar circumstances. Negligence is a common law doctrine, and determining liability under the “reasonable person” standard is often a fact-intensive inquiry.
  - One way a school district can seek to limit liability exposure is to proactively address the risks that are inherent to reopening during a pandemic and take measures to mitigate those risks. Furthermore, students should be instructed about these risks, and any rules that apply to the students and staff to prevent the spread of COVID-19 within the school need to be clearly articulated, unambiguous, and compliance with these rules should be closely tracked. The following Wisconsin Civil Jury Instruction provides some insight as how courts may analyze a school district’s exercise of care:



## Stop 1: Liability and Waivers

- “A teacher occupies a position in relation to his or her pupils comparable to that of a parent to his or her children. A teacher has the duty to instruct and to warn the pupils in his or her custody of any dangers which the teacher knows, or in the exercise of ordinary care ought to know, are present in the classroom (laboratory, gymnasium, etc.) and to instruct them in methods which will protect them from those dangers, whether the danger arises from equipment, devices, machines, or chemicals. A failure to warn the students of such danger or instruct them in means of avoiding such danger is negligence.” WIS-JI-CIVIL 1380.
- Maintaining transparency between the school district, students, and families regarding the risks presented by COVID-19 and the reopening of schools will not only help protect the health and safety of a district’s schools, staff, and students, but clear communication will also help reduce liability exposure for districts.
- Proactively identifying risks and communicating those risks to students and families ahead of the commencement of the school year is advisable. In the event that a claim for negligence is asserted against a school district, the fact that a district provided advance notice of the inherent risks associated with reopening during the COVID-19 pandemic, as well as the measures the school is taking to mitigate those risks, will help support the position that the district has met its duty of care.
- Because operating a school district during a global pandemic is uncharted territory, it is not clear how the negligence standard will be applied within the current environment. That said, adhering to the guidelines set forth below, as well as guidelines issued by federal, state, and local authorities, school districts will be better positioned to defend against a claim of negligence based on an individual’s contraction of COVID-19 alleged to be the result of a district’s negligence.
- **Wisconsin’s Safe Place Statute**
  - It has long been held that Wisconsin’s Safe Place Statute, Wis. Stat. § 101.11, applies to schools and school districts. *Lawver v. Joint Dist. No. 1, Mount Horeb and Blue Mounds*, 232 Wis. 608, 288 N.W. 192 (1939).



## Stop 1: Liability and Waivers

- The Safe Place Statute imposes a duty of care on owners and operators of public places to keep the premises free of unsafe conditions of which the owner or operator had actual or constructive knowledge. Unlike common law negligence, the Safe Place Statute addresses unsafe conditions, not negligent acts, and imposes upon the owner a higher standard of care than that imposed by common-law negligence. Wis. Stat. § 101.11(1); *Gaethke v. Pozder*, 2017 WI App 38.
  - In order to successfully allege a school district's violation of the safe-place statute, a plaintiff must prove: (1) a defect or a hazardous condition existed; (2) the defect or hazardous condition caused the injury; and (3) the defect or hazardous condition existed for a sufficient length of time to afford the owner or employer the opportunity to discover and remedy the situation. *Rosenthal v. Farmers Store Co.*, 10 Wis. 2d 224, 227, 102 N.W.2d 222 (1960).
  - School districts should develop protocols for reporting, monitoring, and tracking positive COVID-19 cases among its staff and students. Because establishing notice is an element of a safe place claim based on a hazardous condition associated with the premises, it is vital that districts actively take steps to ensure that they remain apprised of such risks in order to allow for a prompt and appropriate response.
- **Workers' Compensation**
    - Districts may also face liability exposure under Wisconsin's workers' compensation laws. An employee's contraction of COVID-19 is compensable under Wisconsin's workers' compensation law if an employee is able to medically establish that he or she contracted the virus within the course and scope of his or her employment.
    - That said, given COVID-19's relative ease of transmission, establishing that an employee contracted the virus while at work may be difficult. However, in the event that a school experiences a concentrated outbreak, the ensuing workers' compensation liability exposure could be significant.
    - Adhering to federal, state, and local health officials and agencies' guidance on COVID-19 and the workplace will help minimize this risk.



## Stop 1: Liability and Waivers

- **Civil Rights Claims**

- Districts face liability from a due process claim under the Fourteenth Amendment by having a policy or custom that causes a constitutional deprivation of certain interests (“life, liberty, property”). This usually involves not a written policy, but a widespread practice that is so permanent and well-settled that it constitutes a custom or practice. Due process essentially guarantees basic fairness: notice, an opportunity to be heard at a reasonable time and in a reasonable manner, and a decision supported by the evidence.
- Districts face liability from an equal protection claims under the Fourteenth Amendment by acting with a nefarious discriminatory purpose against a person based upon their membership in a definable class. The difficulty addressing the issues related to COVID-19 include being able to provide equal access to education to all students.

### **B. Immunities and Defenses**

School districts enjoy statutory immunities and defenses which may be available to a school district in the event it must defend against a claim of negligence, a violation of the Safe Place Statute, or a claim for workers’ compensation benefits relating to COVID-19 and the reopening of schools.

- **Discretionary Governmental Immunity**

- Section 893.80(4), Wis. Stats., immunizes school districts from liability for injuries resulting from the performance of any discretionary act within the scope of their governmental employment and applies regardless of whether the public official is employed by the state or by a political subdivision of the state, such as a municipality or school district. *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis.2d 81, 596 N.W.2d 417 (1999).
  - “Discretionary acts” involve the exercise of government discretion and judgment in the application of a rule to specific facts. *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, ¶125, 235 Wis.2d 409, 611 N.W.2d 693.
  - “Discretionary” acts are distinguished from “ministerial” acts, for which discretionary governmental immunity do not apply. Ministerial acts are an absolute, certain and imperative act, involving merely the performance of a specific task when the law imposes, and prescribes



## Stop 1: Liability and Waivers

and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion. See *Kierstyn, supra*.

- Discretionary immunity may provide a school district with a liability defense related to an individual who contracts COVID-19 in a school. Because there are no specific legal provisions regarding COVID-19 precautions that school districts must take, and the DPI guidance for schools provides for a number of recommended options which are not legally mandated, it is likely that the specific precautions a district chooses to take would be considered to be acts of discretion, as opposed to a ministerial duty that is specifically mandated and sufficiently detailed so as to leave no room for discretion. It is advised when making discretionary decisions, the basis of the decision is documented to show a reasonable thought process was undertaken.
- Exceptions to discretionary immunity have been created for situations involving a known and present danger, or for acts that are malicious, willful, and intentional. Immunity for discretionary acts is extinguished if the school knowingly subjects students to danger such as COVID-19 exposure, e.g., knows teacher is contagious and is allowed to enter the premises.
- The doctrine of discretionary governmental immunity does not apply to actions under Wisconsin Safe Place statute. *Minneapolis, St. P. & S. S. M. R. Co. v. City of Fond Du Lac*, 297 F.2d 583 (7th Cir. 1961).
- **Recreational Immunity**
  - Recreational immunity provides immunity to property owners for claims brought against them arising out the use of their property by others for recreational activities under circumstances in which the owner does not derive more than a minimal monetary benefit. Wis. Stat. § 895.52.
  - Recreational immunity may bar certain negligence or Safe Place Statute claims against school districts, but its applicability in the school context is limited to narrow circumstances. For example, recreational immunity would not apply if someone alleged a violation of the Safe Place Statute while participating in a school-based athletic event that charges an admission fee for spectators. Wis. Stat. § 895.52(3)(a). It would, however, likely provide a district with immunity if someone claimed to have contracted COVID-19 while using the school's playground outside of school hours and not in connection with a school activity.



## Stop 1: Liability and Waivers

- **Causation**

- To establish liability under a theory of negligence, the Safe Place Statute, or workers' compensation, the claimant must establish causation.
- Regarding claims under the Safe Place Statute or those which assert negligence, the mere fact that an injury occurred does not, alone, establish liability. *Dykstra v. Arthur G. McKee*, 92 Wis. 2d 17, 25, 284 N.W.2d 692, 697 (Ct. App.1972). In addition, the claimant must establish that the school district's action or inactions caused the injury.
- For any such claim based on the allegation that a school district is liable because of the individual's contraction of COVID-19, the claimant must be able to establish that the contraction of COVID-19 was due to the school district's breach of a duty of care to the individual and that the breach of care directly caused the individual to contract the virus.
- Similarly, an injury or illness is only compensable under workers' compensation laws if the claimant's performance of job duties directly caused the injury or illness, or caused a pre-existing injury or illness to progress beyond its normal progression. Therefore, an employee claiming entitlement to workers' compensation benefits based on his or her contraction of COVID-19 must medically establish that the individual contracted the virus within the course and scope of employment.

### C. **Ways to Reduce Liability**

- **Notice letter to families**

- Consider sending a letter home to families prior to the start of the school year describing safety procedures the district is implementing and the safety protocols students will be required to abide by.
- Include an acknowledgment form with this letter for parents to sign to indicate they received and understand the notice and will share the information in the notice with their children. Include a self-addressed stamped envelope for families to mail the acknowledgment back prior to the start of the school year. Include a comments section if you want to allow families to share questions or concerns with the district.
- Utilizing a letter and acknowledgement form to notify families of the implemented safety protocols will allow the district to prove that parents



## Stop 1: Liability and Waivers

received such a notice, shared the information with their students, and that parents were able to provide input to the district on the new protocols.

- **Clear and documented reminders to students**
  - Consider ways to remind students throughout the school day of the various safety protocols they must follow. For example:
    - Give daily school-wide announcements over the loudspeaker, at the start of the school day and during passing time.
    - Have teachers give regular instructions to their students regarding safety protocols for students to follow.
  - Document the daily announcements and reminders regarding safety practices in order to create a written record. Logging this information creates a written record of all the warnings given should the district need to prove it was acting in a safe and reasonable manner. Requiring staff to log this information will also serve as a reminder to the teacher to reiterate safety protocols throughout the day.
    - Consider giving staff short reference list of daily reminders for students regarding safety protocols. See Appendix A for a sample template.
    - Consider requiring vendors, such as transportation companies, to also log regular reminders given regarding safety protocols.

The reopening of school districts during the COVID-19 pandemic presents numerous health and legal risks, and districts do not have the benefit of relying upon existing legal precedent to guide their reopening considerations. In the absence of such precedence, the recommended best practices for school districts is to adhere to federal, state, and local health officials and agencies' recommendations.

### **D. Exculpatory Agreements (Waivers)**

Schools and recreational venues frequently attempt to limit or preclude liability by using an exculpatory agreement. Exculpatory agreements, which include liability waivers and release agreements, however, are extraordinarily difficult to enforce. Although not invalid *per se*, Wisconsin courts do not favor exculpatory agreements, and they are strictly construed against the party seeking to rely on the waiver/release. *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI



## Stop 1: Liability and Waivers

4, ¶ 12. To avoid an exculpatory agreement being declared unenforceable on public policy grounds, a carefully crafted agreement must, at a minimum, meet these criteria:

- The form must serve one purpose. A registration or participation form must be separate from any waiver of liability. It must be set apart, and clearly and unambiguously inform the reader of the purpose of the document and its nature and significance.
- The agreement cannot be “overly broad and all inclusive” and may only release claims of negligence. In Wisconsin, waivers that purport to waive reckless or intentional conduct are void. Moreover, the participant should be on notice of what signing this waiver would mean – that any acts of negligence by the organization and its employees, officers, or agents, etc., would be waived. The form should be carefully tailored to the event and the activity at issue.
- The agreement must contain an “opportunity to bargain.” Here, the critical point is that the individual waiving liability cannot be forced to either sign the form or not participate in the activity. In the school setting, some activities are required and others are voluntary. The required activities, like class field trips, are distinguished from activities a student chooses, like sports. Certainly, there is better opportunity to negotiate voluntary activities than required activities. The Wisconsin courts have not given any indication about how this would work in practical terms or what an opportunity to bargain would look like. Online waiver agreements likely do not provide an ability to negotiate.
  - Avoid offering the form as a take-it-or-leave-it-basis
  - Provide the form well before the event when there is time to review and contemplate and not “at the gate” with little opportunity to review
  - Produce the form at a meeting in advance of an event or activity to allow discussion of the activity and terms of the waiver, or provide language on the form that indicates there is an opportunity to raise concerns

In addition, exculpatory agreements may have the opposite of their intended effect. Poorly drafted exculpatory agreements may effectively extinguish the statutory immunities that a district may otherwise be able to rely upon as a legal defense.

While it is difficult to enforce exculpatory agreements, there is no harm in presenting a document that puts parties on notice, especially with COVID-19, that the student (and parents) understands the risks associated with the activity and that they have to cooperate to protect their own and their classmates health and safety. Wisconsin courts do not recognize a party’s



## Stop 1: Liability and Waivers

“assumption of the risk,” but it compares the negligence of each party against the others. Further, children under the age of 7 cannot be found contributorily negligent. *See Wis. Stat. § 891.44.*

### Examples Where Exculpatory Agreements Should be Considered:

- Class trips and field trips
- Outside party use of facilities
- Certain transportation situations (parental transportation after an away event)
- Certain leaving campus situations (work study)
- Vendor access to school facilities for the provision of services

### Examples Where Notice of Concerns May be More Beneficial than Exculpatory Agreement

- Extra-curricular participation regarding COVID-19 issues
- Return to schools with COVID-19 issues
- Situations where a school district has a legal obligation for the activity at issue, such as the provision of special education and related services

### **E. Navigation Tips for a Successful Journey**

- Work with legal counsel to ensure all decisions relative to reopening are made based on a reasonable and thorough analysis and are rooted in sound legal reasoning.
- Be leery of the use of exculpatory agreements and ensure through legal review in the event the district is considering use of such agreement.



## Stop 2: Employment

### **Stop 2: General Labor & Employment Considerations for Reopening**

No journey to Reopening would be complete without a stop along the way to review a school district's plans for employment considerations. A district's policies must necessarily change as school building doors reopen, or opportunities for a virtual environment are explored. As of present date, uncertainty remains as to whether schools will be fully open or partially open come Fall 2020, and the ever changing landscape of the COVID-19 pandemic creates challenges for school districts in planning for employees returning to schools and/or working remotely to support the operations of school districts. It appears inevitable that schools will provide certain services in-person and on school premises. To accomplish this on-premises and in-school work, school staff will be required to physically report to work. Each district's journey will look different, but in preparing for the return of employees, school district administrators should consider and address a number of the employment considerations set forth below to ensure a confident transition to the new workplace.

#### **A. Full vs. Partial Reopening**

The first decision a school must make when reopening is whether to immediately fully reopen or to partially reopen in phases over a period of time. While both options are presently legally compliant, practical considerations exist, such as:

- Whether the school can operate efficiently under a phased reopening;
- Whether the school has sufficient resources, including PPE, space, etc., to appropriately safeguard employees upon a full reopening;
- Whether bringing too many employees into the workplace at one single time presents a high-risk of infection among employees, which, in turn, may require a partial or full shutdown; and
- Whether applicable state, federal, or local laws or orders require a partial or phased reopening.

A school district would be well-served to have contingency reopening plans in place, including what a partial or full shutdown would require following a reopening, as the landscape surrounding COVID-19 will continue to remain fluid and present unanticipated issues and challenges.

#### **B. Requiring Employees to Physically Report to Work**

Generally, schools can require employees to physically report to work upon reopening; however, the following considerations exist:



## Stop 2: Employment

- If an employee indicates an unwillingness to return, schools should carefully inquire as to why the employee is unwilling to do so and confirm whether there is a medical basis for the refusal.
- If the refusal is unrelated to a medical restriction, the school may require the employee to report to work and, if the employee refuses, the school may discipline the employee for insubordination, absence without authorized leave, or consider the employee to have voluntarily resigned from their position (if applicable under school policy).
- If the refusal is related to a medical restriction as the basis for the refusal to return to work, a school must engage in the interactive process under the Americans with Disabilities Act (“ADA”), and ask the employee for a medical form from their medical provider. Whether an accommodation constitutes a reasonable accommodation is case-by-case basis and requires a fact-intensive inquiry. As best practice, a school district should consider providing the employee with a standard medical certification form for completion by the employee’s health care provider to confirm: (1) the employee is qualified for consideration for accommodation under federal or state law; (2) the specific restrictions resulting from the disability; and (3) identifying reasonable accommodations that may exist.
- If an employee refuses to report to work due to a medical vulnerability of a family member, a school is not required to accommodate the employee, because it is the family member, not the employee, who is considered disabled under state and federal law. Employers are only required to provide accommodations to disabled employees who are qualified to perform the essential functions of the position in question. Nonetheless, employers are prohibited from discriminating against individuals due to their association with a disabled individual, so schools must ensure they do not treat employees with a medically vulnerable family member differently than other employees (*i.e.*, ensure similar application of rules, discipline, performance metrics, etc.). Thus, if an employee refuses to report to work due to a medically vulnerable family member, a school may apply its policies with respect to authorized employee absences.
- To minimize the likelihood of employees refusing to return to work, consider proactively educating the workforce on the precautions and safeguards the school is taking to protect the health and safety of its employees and students. School districts should also advise employees of the employee’s responsibilities with respect to maintaining a safe and healthy school environment. At a minimum, districts are encouraged to establish rules and protocols in which employees are notified that they must:



## Stop 2: Employment

- Submit a safe-at-work form acknowledging and agreeing to the district's safety guidelines;
- Wash hands frequently and thoroughly for at least 20 seconds with soap and water;
- Stay at home if they are sick, experience symptoms of COVID-19, or have been in close contact with an individual who tested positive for COVID-19 and notify the district of such symptoms or contact;
- Contact their health care provider if they develop COVID-19-like symptoms, including fever, excessive cough, or difficulty breathing; and
- Maintain social distancing and be respectful of employees' wishes regarding their personal or shared workspaces.

### **C. Blanket Exclusion of High-Risk Individuals Prohibited**

- School districts must not automatically exclude employees from a return to work mandate, such as individuals over the age of 60, based on concerns that the health of the employee could be jeopardized upon a return to work because the individual is in a high-risk category. This type of blanket exclusion would constitute prohibited disability discrimination under the ADA.
- The ADA provides narrow exceptions that permit employee exclusions from the workplace based on disability-status. In the context of COVID-19, a school district is only allowed to exclude an employee in a high-risk category from the workplace if the employee's presence would cause a "direct threat" to the individual's health and safety.
- What constitutes a "direct threat" to an individual's health and safety is an individualized, case-by-case determination. It is a high standard to meet. The "direct threat" assessment cannot be based solely on a condition being listed as a CDC high-risk category.
- Even if an individual's presence in the workplace would constitute a "direct threat" to the health and safety of the individual, the employer still cannot exclude the employee from the workplace unless there is no other way to provide a reasonable accommodation. A school district should proactively seek to accommodate any high-risk employee in a manner consistent with school district policies and procedures, prior to seeking to exclude the employee altogether.



## Stop 2: Employment

- If a school district is concerned that a high-risk category employee's presence in the workplace may constitute a "direct threat" to the employee's own health and safety, the employer must use an individualized analysis based on reasonable medical judgment of the employee's disability using objective evidence. The ADA requires the employer to consider:
  - The duration of the risk;
  - The nature and severity of potential harm;
  - The likelihood that the potential harm will occur;
  - The imminence of the potential harm;
  - The severity of the pandemic in the particular area;
  - Whether the employee's disability is well-controlled;
  - The likelihood that the individual will be exposed to the virus at the workplace; and
  - General measures the employer is taking to protect all employees, such as mandatory social distancing.
- If a school district concludes that the employee's presence would pose a "direct threat" to the employee's own health or safety based on the above factors, the employer must still take additional steps to accommodate the employee. Specifically, an employer must reach out to engage in the interactive process to explore whether a reasonable accommodation exists that would allow the employee to be present in the workplace without posing a "direct threat," absent undue hardship on the school district. Whether an accommodation constitutes a reasonable accommodation is case-by-case basis and requires a fact-intensive inquiry. Possible reasonable accommodations include:
  - Enhanced personal protective equipment beyond what the employer generally provides;
  - Erecting barriers to provide separations;
  - Elimination of "marginal" functions;



## Stop 2: Employment

- Temporary modification of work schedules to decrease contact with co-workers or public;
  - Moving the location of where the work is performed;
  - Telework, leave, or reassignment.
- Because of the difficulty of establishing that an employee's presence constitutes a "direct threat," we recommend school districts proceed with caution before excluding an employee based on high-risk status or similar concerns. Under such circumstances, school districts should work with counsel to establish an action plan and thoroughly document all communications with the employee, in order to minimize potential legal vulnerability.
  - In addition to potential reasonable accommodations, to assist high-risk employees with feeling safe in the workplace, proactive steps to educate and instruct the entire workforce on COVID-19 practices and procedures should be implemented.

### **D. Limitations of Teleworking and Ongoing Remote Work**

- School districts are encouraged to focus on bringing back employees whose physical presence in the workplace is necessary. Employees with duties conducive to remote work may continue to work remotely, either full-time or several days per week, to the extent practicable. In evaluating whether continued remote work is appropriate, schools must evaluate what is most effective for them and their students.
- If certain employees will remain in a teleworking status at the beginning of the school year due to a partial reopening, schools should clearly communicate in a signed telework agreement and telework policy that the teleworking status is temporary in light of the COVID-19 pandemic and will eventually cease. This is important because prolonged teleworking arrangements may create an argument that teleworking constitutes a reasonable accommodation under state and federal disability laws, even when the pandemic has ended.
- Schools that allow employees to temporarily telework should consider development and implementation of a temporary written policy specifying the parameters of such arrangement. At a minimum, teleworking policies should do the following:
  - Identify the positions that are eligible for remote working, if any.
  - Describe the limited circumstances when telework is available, including as a reasonable accommodation for a disability.



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- Establish protocols as to how employees should request to telework and identify the appropriate individual to whom employees should direct their requests.
- Cross-reference any other policies which may apply to an employee's teleworking request or arrangements. For example, if teleworking is be offered as a reasonable accommodation, any policy-specific protocols or record-keeping procedures contained the school district's reasonable accommodations policy should be cross-referenced in the teleworking policy.
- Reiterate that all other employment policies remain in effect and are applicable to employees who are teleworking, including anti-harassment and anti-discrimination policies.
- Set forth general performance and availability expectations for teleworking employees.
- Reaffirm the temporary, limited and sporadic nature of teleworking and disavowing any expectation of permanency of such arrangements.
- In addition to implementation of a temporary policy, school districts are encouraged to require a signed telework agreement from any employee as a condition of continued telework. The teleworking agreement should inform the employee of the following:
  - The telecommuting requirements may be modified or eliminated at any time at the school district's discretion, unless otherwise prohibited by applicable law or Executive Order;
  - The agreed-upon hours of availability for work and the ways in which the employee will record working time;
  - Expectations regarding how frequently employees and supervisors will communicate;
  - The equipment to be provided to the employee for purposes of telecommuting; and
  - Employee responsibilities, including safeguarding equipment and confidential information.



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- Any legal obligations applicable to safety compliant workplaces that apply in the telework environment.
- A sunset clause that provides the expiration date of the telework arrangement and expected return to work date (absent a valid medical excuse).
- In addition to pre-arranged telework considerations, school districts should expect to receive teleworking requests from employees who are otherwise expected to physically report to work.
  - Such teleworking arrangements should only be permitted in the following limited circumstances:
    - Telework is medically required and is approved by the school district as a reasonable accommodation for an employee's disability. The interactive cooperative process must be followed prior to such an accommodation being provided.
    - Telework is the only available option that would allow the employee to continue working while experiencing a qualifying reason for leave, as provided under the Families First Coronavirus Response Act's ("FFCRA") two emergency paid leave provisions, the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA").
    - The employee's job duties do not require the employee to be physically present in the workplace in order to be sufficiently performed, and the request for telework has been approved by the school district in advance. Positions within the school district which can be easily adapted to telework arrangements are likely rare and some districts may not have any such positions.

### **E. Requiring Employees to Wear Masks or Shields in the Workplace**

Schools are generally permitted to mandate that employees wear PPE, including masks; however, the following considerations exist:

- Schools must be understanding of PPE that interferes with an employee's duties or that is altogether ineffective, such as a facemask that may prevent a special



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education teacher or aide from effectively working with a hearing-impaired student or a student who is known to spit at staff.

- Consider alternative PPE in these situations, such as face shields that are made of plastic and transparent.
- If an employee demonstrates a legitimate medical basis for being unable to use certain PPE, then a school district should seek medical certification and engage in the interactive process to determine whether reasonable accommodations should be provided, which may include not requiring the employee to wear the PPE at issue.

### **F. Employee Health Screening – Symptom Questionnaire and Temperature Checks**

The EEOC has indicated medical inquiries and examinations aimed at preventing the spread of COVID-19 are permitted under the ADA. A school district may ask employees if they are experiencing symptoms consistent with COVID-19 or have been in close contact with someone who has tested positive or is experiencing symptoms consistent with COVID-19. A school district may also measure an employee's body temperature.

School districts should consider the following issues when implementing employee health screening:

- Frequency of the screening measure. Regularly monitoring employee symptoms through a daily questionnaire and temperature check is encouraged but not required. A school district may implement a policy that provides for health screening weekly, quarterly, upon return from vacation, or some other nondiscriminatory interval.
- A school district that mandates a temperature check or symptom questionnaire may be required to compensate employees for time spent completing the health screen.
- Any medical information obtained through the performance of health screens must be kept confidential and separate from personnel files.
- Proper training and PPE must be provided to the employee conducting the temperature check.
- Develop a procedure for what happens if an employee reports to work with a fever that includes removal of the employee from the premises and return to work protocol.



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- A school district may impose discipline for an employee's refusal to submit to mandatory employer tests and/or questionnaires.
- Health screening information is confidential employee medical information that should be maintained separately from the employee's personnel file.

### **G. Employee Testing for COVID-19**

The landscape of COVID-19 testing is rapidly evolving. At the time of drafting (July 16, 2020), the CDC and EEOC have issued guidance on viral and antibody testing. Viral testing determines whether an employee is currently infected with the virus, while antibody testing determines whether the individual has antibodies consistent with a prior infection. Per EEOC, Viral testing is permitted, whereas antibody testing is not.

Similar to temperature checks, the EEOC has indicated viral testing is permitted to determine whether an employee is currently infected with the virus and, therefore, poses a direct threat to the safety of others. Antibody testing is not permitted because it is not identifying a direct threat, it is identifying a prior infection, and because the science on antibody immunity is unsettled. The latest CDC guidance indicated antibody testing should not be used to make decisions about returning employees to the workplace.

School districts should consider the following before conducting viral testing:

- An employee who recently contracted the virus may test negative for COVID-19. It is recommended that any testing protocol include a follow-up test three (3) days after the initial negative result.
- The value of a negative viral test is limited to a single moment in time. An employee may be infected with COVID-19 and still test negative if the test is administered shortly after exposure. Also, an employee can be exposed to the virus immediately after taking the test.
- CDC guidance as of June 30, 2020, states that universal testing for all students and staff is not recommended, because “[i]t is not known if testing in school settings provides any additional reduction in person-to-person transmission of the virus beyond what would be expected with implementation of other infection preventive measures (e.g., social distancing, cloth face covering, hand washing, enhanced cleaning and disinfecting).”
- Viral testing can be a useful tool in the school district's return to work protocol. For example, if an employee comes to work with a fever the employee should be sent



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home and not allowed to return until they are symptom free or the employee provides a negative COVID-19 test result.

- Viral testing can also be used in the event of exposure at school to determine whether those who had close contact with the infected individual contracted the virus.
- Testing results are confidential employee medical information that should be maintained separately from the employee's personnel file.
- Employee testing is a constantly evolving and fluid issue and school districts are cautioned to frequently check CDC guidance for the latest information.

### **H. Employee Leave Requests and Expanded Paid Leave Opportunities Under the Families First Coronavirus Relief Act ("FFCRA")**

School districts must be aware of the additional paid leave provisions set forth under the Emergency Family Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA") components of the FFCRA that remain in effect until December 31, 2020, including the ways in which these provisions integrate with existing leave policies and the eligibility requirements and applicable method of compensation for each type of leave. In doing so, districts are encouraged to develop leave policies which provide this information to employees and set forth the employees' rights and responsibilities in terms of reporting their need for leave and anticipated return to work.

- EFMLEA
  - The EFMLEA applies to private school employers with fewer than 500 employees and all public employers. Therefore, it applies to employers who may not otherwise have been subject to the federal FMLA, as well as many employers who were previously covered by the federal FMLA. Unlike the federal FMLA and the EPSLA, there is only one reason that qualifies an employee as eligible for EFMLEA leave. Employees are entitled to EFMLEA if they are unable to work or telework due to the employee needing to provide childcare to a son or daughter under the age of eighteen (18) because the child's school, childcare provider, or place of childcare has closed or is unavailable due to COVID-19.
  - School districts should develop EFMLEA policies with information as to qualifying reasons for leave and establish protocols for requesting and documenting leave.



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- School districts should also modify existing FMLA leave forms and certifications to include EFMLEA components.
- Regular FMLA
  - To the extent that school districts are subject to the federal or Wisconsin FMLA laws, it is important to note that these laws were not substantively changed by the FFCRA. Therefore, leave requests under federal or state FMLA laws should be considered in accordance with the school district's existing policies and applicable law.
  - In managing FMLA and EFMLEA leave requests, it is important that school districts properly classify which leave is being utilized by an employee based on the reason for the leave. EFMLEA provides for paid leave, while the FMLA is unpaid.
  - While EFMLEA and FMLA leave have distinguishing characteristics, an employee is only entitled to take a total of 12 weeks of leave in a 12-month period for both FMLA and EFMLEA. Therefore, if an employee has exhausted all FMLA leave entitlement, they are not eligible for additional leave under the EFMLEA regardless if the employee experiences a qualifying event under the EFMLEA.
- EPSLA
  - The EPSLA applies to private school employers with fewer than 500 employees and all public employers. It provides up to 2 weeks of paid leave for qualifying reasons and runs concurrently with FMLA and EFMLEA leaves of absence. There are six (6) qualifying reasons for EPSLA leave, and the rate of pay associated with these reasons depends on which reason is the basis for leave:
    - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
    - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
    - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.



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- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2)
- (5) The employee is caring for a son or daughter of such employee 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.
- (6) 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.
- School districts should develop an EPSLA policy with information as to qualifying reasons for leave and establish protocols for requesting and documenting leave.
- District Paid Time Off (“PTO”) and/or Other Sick Leave
  - District PTO and existing sick leave it provides to employees are not replaced by paid leave under the FFCRA. Rather, the paid sick leave benefits under the EPSLA are intended to supplement any other leave benefits provided by the school district or under applicable law.
  - Therefore, school districts cannot require employees to exhaust PTO/sick leave prior to taking EPSLA leave or require that any earned PTO/sick leave benefits run concurrently with EPSLA leave.
- Pay Issues, Tax Credits and Record-Keeping Considerations
  - *Rates of Pay and Pay Caps under the EFMLEA and EPSLA.*
    - The EFMLEA and EPSLA both provide paid leave entitlement to eligible employees, but the rates of pay and the applicable pay caps depend on the employee’s qualifying reason for leave.
    - Employees who take EPSLA leave are entitled to the higher of their regular rate of pay, the federal minimum wage, or the local minimum wage for qualifying reasons (1), (2) and (3) under the EPSLA. Paid leave is capped at \$511 per day and \$5,110 in the aggregate per person. Alternatively, employees are entitled to two-thirds that rate



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of pay for qualifying reasons (4), (5) and (6) Capped at \$200 per day and \$2,000 in the aggregate per person.

- In contrast, the first 10 days of EFMLEA leave are unpaid. However, when the employee takes both EFMLEA and EPSLA leaves, both leaves are permitted to run concurrently with each other. In this situation, the EPSLA can provide for paid leave during the first 10 days of EFMLEA.
  - Under the EFMLEA, after the first 10 days of leave, employees are compensated at two-thirds of their regular rate of pay. Paid leave under the EFMLEA is capped at \$200 per day and \$10,000 in the aggregate per person.
- *Substantiating Entitlement to Tax Credits for Paid Leave Under the FFCRA*
- School districts are not entitled to the refundable tax credits that are available to private employers. For the time being, the EPSLA and EFMLEA are unfunded mandates.
  - School districts are not obligated to pay the employer's 6.2% share of social security tax on FFCRA wages.
  - School districts will be required to pay the employers 1.45% share of Medicare taxes on FFCRA benefits.
  - Nevertheless, school districts should still develop record-keeping protocols for purposes of preserving information needed to substantiate the costs of providing FFCRA leave to employees.
  - Per the IRS, the following information will substantiate eligibility for tax credits available under the EFMLEA or EPSLA for private employers. School districts should consider maintaining such records in the event further legislation will provide local governments with further relief.
  - Records to maintain include the following:
    - The employee's name;
    - The date or dates for which leave is requested;



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- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, for such reason.
- In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include:
  - The name and age of the child (or children) to be cared for,
  - The name of the school that has closed or place of care that is unavailable,
  - A representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and,
  - With respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.
- Other than requesting a doctor's note regarding an employee who is taking leave due medical conditions related to COVID-19, school districts should be cautious in requesting employees for any additional information to validate the stated need for leave. Doing so increases the district's legal exposure for potentially interfering with an employee's leave rights under the FFCRA.
- Other Leave Considerations
  - The CDC has issued guidance for schools related to policy development and implementation as school districts prepare for reopening in the fall. The CDC recommends that schools implement or revise existing sick leave to allow flexibility and enable staff to stay home when they are sick, have been exposed to illness, or are caring for someone who is sick. In doing so, schools are encouraged to:



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- Examine and revise policies for leave, telework, and employee compensation.
  - Leave policies should be flexible and not punish people for taking time off due to illness or exposure to illness, and should allow sick employees to stay home and away from co-workers. School districts may wish to consider whether to allow additional leave for employees who need to stay home with their children if there are school or childcare closures, or to care for sick family members.
  - Develop policies for return-to-school after COVID-19 illness. CDC's criteria to discontinue home isolation and quarantine can inform these policies.
  - Monitor absenteeism of students and employees, cross-train staff, and create a roster of trained back-up staff.
- It is prudent for school districts to keep these considerations in mind as they prepare to reopen. Following the CDC's recommendations will help school districts implement policies and procedures that are both flexible and tailored to the unique circumstances each school district faces.

### I. Leadership

Successful reopening will require a multi-disciplinary approach.

- Consider creating a leadership team to plan and manage the reopening with representatives from human resources, finance, buildings and grounds, student services, etc. The leadership team should proactively reach out to departments to see what issues and concerns they are facing as the re-open proceeds. The leadership team should regularly meet with human resources to keep track of concerns and coordinate responses. Proactive problem solving will provide district employees with guidance and confidence in what will be a fluid and novel situation.
- Consider providing regular email updates to keep employees apprised of progress throughout re-opening. Include constant reminders to follow all COVID-19 policies and procedures in a positive and collaborative fashion.
- Consider how the multi-disciplinary team is created and what impact that may have under Wisconsin's Open Meetings Law (*i.e.*, Board-created or Board-approved vs. Superintendent-created).



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- Inclusion of a local municipal or county health officer may also prove to be beneficial. At a minimum, the school district's reopening plan should include coordination between the leadership team and the local health department.
- Be sure to stay current on all relevant state, local and federal health guidance. These documents are updated frequently, and changes should be reflected in relevant school district policies.

### **J. Critical Roles**

If a phased reopening is utilized:

- Critical roles should be prioritized, allowing those employees in critical roles to return first.
- Who holds a critical role will largely be determined by the aspects of the reopening plan; however, critical employees would likely include some administrators, professional staff, buildings and grounds staff, custodial staff, and certain support staff (*i.e.*, food service employees, paraprofessionals, etc.).
- For staff not initially returned to the school buildings, it will be important to be careful with messaging so that they continue to feel valued.

### **K. Limit Capacity**

- If schools utilize a phased reopening, schools should explore various ways to limit the number of employees onsite at any given time while still allowing the school to function.
- If capacity limitations are not realistic, consider creative methods of spreading staff out throughout school facilities, including increased use of outdoor spaces, hallways, gym areas, cafeterias, and other large, open spaces not ordinarily utilized for classroom instruction.
- In addition to remote work, schools can consider shift rotations or staggered schedules for professional and non-professional staff to help reduce the number of employees onsite at a time.



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### **L. Consider the Physical Work Environment**

- Reopening plans will vary by school district and by the type of facilities available within each district. A district with one large building will likely have a different approach than a district with multiple buildings.
- Factors to be considered include the number and proximity of shared workspaces, the number and proximity of shared break spaces, the ability of restroom facilities to accommodate social distancing, and the number of shared equipment, doors, and other touch points.
- Consider temporary adjustments to physical workspaces, such as installing temporary barriers or partitions, leaving doors open to offices to allow for touch free entry, and temporarily closing communal spaces and appliances.
- Post signs at appropriate places, such as entryways and high-traffic areas, providing social distancing reminders.

### **M. Increase Sanitation**

- Consider increasing sanitation procedures, especially for shared spaces and touch points such as restrooms, breakrooms, door knobs, copy equipment, and elevator buttons.
- Post signs at sinks and restrooms reminding users to wash hands consistent with COVID-19 procedures.
- Disseminate hand sanitizer and other cleaning materials throughout the facilities.

### **N. Implement Protective Measures**

- Protective measures may help limit the spread of the virus within the workplace. Such measures may include the installation of high-efficiency air filters, increased ventilation rates, assigning tools and supplies to specific employees, and the addition of physical barriers to separate employees.
- Protective measures also include the provision of PPE and implementing social measures such as maintaining distances of at least six feet, limiting shared elevator and room usage, and cancelling or relocating certain employee gatherings and events.



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### O. Social Distancing

In order to reduce the spread of COVID-19, social distancing is strongly recommended by the CDC. Social distancing means to be at least six feet apart from other people at all times. The following are ways in which social distancing can be implemented and maintained in schools:

- If working remotely is not an option, then ensure that employee's workspaces are separated from each other. If possible, plexiglass should be used to provide a barrier between employees and visitors.
- Use tape to mark distances of six feet in communal areas such as bathrooms where people may be lining up, or in break rooms, so employees know how to be socially distant from one another. Consider blocking off certain bathroom stalls or urinals to create six feet of space between restroom facilities.
- In hallways, consider putting down tape or installing barriers to indicate that there are "one way" routes so people are not closer than six feet apart.
- Implement a schedule for when employees can use communal areas such as break rooms, or require that employees eat in their designated classrooms or offices.
- Implement staggered drop-off and pick-up times so contact between other parents and students is limited.
- Encourage employees to stay home if they feel sick. Consider increasing the substitute teacher pool to ensure availability when a staff member must be absent.

### P. Travel Restrictions

The following considerations exist with respect to employee travel:

- Employers may require that employees report upcoming personal travel for purposes of identifying the location and mode of transportation.
- Employees cannot be prohibited from engaging in personal traveling during non-work hours, including to areas that the CDC may consider COVID-19 "hotspots."
- However, employers can require that employees who travel to certain COVID-19 "hotspots" or other high-risk COVID-19 areas remain off work for a certain period of time, and obtain medical certification that they are not positive for COVID-19 prior to returning to work.



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- Employers may be permitted to require that employees use paid time off during this required period off of work or take the leave unpaid. Be cognizant of whether the employee is exempt or non-exempt under the FLSA, however, as exempt employees generally must be paid for any week in which they perform some work unless FLSA Safe Harbor or public accountability principles permit deductions from the salary.

### **Q. Create Documents for Employees**

- Returning employees may have questions about new policies, benefit eligibility, and the overall plan for the reopening of the school. Consider creating a written resource on these issues for employees to reference.
- A weekly update regarding safety measures or anticipated changes, such as continued reopening, may also assist with keeping employees informed and at ease.

### **R. Positive Test Response**

- Schools should be prepared for an employee who tests positive for the virus following reopening. Be prepared to follow the CDC exposure guidance, including the cleaning and disinfecting of any space occupied by the employee within 48 hours of the positive test.
- Consider whether contact tracing is appropriate and, if so, whether it should be conducted by someone outside your organization, such as a local health officer or department.
- Consider the manner and content of communications to employees regarding the positive test, and be prepared with a communication protocol to implement upon learning of a positive test.

### **S. Layoff, Furloughs, and Reductions in Force**

- Implementing layoffs or reduction in force (“RIF”) as a necessary cost-saving measure presents challenges and uncertainties for both school districts and their employees. If a school district determines that a RIF is necessary, in addition to managing the effects on its remaining workforce’s morale, there are various legal requirements which may apply to the RIF. It is vital that school districts comply with applicable requirements and take steps necessary to limit their liability prior to acting. A RIF is a drastic cost-saving measure which is usually the result of an employer’s calculated determination that the RIF is an economic necessity.



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Accordingly, the importance of minimizing legal exposure in conducting a RIF cannot be overstated. Some of legal exposure areas that school districts need to be cognizant of in carrying out a RIF include:

- Wrongful Discharge, Discrimination, and Retaliation Risks
  - When conducting a mass layoff or large-scale RIF, the failure of a school district to carefully consider the criteria used to select affected employees can result in increased liability exposure for discrimination and retaliation claims. Even if the district implements a RIF with no discriminatory motive, if a disproportionate percentage of the affected employees are in a protected class, such as over 40-years old, the district may be susceptible to claims for disparate impact discrimination.
  - Districts should also be mindful of the risks associated with a RIF that affects employees who are on protected leave, such as FMLA leave, or employees who have recently participated in protected activity, such as participating in an internal investigation, making internal complaints, or participating in a lawsuit against the district. Depending on the facts and circumstances, terminating the employment or taking other adverse employment actions against these employees presents an increased risk that the district will have to defend claims of wrongful discharge, discrimination, or retaliation.
  - To help minimize these risks, districts should carefully consider the selection criteria used to determine which employees will be subject to a RIF. Common examples of objective criteria include performance, productivity, elimination of job functions or positions, or special or unique skills. Importantly, the basis for the RIF, the objective selection criteria used, and the non-discriminatory reasons for the district's RIF decisions should be well documented. To the extent feasible, offering severance packages conditioned on the departing employees' execution of legally enforceable release of liability agreements may also help minimize liability risks.
- Wage & Hour Considerations
  - If a district determines that it needs to downsize on a temporary basis, it should be aware of the potential ramifications of furloughing employees who are exempt from the FLSA's overtime provisions. In particular, districts should exercise caution when furloughing an exempt employee so as not to inadvertently cause those employees to lose their exempt status. Among



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other requirements, for the exemption to apply, employees must be paid on a salary basis.

- Generally, to meet the FLSA’s salary basis requirements, employers must pay a salaried employee’s full salary for any work performed in a workweek. To minimize the risk of losing a furloughed employee’s FLSA exempt status, it is advisable to either furlough in full week increments, or prospectively reduce the workweek and pay based on long-term business needs.
- Contract Considerations
  - Section 118.22, Wis. Stats., involving teacher contracts, section 118.24, Wis. Stats. involving administrator contracts, language in individual contracts and language in district policy all impact the ability of a school to lay off employees. In *Mack v. Jt. School District*, 92 Wis.2d 476 (1979), the Wisconsin Supreme Court distinguished a “nonrenewal” as being different from a “layoff” and upheld the school district’s layoffs which did not follow the statutory nonrenewal timelines. That decision referenced the layoff language negotiated in a collective bargaining agreement existing at the time. Now, in the absence of collective bargaining agreements, schools must evaluate the language in individual contracts and language in policy to determine to what extent, if any, they can lay off employees under a teacher or administrator contract at time separate from the nonrenewal timelines set forth by statute.

### **T. Implement New Policies**

- Reopening is an excellent opportunity to implement new policies, organizational values, and performance expectations related to attendance, leave authorizations, professional values and commitment, telecommuting, social distancing, and traveling.
- Consider issues that arose during the school closure and how those might be best addressed via new or updated policies.
- Additionally, consider encompassing the aspects identified within this Road Map within policy to memorialize and clearly communicate the various components of your reopening plan.

### **U. Employee First Amendment and Municipal Employment Relations Act (“MERA”) Rights**

As a governmental entity, schools must be cognizant of certain, additional laws when reopening. These are highly nuanced standards, both respect to the First Amendment and the



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MERA, such that school districts should proceed with caution before taking action with respect to employment.

School districts must consider the right of employees to engage in protected speech under the First Amendment. While this may seem like an unlikely issue, employees who are dissatisfied with returning to work or how their employer is addressing reopening may decide to voice their opinions in the workplace, to the community, on social media, at Board meetings, or elsewhere. It is important to understand when a school can and cannot discipline employees when such issues arise.

To determine whether speech is protected by the First Amendment, courts apply the following balancing test:

- (1) Was the individual speaking as a citizen or an employee?
  - a. If as a citizen, you proceed to the second factor of the balancing test. If as an employee, the speech is unprotected.
  - b. Courts look at the totality of circumstances under this factor and consider whether the individual was holding themselves out as an employee or otherwise identified themselves an employee.
  - c. If the speech was by an employee and part of the employee's duties, then the speech is generally unprotected and the inquiry ends here.
  
- (2) Was the individual speaking on a matter of public concern or a private concern?
  - a. If on a matter of public concern, you proceed to the third factor of the balancing test. If on a private concern or grievance, the speech is unprotected.
  - b. Courts consider whether the issue discussed is or would be a hot-button issue of social, cultural or political importance to the community or the public-at-large or whether the issue is limited to the individual's position of employment or personal interests. For example, discussing government corruption is almost always considered a matter of public concern. Social movements and issues, such as Black Lives Matter, also generally constitute matters of public concerns. On the other hand, an employee complaining about a workplace rule or employment decision applicable to that employee, provided it doesn't violate a law, generally constitutes a matter of private concern.



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- (3) Does the individual's interest in speaking on a matter of public concern outweigh the government's interest in providing efficient and effective services to the public?
  - a. If the individual's speech is on a matter of public concern but causes such substantial disruption, or has the potential to cause such disruption, that it undermines the employer's ability to efficiently and effectively provide services to the public, the speech is unprotected. If there is not a potential for substantial disruption, or substantial disruption does not actually occur, the speech is protected.
  - b. Courts consider the impacts of an employee's statements on the workplace, including but not limited to the impact on co-workers, students, parents, and other community members, in assessing whether substantial disruption did or was reasonably forecast to occur. For example, an extremely offensive comment regarding the Black Lives Matter movement may be made by an employee in their capacity as a citizen and relate to a matter of public concern, but if it causes or is forecast to cause substantial disruption within the school community such that the ability to provide an effective and efficient education is disrupted or forecast to be disrupted, then the speech would arguably be unprotected.

First Amendment issues are fact-intensive and difficult to assess without careful analysis. Schools are therefore encouraged to contact legal counsel upon becoming aware of employee speech that may warrant discipline for assistance with determining whether discipline is truly appropriate.

### **V. Protected Concerted Activity**

In addition to First Amendment concerns, school districts must ensure that they do not infringe upon employees' rights to engage in protected concerted activity. Generally, an employer cannot limit "union" speech based on content, but can enforce legitimate limits based on time, place, and manner. Thus, careful consideration of the impact of employer policy choices and consistent enforcement are necessary. Protected concerted activity issues involve a fact-intensive analysis with decisions made on a case-by-case basis in consultation with legal counsel.

These principles are demonstrated by the WERC's decision in *UW Hospitals*, Dec. No. 30202-C (WERC 4/2004), which states:

An employer may interfere with its employees lawful concerted activity to the extent justified by the Hospital's operational needs, as it is well established that



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employer conduct which may well have a reasonable tendency to interfere with employee rights will generally not be found violative if the employer had a valid business reason for its actions. [ . . . ] The legitimacy of the Hospital's interests is belied chiefly by the selective nature of its action, not only in blocking the Union's e-mail while evidencing little concern about other outside access, but in admittedly reacting to the content of the Union's e-mail and doing so at a time of heated negotiations. Where an employer claims an interest in safeguarding its property, but has only selectively or sporadically paid heed to that interest except where union activity is involved, doubt arises as to the genuineness of the asserted interest. In our view, this doubt largely accounts for the virtual maxim that a facially valid rule will be unlawful if it is discriminatory in application. [ . . . ] Other facts of this case support the inference that the Hospital was not genuinely concerned about its property rights in keeping outsiders from its e-mail system or that the Union's access to the system would undermine the system itself or work force productivity. The Hospital generally allowed employees to e-mail each other, presumably even with the Union's message, as long as such personal e-mail use was within the permissible bounds and did not interfere with work.

### **W. Employee Benefit Considerations**

In ordinary course, employee benefit plans should be reviewed annually by school districts. As a result of the COVID-19 pandemic, the time for plan review is now to minimize issues caused by the coronavirus outbreak and to ensure plans are compliant with new legislative changes aimed to make plans more flexible for participants. Three areas of consideration for school districts to review for employee benefit plan compliance include: (1) determination of employment status of your workforce, (2) notice obligations, and (3) new lenient legislation for plan participants to immediately access their benefits.

1. Returning Employees to the Workplace – Is the employee a new hire or returning employee?
  - Initial questions to consider:
    - Was the employee terminated? Furloughed? Laid off? On leave?
    - If the employee was on leave, was the leave paid or unpaid?
    - What was the period of time in which the employee was not performing services for the school?
  - School districts must review plan documents, including health and welfare and retirement plan documents.
    - What does your district's plan say?



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- How does the period of no service count for vesting/service credit?
    - Is the plan frozen or current?
  - With respect to Health Plans, school districts must keep in mind the following:
    - Applicable large employers are subject to the employer shared responsibility requirements. Using the “look-back” method for determining full-time status, a school district will need to determine if the employee is an ongoing employee with a period during which no work was performed, or a new hire subject to a new initial measurement period.
    - If an employee is classified as an ongoing employee, the school district will need to determine if the employee earned any hours of service while on leave (e.g., paid leave)
2. Coverage/Notice obligation considerations for school districts include:
- Temporary relief of COBRA election notices beyond ordinary timeframes is permitted per IRS/DOL Joint Rule (<https://www.govinfo.gov/content/pkg/FR-2020-05-04/pdf/2020-09399.pdf>).
    - School districts are ordinarily required to provide plan administrators notice of an employee’s reduction in hours or termination. Then, the plan administrator would provide the terminating employee notice of COBRA eligibility within 14 days (44 days total if the school district administers its own plan), the employee then would have 60 days from the date of notification to elect coverage, and 45 days thereafter to make the first premium payment.
    - Now, school districts have flexibility through the end of the Outbreak Period (60 days after the COVID-19 national emergency period ends) to provide required notices.
    - Premium payment deadlines are also extended for participants.
  - For employees that separated from employment during the outbreak (on their own course or via termination) and are returning to work, but notify you that they do not intend to re-enroll in the plan, there may be an obligation to provide the initial COBRA notice and/or HIPAA privacy notice.
    - Employees are required to inform employers of their election changes



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### 3. Legislative Changes Impacting Employee Benefits

- Implications of the CARES Act:
  - As to Retirement Plans:
    - Allows penalty-free coronavirus-related distributions of up to \$100,000 from retirement plans – exempt from the 10% early-withdrawal tax under Code Section 72(t)
    - Increases the amount of a permissible retirement plan loan for individuals affected by the coronavirus
    - Waives defined contribution required minimum distribution requirements for 2020
  - As to Health & Welfare Plans:
    - Expands the Families First Coronavirus Response Act (“FFCRA”) testing coverage mandate to require coverage for a broader range of diagnostic items and services
    - Adds reimbursement rate requirements related to the testing coverage mandate for out-of-network health providers
    - Employees are allowed to make mid-year changes to Section 125, Flex Savings Accounts (“FSA”), health coverage, and dependent care assistance programs
    - Extends claims periods to apply unused amounts remaining in a health FSA or dependent care assistance program
    - Increases limit for unused FSA carryover amounts from \$500 to \$550
    - Earlier relief for High Deductible Healthcare Plans, prior to an employee hitting their deductible
    - Coverage must be provided for inpatient/telehealth services, urgent care visits, ER visits for COVID-19 testing
- Families First Coronavirus Response Act
  - Group Health Plans and health insurers must cover certain items and services related to diagnostic testing for detecting COVID-19
  - Covered testing includes testing of: (1) individuals with signs/symptoms that are compatible with COVID-19 or (2) asymptomatic individuals with known or suspected recent exposure to COVID-19.



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- Health plans cannot impose cost-sharing (deductibles, copayments, coinsurance), preauthorization, or other medical management requirements on testing
4. School districts should take a number of actions now to ensure compliance regarding health and welfare and retirement plans.
- As an initial matter, school districts should review their plan documents
  - As part of the review, districts must be prepared to evaluate the current benefits to determine vulnerabilities.
  - School districts will need to determine whether employees are returning or whether employees are being rehired.
  - School districts should work with legal counsel on IRS/DOL extension periods and plan review.
  - To the extent necessary, school districts should amend their plans to comply with COVID-19 guidance.

### **X. Navigation Tips for a Successful Journey**

- School districts must make a determination as to the manner in which the school district will reopen to staff members and what measures will be implemented to provide for the health and safety of individuals within school buildings.
  - Review and revise staff handbook(s) as necessary
  - Establish training protocol for all staff on PPE, building safety and changes to standard protocol
- School districts should consider whether telework will be allowed and establish the parameters of such work.
- School districts must understand their obligations with respect to leave entitlements under the Families First Coronavirus Response Act.
  - Implement policy revisions necessary to effectuate the law's provisions.
  - Create the necessary leave forms
- Establishing protocols for self-monitoring, quarantine, and isolation for employees showing COVID-19 symptoms or contact with someone with COVID-19 is necessary.



## Stop 3: Student Considerations

### Stop 3: Welcoming Students Back to our School Buildings

For the past several months, COVID-19 has wreaked havoc on the educational environment and all indications point to continued issues with the pandemic in the coming academic year. By far, the most uncertain journey of this roadmap relates to how school districts adequately prepare to deliver education to their students. While schools have waited with baited breath, hopeful of a return to normalcy (or at least a “new normal”), schools have increasingly shifted gears into contingency planning and a complete overhaul of the manner in which education is provided.

Pupil instruction and extra-curricular activities will look and feel different. While health and safety considerations have always been a priority, we are now tasked with determining how to deal with a communicable disease for which there is currently no cure. How can a school deliver full content in a manner that guarantees the safety and well-being of students, staff, and visitors?

In making the journey to return to school, there are a multitude of issues schools must consider along the way. Remote learning may take center stage in some districts. Classrooms and instructional methods will be transformed. There are no state or federal mandates dictating how schools are to reopen—only guidance or recommendations that school districts may consult and consider in making individualized determinations about how school will look for the individual district. Each district’s journey will look different, but addressing the issues at the heart of a well-executed reopening plan will position districts for a confident reopening and return of students to schools, whatever form that may take.

#### A. Returning Students to School – Health and Safety Considerations

##### 1. Masks and Personal Protective Equipment

Face coverings have been shown to slow the spread of the virus and help prevent people who may have the virus from spreading it to others. It is important to remember, however, that cloth face coverings do not replace physical distancing or other safety precautions. The following considerations exist with respect to students being required to wear masks:

- Masks may be required.
  - Consider whether to implement a mandatory mask policy. Although there is no legal requirement that students wear masks, DHS recommends that adults and students over the age of two (2) wear cloth face coverings.



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- If implemented, consider the scope of the mandatory mask policy. Face coverings are most useful when physical distancing is difficult. If sufficient social distancing can be accomplished in the classroom, school districts may consider limiting the mandatory mask policy to times when social distancing is difficult. (i.e. arrival and departure from school, lunch, traveling in between periods, etc.)
  - Identify the styles of face coverings allowed under the policy. In addition to the paper or cloth face covering that loops over the ears, people are also wearing bandanas, balaclavas, plastic face shields, shirt sleeves, etc. The definition of an acceptable face covering should require coverage of the nose and mouth but prohibit covering the entire face (i.e. no Halloween masks)
  - Consider whether the school district will provide face coverings to all students or only those students who are unable to provide their own covering. Also consider whether the school district will provide masks to students who forget or lose their masks during the school day.
  - Establish a progressive discipline protocol for students that fail to comply with the mask policy.
- Teach and reinforce use of masks and face coverings.
  - Face coverings may be challenging for students, especially younger students.
  - Face covering should be worn by staff with proper use modeled for students.
  - Students should be reminded not to touch the face covering and to wash their hands frequently.
- Students may be subject to discipline for failure to wear a mask.
  - School districts have authority to implement rules to protect the health and safety of students and staff. The EEOC has said an individual with COVID-19 poses a “direct threat” to the safety of others. The CDC states that cloth face coverings are meant to protect others in case the wearer is unknowingly infected with the virus. A student that refuses to wear a mask in violation of the policy is engaged in behavior that poses a potential health risk to students and staff.
  - Pursuant to Wis. Stat. 120.13 (1) (b), a school district has the authority to suspend a student for disobeying school rules and also for engaging in conduct while at school that endangers the health and safety of others. Assuming statutory notice requirements are satisfied, a student may be suspended for refusing to comply with a school district’s mask policy.



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- Likewise, a school district has the authority to expel a student if the school board finds repeated refusal or neglect to follow school rules. A student's repeated refusal to wear a mask or to comply with other safety measures such as social distancing poses a health risk but also disrupts the schools ability to maintain order and provide a safe educational atmosphere. A school district dealing with persistent noncompliance should consult legal counsel to evaluate the severity of the misconduct and the possibility of expulsion.

### 2. Other Health and Safety Considerations

In addition to utilizing cloth face coverings, other health and safety measures should be considered to help slow the spread of the virus and help prevent individuals who may have the virus from spreading it to others. School districts should consider the following health and safety measures and clearly communicate any expectations surrounding the same to families prior to returning students to school:

- Reinforce Good Hygiene Practices
  - Teach and reinforce handwashing with soap and water for at least 20 seconds.
  - Increase monitoring of handwashing practices to ensure best practices are followed.
  - Ensure availability of hand sanitizer for use when handwashing is not readily available.
  - Encourage students to cover coughs and sneezes with a tissue/elbow and follow with handwashing.
  - Encourage social distancing practices by students when engaging in hygiene practices.
  - Ensure adequate hygiene supplies are available for students.
  - Build structured routines into the student day to reinforce sanitizing of frequently touched surfaces (e.g., student desks, any shared supplies).
  - Consider issuing a [Daily Reminders Template](#) to staff to ensure regular and consistent messaging to students throughout the day regarding health and safety protocols students must be following.
  - Consider ways to use the pandemic as an opportunity to teach students about related topics, such as proper handwashing practices, other personal hygiene measures, and the science behind what germs are and how they can spread.



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- Social Distancing Implementation
  - In order to reduce the spread of COVID-19, social distancing is strongly recommended by the CDC.
  - Social distancing means to be at least six feet apart from other people at all times, which should be encouraged and reinforced with students.
  - Use tape to mark distances of six feet in communal areas, such as bathrooms where students may be lining up, so students know how to be socially distant from one another. Consider blocking off certain bathroom stalls or urinals to create six feet of space between restroom facilities.
  - Post age-appropriate signage at appropriate locations throughout school buildings.
  - In hallways, consider putting down tape or installing barriers to indicate that there are “one way” routes so students are not closer than six feet apart.
  - Consider options for delivery of special classes, lunch, and other situations that would ordinarily involve the congregation of large numbers of students.
  - Implement staggered drop-off and pick-up times so contact between other parents and students is limited.
  
- Health Screening Upon Entry
  - Students may be screened upon entry to schools.
  - Potential screening methods include:
    - Temperature screen
    - Questionnaire
    - Acknowledgment
  - Considerations when selecting the appropriate health screening method for your school district may include the following:
    - The availability of supplies, such as thermometers, disinfectant for the thermometers, and PPE. If asking families to monitor students’ temperatures at home, determine whether your district is able to supply families with thermometers for those who do not have access to thermometers at home.
    - What PPE must be supplied to staff tasked with carrying out daily temperature screens (e.g. face coverings, face shields, eye protection, gloves) and whether physical barriers should be used.
    - Beware of the potential for a “false positive” temperature reading as the result of a student engaging in recess, gym class, or simply



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as a result of warm weather. School districts may wish to consider conducting a temperature re-test if such factors are present to confirm a high temperature prior to sending a student home.

- Determine availability of staff to carry out the selected screening method and whether staff will need specific training for their assigned roles in the screening process, such as [how to properly use a non-contact infrared thermometer](#).
  - Assess what accommodations may be required for students with specific health or behavioral needs for each screening method.
  - Consider how records created during the chosen screening process will be handled, as any records created will likely be considered “education records” under the Family Educational Rights and Privacy Act (“FERPA”).
    - Follow guidance from the [Department of Education](#) and consult with legal counsel for specific questions regarding FERPA in the screening process.
- Stay Home Requirements
    - Educate families about when students should remain home and when they may return to school.
    - Encourage students to stay home if they feel sick.
    - Actively encourage families to comply with CDC guidance regarding quarantine and isolation upon close contact with a person.
    - School districts should consider eliminating “perfect attendance” awards, reviewing attendance policies for what is deemed an “excused” absence, and offering virtual learning options for students who may be subject to quarantine or isolation.

### **B. Compulsory School Attendance and Truancy**

Inevitably, school districts will be faced with student absences in connection with COVID-19. Whether it is a student who is quarantining as a result of contact with an individual with COVID-19 or COVID-19 symptoms, an immunocompromised or medically fragile student, or a student who has contracted the coronavirus, lengthy, unscheduled, and emergency student absences will be commonplace in schools. Even in a pandemic, school districts must continue to be mindful of their obligations with respect to compulsory school attendance.

- Compulsory school attendance law requires students between the ages of 6 and 18 years who have not graduated from high school to attend school regularly.



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- School boards are required to establish a written policy specifying the reasons for which pupils may be permitted to be absent from school.
- Parents may excuse their child's absence upon prior written notice.
- Students may be excused to allow for program or curriculum modifications or graduation alternatives in limited circumstances.
- Students, however, may not be excused for more than 10 days in a school year for a non-illness/non-medical reason.
- School boards may excuse children temporarily for medical reasons for up to 30 days upon written notice from a statutorily designed health care provider. A health care provider notice is only valid for 30 days. Medical absences in excess of a 30-day period would require updated medical documentation.
- There is no limit, however, under state law regarding how many days a student may be excused from school because of illness.
- Truancy results when a student is absent without an acceptable excuse for all or part of one or more days during which school is held.
- Students qualify as "habitually truant" when absences without an acceptable excuse exceed five (5) or more days in a school semester.
- Virtual schooling may raise questions as to what constitutes attendance and what circumstances warrant an excused or unexcused absence with respect to student education.
- Open enrollment decisions, specifically, the termination of open enrollment, may result when a student is habitually truant.
- School districts must keep in mind that attendance policy is a local school decision. Because of that, school districts should consider the following actions to ensure they are prepared to address issues related to compulsory school attendance and absences caused by or related to COVID-19:
  - Local attendance policies should define excused and unexcused absences and a written excuse from a medical provider may be required.



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- School districts should review, and to the extent necessary, revise attendance policies to define excused and unexcused absences.
- School staff should be trained in coding absences to ensure pupil records reflect district policy.
- Any decision with respect to the initiation of truancy proceedings or the termination of open enrollment based on habitually truancy should be reviewed with legal counsel.

### C. Special Education Considerations

In addition to determining instructional delivery methods for all students, school districts will need to be particularly mindful of the provision of education to students with disabilities. School districts are well aware of their obligations to students with disabilities under the IDEA and Section 504; this roadmap provides guidance that will serve to assist school districts in making decisions with respect to serving students with disabilities in a manner that minimizes legal liability.

School districts must be prepared to address a multitude of concerns regarding the disruption of educational services that occurred as a result of the mandatory school closure, while continuing to provide students with disabilities with a Free Appropriate Public Education (“FAPE”). Due to the Spring 2020 school closure and the expectation that schools as a whole will be operating very differently when schools reopen for the 2020-2021 school year, the provision of special education services will necessarily need to be modified from normal course.

#### 1. Provision of FAPE

- Every student with a disability is entitled to a FAPE and the provision of special education services based upon their individualized education program (“IEP”).
- An LEA’s core responsibilities to students with disabilities have not changed: districts are still obligated to provide FAPE in the least restrictive environment (“LRE”); IEP teams must provide a student with a disability with an IEP; and students must be evaluated on their progress toward IEP goals and progress in the general education curriculum.
- Students with disabilities are likely to be more negatively impacted by remote/virtual learning, as well as potential interruptions to education as the result of a second-wave school closure.
- Health and safety guidelines and criteria should be implemented on a case-by-case basis, taking into account the needs of the child.



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### 2. IEP Meetings

- Schools must reconvene IEP teams for each student with a disability to determine the impact of loss of instructional time, specially designed instruction, and related services. This assessment should also include an assessment of the social and emotional aspects of the school closure.
- IEP teams must conduct assessments to determine student progress (or lack thereof).
- IEP teams must be prepared to address the provision of “additional services,” that is COVID-19 impact services that the student would have otherwise received but for the pandemic related school closure.
- As always, parents/caregivers are a key component to the IEP process and collaboration in the evaluation process is encouraged. Parents will be a primary source of data and information regarding a given student’s progress towards his or her goals and in the general education curriculum during the extended shutdown.

### 3. Evaluations

- Given that a number of evaluations (both initial evaluations and reevaluations) were postponed in the wake of the pandemic-related school closure, schools can expect a backlog in evaluations and should prioritize the manner in which evaluations will be conducted.
- Schools should consider prioritizing new referrals first, with reevaluations secondary.
- Schools should consider further prioritization of reevaluations, such as prioritizing reevaluations based on student need.
- Schools may wish to utilize interventions, where appropriate, until evaluations can be completed.

### 4. Additional Services (COVID-19 Impact Services (“CIS”))

- DPI understands that some students with disabilities may have experienced a regression in skills over the course of the school closure which may be remedied through a district’s provision of “Additional Services,” or COVID-19 Impact Services (“CIS”).
- Schools should convene IEP teams to determine skill regression, student ability to retain skills, and progress toward IEP goals, with an eye toward determining appropriate CIS to supplement the 2020-2021 IEP for lost instructional time and services.
- Schools should begin collection and analysis of data to allow for an informed determination of CIS required for each individual student.



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- DPI recognizes that CIS may not represent a “minute for minute” replacement of instruction time that was missed; rather, the expectation is that the IEP will work to come up with a plan for CIS to address the regression of skills.
- DPI further acknowledges that no such services may be needed and the determination will largely depend on how successful virtual learning was during the closure.
- DPI advises that schools should consider adding contingency plans in the event of “second wave” of COVID-19 exposure and another school closure.
- School districts should begin the process of evaluating currently existing data collected through progress monitoring and determine whether and which assessments may need to be conducted to assess the effectiveness of student learning in the remote virtual environment.
- School districts should begin the process of data review and collection sooner, rather than later, given the vast amount of work that special education teams will return to as schools reopen.

### 5. Data to Consider

- IEP teams must collect and evaluate data from before and during the closure and upon return to school, to the extent practicable.
- Parent feedback and observations will be critical.
- IEP teams should consider whether a student has experienced a regression in function or academic performance and whether the student may be reasonably expected to regain the skills without additional services.
- IEP teams should consider whether, to the extent a student has made progress, the extent to which the student made progress toward IEP goals compared to the progress made by all students during the period of school closure.
- In situations where data is unavailable, IEP teams should compare a student’s progress to grade level standards.
- IEP teams should consider whether services are necessary for the student to transition back to the school environment.

### 6. A “Triage Approach” to Scheduling

- It is understood that it will be difficult for school districts to undertake IEP meetings for all students, evaluations, reevaluations, data review, and assessments.
- School districts should begin work on a realistic scheduling plan that allocates special education resources, takes into account scheduling of IEP teams, and allows appropriate time for evaluations and reevaluations.



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- Per DPI, school districts should prioritize students who need additional services to successfully return to school due to newly identified needs and students who did not receive special education and related services during the school closure.
- Students who are graduating and will reach the age of 21 before the end of the current term also should be prioritized and a determination as to CIS should be made.

### 7. Timing of Decision Making

- The assessment of Additional Services for all students should be prioritized based on student need, but in any event, decisions with respect to Additional Services should be made no later than six (6) months after school starts for the 2020-2021 school year (approximately February/March 2021).
- DPI encourages school districts to consider starting data evaluation and, potentially, services before the 2020-2021 school year begins, if possible; however, this is not mandatory.
- School district should take a strategic approach to decision making as to CIS, planning the method of prioritization, the need for additional data and/or assessments, and the scheduling of IEP meetings to make CIS determinations.

### 8. Documentation

- As always, a school district must be mindful of the need to document all IEP team decisions, including all services and placement offered by the school district and rejected by the parent/student, including the reasons, if known, for the rejection. Use of the M-1 form would be appropriate for documenting same.
- Clearly document CIS due to school closure as an addendum to an IEP or within the program summary section of the IEP. In writing CIS into IEPs, school districts should note with specificity the services and supports to be provided, the frequency, amount, location, and duration of the services, and the environment in which CIS will be delivered.
- Documentation should reflect an acknowledgment that the district and parent/guardian are in agreement that the CIS are provided to satisfy any deprivation caused by the COVID-19 pandemic school closure during the 2019-2020 school year.
- In documenting CIS, school districts should be mindful of the prospect of a “second wave” school closure which may impede a district’s ability to deliver CIS, in addition to the services and programming set forth in a student’s annual IEP.



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### 9. Surveying Families for Contingency Plan

- It may be worthwhile for schools to explore family surveys to gauge effectiveness of virtual learning during the Spring 2020 school closure, and likelihood of student engagement in the event of further school closures.
- Surveys of students with disabilities should be used in conjunction with broader surveys of the general student population.

### 10. Defining Least Restrictive Environment

- IEP teams must make all decisions with respect to a student's placement in light of the mandate of the student receiving programming and services in the least restrictive environment ("LRE").
- An IEP team's consideration of the least restrictive environment ("LRE") will be expected to adapt in accordance with the circumstances.
- The DPI's "Education Forward: Reopening Wisconsin's Schools" guidance has set forth a number of potential instructional scenarios which may present practical and logistical challenges to ensuring students with disabilities continue to learn in the LRE.
- School-based IEP team members should give due weight to the requests of parents for students to access virtual instruction.
- Regardless of the environment, schools must ensure virtual learning is a viable method for the student to make progress toward IEP goals.

### 11. Virtual School Options

- Schools may be considering offering parents the option to elect either to send their children to school or have their child attend school virtually. If the offer is made to general education students, schools should also offer the virtual choice to special education students.
- The IEP team of a student who voluntarily enrolls in a remote/virtual learning model must convene to address changes to the student's IEP.
- A school district cannot make all classes, programs, services, and supports available in a remote environment and a parent's/guardian's choice to opt out of face-to-face instruction may result in decreased or different special education supports and services.
- Schools must consider whether a student with a disability is able to receive all programming and services virtually, or whether some services and supports will need to be provided face-to-face.
- Schools must consider logistics related to transportation, student and staff safety precautions, and classroom safety measures.



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### 12. Mental and Behavioral Health and Emotional Supports

- A wide range of mental, behavioral, and emotional supports may be needed by students, given the various factors at play for any given child. Such supports may include the mental health and emotional impact of the COVID-19 pandemic itself; family considerations, such as financial/employment concerns; societal and political concerns, including racism and racial inequality; socioeconomic considerations; and the political environment.
- Schools should consider the need for increased social and emotional programming and support.
- Schools should engage mental health professionals to assist students with pandemic related mental health concerns.

### 13. Physical Health and Hygiene

- It is expected that certain students with disabilities may have a more difficult time adhering to health and hygiene policies implemented by schools due to COVID-19.
- Schools should consider additional training to address appropriate practices, including modeling and teaching appropriate PPE behavior in accordance with school policy for the general student body, modeling and teaching appropriate social distancing, and collaborating with families on modeling responsible preventative behavior in the home.

School districts should consider the following actions to ensure they are prepared to address issues related to students with disabilities arising from unique COVID-19 impacts to education:

- Determine what data exists for each student with respect to progress monitoring and what additional assessments, if any, are needed to allow for appropriate decision making.
- Prioritize IEP team meetings and evaluations/reevaluations based on factors appropriate to your district, which may range from age level of student to student need.
- Assess student instruction and related services needs for the 2020-2021 school year and revise student IEPs accordingly.
- Consider the need for CIS and determine the nature and extent of such services.



## Stop 3: Student Considerations

### D. Returning Students to School Buildings

#### 1. Student Arrival and Dismissal

- Schools may consider staggered arrival/dismissal times for different groups of students to avoid contact between groups, including staggered bus and parent drop-off/pick-up times.
- Schools may also consider adding additional drop-off and pick-up locations and assignment of entry points to prevent groups from congregating.
  - If schools utilize multiple entrances, schools must ensure entrances are appropriately staffed to ensure student and building safety.
- Schools may consider using one-way flow of traffic into and out of the building when possible.
- A prohibition on parents/guardians/visitors from entering the building to drop off or pick up may be implemented to allow for enhanced social distancing.

#### 2. Communication with Families

- Schools should plan for how they will communicate new health and safety procedures and expectations to families and students prior to the start of the school year.
- Consider having students and families sign acknowledgement forms to acknowledge the health and safety procedures the school district will be requiring for all students and visitors.
- Prepare for how to respond to questions and concerns from families regarding new procedures.

### E. Restructuring Classrooms and Use of School Facilities

#### 1. Modified Classroom Layouts

- Schools should consider modified classroom layouts to allow for appropriate social distancing. The CDC recommends student seating be spaced 6 feet apart when feasible; the American Academy of Pediatrics (“AAP”) recommends 3 to 6 feet of spacing.
  - Recognizing that 6 feet of space between students is not always feasible, the AAP has indicated spacing students 3 feet apart, so long as students are wearing face coverings, may provide a similar benefit as spacing students 6 feet apart, with the added benefit of allowing more students to remain in school. The AAP has also noted that the transmission and severity of COVID-19 in students appears to be less than in adults.
- Consider what infrastructure changes are possible to increase the physical space between students and staff:



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- Space seating/desks at least 3 to 6 feet apart
  - Turn desks to face in the same direction (rather than facing each other), or have students sit on only one side of tables, spaced apart
  - Turn teachers' desks to face the same direction as student desks (rather than having the teacher face the students)
  - Repurpose offices or break rooms to allow for additional learning space
  - Use portable classrooms, to the extent available
  - See [sample classroom seating plan from DPI](#)
  - If students must sit facing each other or within 6 feet of each other, consider adding a physical barrier, such as a sneeze guard or partition.
2. Learning Environments and Instructional Models
- The American Academy of Pediatrics recommends schools approach the 2020-2021 school year with the goal of having students physically present in school if at all possible, due to the wide range of educational, developmental, social, and emotional benefits in-person instruction provides to students.
  - Schools must individually decide what learning environment, or combination of learning environments, is appropriate based on local health conditions, which may include a combination of in-person instruction, physically distanced in-person instruction, and/or virtual learning.
    - Schools should prepare staff, student, and technology resources to transition to 100% virtual learning with little to no notice in the event a second wave causes another school shutdown or a positive case of COVID-19 necessitates a temporary short term closure of one individual school to allow for contact tracing and disinfecting of the building.
  - Ensure students with IEPs or 504 plans continue to receive services regardless of the school's scheduling plan.
  - Consider implementing [flexible instructional models](#) to help increase social distancing in the in-person and virtual learning environments.
  - Consider implementing [modified student schedules](#) to maximize social distancing.
  - Communicate with parents regarding alternate ways they may contact their child's teacher(s) with any questions or concerns.
3. Student Scheduling
- Cohort Considerations:
    - Cohort designation (small student groups) and use is recommended, keeping students together throughout the school day in order to limit mixing between students and staff.



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- Use of static cohort groups as much as possible will assist with contact tracing should a member of a cohort group show symptoms or test positive for COVID-19.
  - Hallway passing time considerations:
    - Shorten passing time to lessen the amount of time students are in contact with large groups in the hallways.
    - Stagger passing times so that all students are not in the hallway at the same time.
  - Locker Considerations:
    - Consider eliminating lockers
    - Give students assigned times to access lockers to ensure that students with lockers next to each other are not at their lockers at the same time.
    - Assign lockers by cohort to prevent students from needing to travel unnecessarily far from their classrooms and from unnecessary interactions with students outside their cohort.
    - Consider minimizing items students need to carry or store in a locker, including using online texts and materials as opposed to actual books.
    - Schools that maintain “no backpack” policies may consider revising or temporarily suspending such policies to allow students to have ready access to needed materials without accessing lockers.
  - Consider staggering or adding more sections of certain times and class periods where social distancing is more difficult to prevent large groups from being together at once. For example: arrival/dismissal, recess, lunch, lab time, special classes, etc.
4. Modifications to Specials
- Music Classes
    - Consider the increased risk of COVID-19 presented by the respiratory droplets created in certain music classes (e.g., singing and [wind instruments](#)) and what can be done to minimize those risks.
    - Possible ways to reduce the risk of COVID-19 spread for music classes include:
      - Holding music classes outdoor when possible, or in a larger space such as a gym or auditorium where students can be spread out.
      - Reduce class time, since a reduction in time reduces the potential for contracting COVID-19. Consider taking a break from playing or singing mid-class to allow any possible contaminated air to dissipate.
      - Use barriers between students.
      - Students should not share music stands or other materials.



## Stop 3: Student Considerations

- High touch surfaces, such as music stands, should be disinfected between students.
    - See the following resources for further guidance on COVID-19 risk mitigation in the performing arts:
      - West Point Music Research Center's [Army Band Risk Mitigation Plan](#)
      - [National Federation of State High School Associations](#)
  - Physical Education Classes
    - Aerobic activity presents an increased risk of COVID-19 due to the greater amount of expelled respiratory droplets.
    - Students should avoid close physical proximity when exercising.
    - Consider holding physical education classes outdoors whenever possible, and encourage students to spread out to maximize physical distancing.
  - Recess
    - Limit the number of students playing on the playground at once.
    - Consider only having one cohort of students on the playground at one time.
5. Restrooms
- Add physical barriers between bathroom sinks and urinals, especially when they cannot be at least 6 feet apart.
  - Consider blocking off every other bathroom sink and urinal in order to encourage social distancing.
  - Do not allow students to congregate in bathrooms. Use floor markers (e.g., tape or stickers) outside of bathrooms to direct students to wait their turn standing 6 feet apart outside of the bathroom.
  - Disconnect or tape off air powered hand dryers and replace with single-use paper towel and touchless garbage cans.
  - Utilize touchless dispensers for soap and paper towel when possible.
  - Remove lids to all trash receptacles and/or use no-touch or foot-pedal trash cans.
  - Consider ways to reduce risk of spread when entering and exiting bathrooms:
    - Prop open bathroom doors if possible.
    - Install hand sanitizer dispensers next to the door handle, or place a trash can by the door so users can open the door using paper towel and then dispose of the towel afterward.



## Stop 3: Student Considerations

### 6. Locker Rooms and Gyms/Fitness Centers

- Instruct individuals to carry a towel that they can use to cover their nose and mouth if they get the urge to sneeze or cough. Hands should be washed immediately afterwards.
- Have students supply their own towel and exercise clothes. Ask students to take home and launder these items each night.
- Clean and disinfect equipment between each student. Either have students clean equipment after use, or provide “Ready to Clean” tags that students can use to indicate equipment is ready for a designated staff member to disinfect.
- Instruct students to wash hands before and after using the locker room and the gym/fitness center.
- Equipment should be spaced so that users are at least six feet apart. Consider greater distancing for highly aerobic equipment, such as treadmills.
- Use physical barriers to help segregate the space around equipment.
- Use tape and signage to mark safe distancing spots.
- Limit the number of users at one time.
- Discourage use of fans in gym/fitness centers. If fans are used, do not have fans blow directly from one person toward another.
- Locker room showers should be closed unless physical distancing is enforced, either by installing partitions or by signs and markings indicating social distancing requirements.
- Water shoes should be worn in showers and locker rooms.
- Locker room bathrooms should adhere to the recommendations for regular school bathrooms.

### 7. School Libraries

- Follow the same social distancing practices recommended for classrooms. For example:
  - Seating should have students face one direction, spaced 6 feet apart.
  - Spaces where lines normally form (e.g., the circulation desk) should have spots marked on the floor indicating where to stand to be 6 feet apart.
- Put up plexiglass barriers where needed, such as at the circulation desk.
- Plan for how students can safely return library materials. Consider whether it is feasible for library staff to disinfect every returned item individually or whether returned materials should be placed in dated containers and quarantined for a minimum of 72 hours before being handled by staff.



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- Consider how to minimize the touching of multiple objects when students are browsing for materials and keep hand sanitizer stations throughout the library to ensure the safety of library materials.
- For students who are engaging in virtual learning, create a pick-up/drop-off procedure so students are able to access library materials, ideally without entering the school building.
  - Coordinate the pick-up/drop-off of library materials with other items the student needs from the school (e.g., meals, school work) to minimize necessary interactions.
- Promote and educate students on the use of online materials.

### 8. Mandatory Reporting

- Many children have had, and will continue to have, less contact with school officials and other mandatory reporters as a result of the school closure and possible scheduling nuances to start the 2020-2021 school year. Moreover, families may experience extra stress due to job loss and additional time together in an unstructured environment. This may lead to additional instances of abuse or neglect. As a result, teachers and school officials should be extra vigilant to recognize the signs of abuse or neglect. Any suspected abuse or neglect should be reported to the appropriate agency.
- Schools should review the mandatory reporting requirements and ensure that all staff are aware of their legal obligations to report suspected abuse or neglect.
  - Sections 48.981(2)(a)14 through 16m, Wis. Stats., mandate that all staff and employees of public school districts report suspected abuse or neglect of a child seen in the course of his or her professional duties.
  - The requirement to report abuse or neglect only applies where the child is seen by school staff or employees “in the course of professional duties.” A reasonable interpretation of that statute mandates that school staff and employees report suspected abuse if the child is seen while engaging in virtual learning at home. It is unlikely that virtual learning will affect the legal obligation to report suspected abuse or neglect.
- Schools should continue to be vigilant to ensure staff have received training to identify the signs of abuse or neglect.
  - For a resource on identifying the signs of abuse, see DPI’s Information for Mandated Reporters.
  - While Wis. Stat. § 118.07(5) only mandates that all employees receive training provided by the DPI within 6 months of initial hiring and every 5 years thereafter, school districts may wish to consider more frequent training.



## Stop 3: Student Considerations

### F. Student Athletics and Extracurricular Activities

1. Athletics and extracurricular activities promote the physical, mental, and emotional health of students. Physical activity should be encouraged whenever it can be safely accomplished.
  - The WIAA has provided [guidance for summer activities](#) and the CDC has provided [CDC guidance for youth sports](#) to help schools and districts. Coaches, school administrators, and school boards should review that guidance.
  - Schools should consider the [WIAA's Sport-Specific Guidelines for Summer Activities](#) in planning for health and safety protocols for fall sports.
  - In response to COVID-19's impact on athletics, the WIAA Board of Control approved the following items:
    - Schools may defer academic eligibility grade requirements for all students until the first grading period of the 2020-2021 school year. The WIAA will be providing additional guidance on this topic.
    - The window to use coaches' five unrestricted coaching days has been extended by one week for the summer of 2020, allowing 11-player football coaches unrestricted contact through August 1, 2020, and all other coaches through August 8, 2020. The WIAA will be providing additional guidance on this topic.
  - Identify and Appoint a COVID-19 Coach or Athletic Advisor and Monitor Risk Level.
    - Each school district should continue to monitor the risk of potential transmission in their respective locales, and consider modifications to physical activity and sports based on the potential level of risk.
    - Risk tracking and monitoring of local conditions should occur on a daily basis.
  - Risk Levels have been identified by the WIAA in keeping with CDC guidance: high, moderate, low, and lowest risk levels provide guidance as to the size of gatherings and whether such take place indoors or outdoors.
    - Each Risk Level carries with it corresponding restrictions on the types of activities that should be pursued or avoided.
  - School districts must then determine the potential risk by sport or contest.
    - In general the guidelines suggested by the WIAA and other national sports organizations categorize the following activities based on respective risk level:
      - Higher Risk Sports – Sports such as wrestling, MMA, tackle football, lacrosse, rugby, competitive cheerleading, and dance have higher levels of contact and require frequent close distances.



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- Moderate Risk Sports – Sports such as basketball, baseball, softball, soccer, hockey, and many track and field events have close, frequent contact with shared surfaces, but protective equipment and strict cleaning standards can reduce the risk of transmission of illness.
  - Low Risk Sports – Sports such as individual running events, golf, and skiing can be done with social distancing and no sharing of equipment.
2. Preparing for the return of athletics and activities.
- Schools should prepare for the possibility of fall sports and activities by considering ways to allow student participation while minimizing the risk of COVID-19, including:
    - Holding games without spectators.
    - Having all participants and student-athletes sign an acknowledgment agreeing to comply, with flexibility, to the requirements of the school and district in order to safely pursue sports, physical training, activity, and contests.
  - Review your district’s Code of Conduct and ensure that student-athletes, and parents or guardians understand there is a risk of illness and transmission of disease with participation in sport; that this risk cannot be completely eliminated; that the player has a personal responsibility for reporting ill health, elevated temperatures or other symptoms; that failure to obey the coach’s requirements may result in suspension or removal from the team; and that the health crisis situation remains fluid and the season may be canceled if such drastic measures are required.
  - Consider implementing the following safety protocols:
    - Require student-athletes and coaches to use cloth face coverings as much as is safe for the level of activity.
    - Require participants show up and leave in uniform, minimize use of locker rooms, or stagger locker room usage to maintain social distancing.
    - Eliminate shared equipment and/or issue a standard set of equipment to each athlete on a team. This individual “kit” should include a water bottle, uniform, practice uniform (if available), and equipment needed for the required sport.
    - Encourage thorough cleaning of uniform and equipment after every use.
    - Create a dedicated and thorough cleaning schedule of all equipment between uses, including wiping down weight training equipment, balls used in sports and training, and electronic equipment for keeping time and score.



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- Consider suspending close-contact sports until Risk Level is Low or Lowest in the specific locale.
- Designate a “COVID Coach” for each team who will be in charge of monitoring and reminding players about physical distancing, disinfecting equipment, hand-washing, mask-wearing, etc.
- Watch for future guidance from the WIAA and CDC for further considerations for school districts regarding the extent to which student athletics should occur for the 2020-2021 school year.

### G. First Amendment Considerations

With protective face coverings potentially becoming the norm in the classroom setting, it is important to remember that student choice in decorated face coverings remain subject to existing standards surrounding acceptable clothing and displays. Specifically, the same concerns that surround depictions of violence, obscenity, political messaging, etc., on a student’s article of clothing apply in equal force to a student’s face covering. However, there are potentially elements of expression contained on clothing, including face coverings, which are considered protected under the First Amendment. For this reason, it is important to review the legal considerations involved in regulating student clothing containing expressions as those considerations also apply to face coverings.

#### 1. Applicable Legal Analysis

The seminal case on student First Amendment rights is *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Tinker case established what is known as the “substantial disruption” standard in evaluating the extent to which a school district may regulate student speech under the First Amendment. In simple terms, the Supreme Court in Tinker held that a school district may not regulate a student’s exercise of free speech rights (in this case, wearing a black armband to protest the Vietnam War) unless it can be shown that the student’s activity would substantially disrupt or materially interfere with school activities.

Thereafter, in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Supreme Court determined that a school district had a right to regulate speech considered “vulgar, offensive, lewd and indecent” without necessarily showing that the speech created a “substantial disruption.” In other words, an expression that is considered vulgar and indecent may be outright prohibited.

Finally, in *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court upheld a school district’s regulation of speech that the district reasonably regarded as



## Stop 3: Student Considerations

promoting drug abuse. In the case of Morse, the Court found that the school district was justified in confiscating a banner reading “BONG HITS 4 JESUS” and imposing a disciplinary suspension upon the student creating and displaying the banner.

As one might imagine, there are any number of cases dealing with variations of the “substantial disruption” test enumerated in Tinker, the “vulgar, offensive, lewd and indecent” standard set forth in Fraser, and the promotion of illegal activities criterion contained in Morse. More recently, there are several cases relating to student discipline for wearing articles of clothing depicting firearms or violence. The purpose here is not to provide definitive guidance on the extent to which a school district may regulate student expressions but to highlight the foundational legal principles that will determine whether particular speech, conduct, or expression will be entitled to First Amendment protections. With this foundational knowledge, a school district can fashion the appropriate policies and procedures to proactively manage the regulatory concerns.

### 2. Considerations to Avoid First Amendment Legal Challenges

School districts should consider the following actions to ensure they are prepared to address issues arising from the mandated use of face coverings:

- Review and potentially update student conduct and dress codes
- Review and potentially update Board policy relating to regulation of student dress
- Consider providing uniform face coverings for students to wear
- Establish a process for resolving concerns regarding student dress, including face covering

### H. Equity and Access

1. Nondiscrimination laws require school district to provide equal educational opportunities for all students, which includes the provision of virtual instruction.
2. Examples of equal access considerations include: students with disabilities, English language learners, gifted and talented students, homeless students, and children in foster care, to name a few.
3. Virtual instruction must be equally accessible to all students.



## Stop 3: Student Considerations

- School districts must ensure access to educational technology resources for all students, including devices and broadband internet connectivity.
- Ensure supports are in place to allow access to virtual instruction.
- Regularly engage students in virtual instruction through teacher or staff communications on online platforms.
- Staff members must be accessible to students and families in partnership to advance student learning.

### I. Copyright Considerations

Virtual/Remote learning environments have created a greater need for school districts to be mindful of the legal implications of utilizing copyrighted material in instructional practices. Many instructional materials are freely available on the web; however, such availability does not translate into freely available use in classrooms or for virtual platform instruction. Schools must be especially vigilant with respect to their responsibilities with respect to copyrights when instruction is moved to online platforms.

The TEACH Act allows online educators to make use of copyrighted works in their courses in ways comparable to what copyright law permits educators to do in traditional classrooms. However, even under the TEACH Act, school districts must be cognizant of the fact that when an educator's online use of copyrighted works could serve as a substitute for student purchase of such works, legal issues abound. For example, playing an entire movie online or posting entire songs online is nearly always going to be an infringement.

The TEACH Act does not provide school districts with a "get out of jail free" card – (I'm teaching – therefore the use is OK, right?) Rather, the TEACH Act has some significant requirements for use of instructional materials, including:

- Implement a copyright policy. Copyright infringement violates is a violation of district policy.
- Educate school district staff. Provide information to staff and students that accurately describes copyright law and promotes compliance with copyright law.
- Ensure use is an integral part of curriculum. The material to be used must be provided at the direction of or under the supervision of an instructor and must be an integral part of the course curriculum (i.e., not merely entertainment or unrelated background material).
- Limit display of material. The amount of material provided must be comparable to that typically displayed in a live classroom session. Distribution of entire textbooks, course-packs or entire songs, movies, etc. would never be authorized under the TEACH Act (or by fair use).



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- Provide notice to users. Provide notice to students that materials distributed in the course may be subject to copyright protection.
- Password protect the use of copyright material. To the extent technologically feasible, the transmission of material is limited to students enrolled in the course.
- Prohibit downloads of copyright material. Students may not be permitted to retain a permanent copy of the material or to further disseminate it.

Given the sudden shift of schools to online platforms, it remains to be seen how copyright issues will be addressed by the courts. Following this guidance will allow districts to minimize potential legal liability when instructional materials are utilized in virtual platforms.

### **J. Navigation Tips for a Successful Journey**

- School districts must make a determination as to instructional delivery methods and the overall delivery of education to students, while considering the overall health and safety of the school district and all of its stakeholder groups. Thoroughly review and, as applicable, update the following:
  - Board policies
  - Administrative procedures
  - Extra-curricular Handbooks
  - Student Codes of Conduct
  - Employee Handbooks
- School district should review student attendance and absence policies to determine what revisions are required.
- Special education remains at the forefront of the challenges school districts face. Districts must consider how to fulfill their obligations under the IDEA and state law for the 2020-2021 school year, as well as whether the provision of additional services (CIS) is required.
  - Update IEP procedures
  - Prioritize IEP calendars
  - Train staff on updated processes
- Establishing protocols for self-monitoring, quarantine, and isolation for students showing COVID-19 symptoms or contact with someone with COVID-19 is necessary, as well as developing protocols for communications for health and safety considerations to be delivered in an expedient and informed manner.



## Stop 4: Overall Safety Considerations

### Stop 4: School Reopening Safety Considerations

While the topic of facility cleaning and safety may seem mundane, it is this journey of the Roadmap that parents/guardians and other district stakeholders may deem most important. For this reason, it is important for a district to both implement protocols to ensure a safe and clean educational environment and also consider publishing the efforts the district is undertaking in this regard.

The Centers for Disease Control (“CDC”) and the Department of Public Instruction (“DPI”) have established guidance specific to school districts, while other state and federal agencies have offered general workplace guidance that can also serve as a resource for schools preparing to reopen.

Each school district will need to tailor their response to the COVID-19 pandemic when deciding whether to implement some, or all, of the published guidance. Each school district will have different individual circumstances, needs of students, and capital capabilities such that one size does not fit all. Understanding this, the CDC recommends schools consider what will meet their individual circumstances, stating, “[i]mplementation should be guided by what is feasible, practical, acceptable, and tailored to the needs of each community.”<sup>1</sup>

The following is a compilation of guidance and best practices from state and federal sources. Please note that the guidance put forth by this Roadmap is meant to supplement, not replace, any federal, state, or local laws or orders with which schools are required to comply. Regardless of the extent to which a district follows the guidance, or even establishes what it views to be enhanced protocols, a district should be sure the community knows of the district’s efforts to provide a clean and safe educational environment.

#### A. Building Operations Considerations

- **Determine When to Reopen Schools**
  - Utilize this “Roadmap to Reopening” to guide your decision making as you look to reopen your school district.
  - Review guidance and recommendations from all sources, including DHS, DPI, the CDC, and other relevant state and federal agencies to guide you. Remember that these sources offer just that—suggestions and considerations. The guidance and recommendations are not mandatory, but can be used to inform the critical decisions that are best for your school district.

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<sup>1</sup> CDC, “Considerations for Schools,” <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html>



## Stop 4: Overall Safety Considerations

- Access relevant resources for your school district’s review and consideration in [Appendix B](#).
- **Designate a COVID-19 Point of Contact**
  - Designate a staff person or team to be responsible for responding to COVID-19 concerns (e.g., school nurse).
    - Consider designating one individual or a team to be the point of contact for all COVID-19 related health concerns for individual facilities.
    - A point of contact person should be designed for each school building of the school district.
  - All school staff and families should know the point of contact(s) and how to contact them.
- **Collaborate with State and Local Health Officers**
  - School districts should work with state and local health officers to the extent possible.
  - Due to the ever changing nature of COVID-19, school administrators must stay up to date on local or state regulatory agency policies or orders related to group gatherings to determine if events can be held.
  - School districts must be prepared to follow any orders or directives issued by the local health officer.
    - Local health officers are given broad statutory authority to “take all measures necessary to prevent, suppress and control communicable diseases,” such as COVID-19. Wis. Stat. § 252.03(1). Local health officers may also do what is “reasonable and necessary” to prevent and suppress a disease, with the specific authority to forbid public gatherings and issue quarantine and isolation orders. Wis. Stats. §§ 252.03(2), 252.06(1).
    - Schools should contact legal counsel with any specific questions on the scope of a local health officer’s authority.
  - In the event of substantial community transmission, state and local health officers may provide guidance regarding potential school closures.
- **Emergency Operations Plans**
  - Review and update emergency operations plans.
  - Consider including the following in emergency operations plans and policies:
    - Strategies to reduce the spread of a wide variety of infectious diseases (e.g., seasonal influenza).



## Stop 4: Overall Safety Considerations

- Strategies for enhanced social distancing and school dismissal that may need to be used to stop or slow the spread of infectious disease.
  - Strategies for continuing education, meal programs, and other related services in the event of school dismissal.
  - Strategies for emphasizing everyday preventative actions for students and staff (actions such as staying home when sick, covering coughs and sneezes, cleaning frequently touched surfaces, frequent hand washing).
- **Infectious/Communicable Disease Policies**
    - Review and update as needed any board policies and administrative procedures pertaining to infectious or communicable diseases.
      - Ensure any such policies are applicable to COVID-19.
    - Communicable disease policies should include a reporting mechanism for suspected or known cases of COVID-19 in the school to the local health officer.
      - Section 252.21(1), Wis. Stat., requires a teacher, school nurse, or principal to notify the local health officer if the individual knows or suspects that a communicable disease is present in the school.
    - Communicable disease policies should include a provision allowing staff to send home a student who is suspected of having a communicable disease.
      - Section 252.21(1), Wis. Stat., authorizes any teacher, school nurse, or principal to send home pupils who are suspected of having a communicable disease, so long as the pupil's parents are immediately notified of the action and the reason for the action.
    - Schools are not statutorily required to have an infectious/communicable disease policy. Schools without such a policy are not be required to adopt one. A school district may wish to consider the creation of a communicable disease policy.
  - **Student and Staff Health Considerations**
    - Immunizations
      - While not required, schools should highly encourage students and staff to get the influenza vaccination this coming school year.
      - Schools must ensure students are up to date on all other required vaccinations, or provide appropriate documentation related to exempt status.
    - COVID-19 presents additional areas of concern for students and staff who suffer from and require treatment (inhaler, nebulize, etc.) for asthma. School



## Stop 4: Overall Safety Considerations

district nursing staff should anticipate and be prepared to respond to such inquiries.

### **B. Communicating and Promoting Behaviors that Reduce the Spread of COVID-19**

#### **• Stay Home When Appropriate**

- Actively encourage staff and students to stay home if they have tested positive for COVID-19, are exhibiting COVID-19 symptoms, or have had recent close contact with a person with COVID-19.
- Proactively educate staff, students, and families on when they should stay home and when it is safe to return to school.
- Encourage staying home when sick by:
  - Developing attendance or sick leave policies that are flexible and encourage staff and students to stay home when sick, when exposed to others who are sick or when staff need to care for sick family members. Ensure staff, students, and families are aware of these policies.
  - Eliminating perfect attendance awards.
  - Offering virtual learning and telework options.

#### **• Hand Hygiene**

- Teach and reinforce handwashing with soap and water for at least 20 seconds.
- Ensure staff monitor students, especially younger students, for handwashing compliance.
- Consider building daily classroom routines that involve regular hand washing before and after certain activities (e.g., upon entering and leaving the classroom, after handling any shared classroom materials, before and after lunch).
- Place hand sanitizer (minimum 60% alcohol) in easily accessible locations around the school for use when soap and water is not readily available.
- Frequently remind staff and students not to touch their faces.

#### **• Respiratory Hygiene**

- Teach and reinforce covering of coughs and sneezes.
  - Use a tissue if possible, or use the crook of the elbow. Used tissues should immediately be thrown away.
  - Wash hands immediately with soap and water (if possible) or hand sanitizer



## Stop 4: Overall Safety Considerations

- **Face Coverings**
  - Schools should be mindful of CDC and DPI recommendations regarding the use of cloth face coverings (face masks) by students and staff, especially when 6 feet of physical distancing is difficult.
  - To the extent face coverings are required, school staff are responsible for teaching and reinforcing use of face coverings for staff and students, including proper use:
    - How to properly wear a face covering (e.g., face covering should cover both mouth and nose, fit should be snug against sides of the face).
    - How to properly don and doff the face covering (e.g., touch mask only by the ear loops or ties, do not touch the front of the mask, do not touch face after touching mask, wash hands immediately after touching mask).
    - How and when to properly wash cloth face covering.
  - The CDC and DPI recommend face coverings should be used as much as possible, especially at times when physical distancing is difficult.
    - Schools should balance the use of face coverings with the challenges of enforcement of face coverings with younger students.
  - Schools must also recognize that face coverings may not be appropriate for children under age 2 and individuals with medical concerns that make face coverings difficult or medically inappropriate.
  - The American Academy of Pediatrics (“AAP”) has advised that when wearing face coverings is not developmentally feasible for younger students, such as when wearing a face covering causes a student to touch his face more than usual, schools may opt not to require their use so long as physical distancing measures can be used.
  - Face shields may be appropriate instead of, or in addition to, face coverings for certain staff or students. For instance:
    - Both a mask and a shield may be appropriate for staff performing daily health screenings, staff who are interacting with a suspected positive case, or staff tasked with disinfecting the school.
    - Just a shield, and no mask, may be appropriate for certain staff members (e.g., speech pathologists) or students (e.g., deaf and hard of hearing students or those who have other health or sensory concerns).
  - To the extent face coverings are required, schools must be prepared to discuss possible alternatives to face coverings due to health, sensory, or racial discrimination concerns.



## Stop 4: Overall Safety Considerations

- Review [DPI's PPE Considerations for Schools chart](#) for additional PPE that may be appropriate.
- **Signs and Messaging**
  - Schools should develop and implement safety protocols and signage and messaging should be utilized to relay the protocols to all stakeholders, including staff, students, parents, and community members.
  - Signs should be posted in highly visible locations (e.g., school entrances, classroom doors, restrooms) to promote handwashing, respiratory hygiene, social distancing, face masks, and other protective measures to stop the spread.
  - Other ways of messaging protective measures to staff, students, and families include:
    - Regular announcements on PA system
    - Regular messages (videos, graphics, etc.) on school websites, in emails, and on social media accounts.
    - Create a school nurse webpage on the school website
  - Resources for signs and messaging:
    - [CDC Print Resources](#)
    - [CDC Communication Resources](#)

### C. Maintaining Healthy School Environments

- **Cleaning and Disinfection**
  - Surfaces and objects should be subject to routine cleaning with soap and water.
  - Frequently touched surfaces should be cleaned and disinfected at least daily or between use as much as possible, including: door handles, cabinet/drawer handles, tables, countertops, desks, phones, keyboards/computer mice, touchscreens, light switches, toilets, faucets, drinking fountains (bubblers), playground equipment, etc.
  - Consider moving or removing certain objects to reduce frequent touching or contact from multiple people, especially for hard to clean materials (e.g., soft or porous materials, such as area rugs or fabric covered seating).
  - If items are suspected to be contaminated and cannot be cleaned, items should be isolated.
    - Soft (porous) items or surfaces should be isolated for a minimum of 24 hours before handling. After 24 hours, remove soft materials from the area and clean and disinfect the hard (non-porous) surfaces.



## Stop 4: Overall Safety Considerations

- Hard (non-porous) surfaces that cannot be cleaned and disinfected should be isolated for a minimum of 7 days before handling.
- Develop a schedule for increased, routine cleaning and disinfection.
- For the further guidance on cleaning and disinfecting, see the following resources:
  - [CDC/EPA Cleaning & Disinfecting Guidance](#)
- **Shared Objects**
  - Limit use of shared objects (e.g., gym or physical education equipment, art supplies, toys, games) whenever possible.
  - Discourage sharing of items that are difficult to clean or disinfect (e.g., avoid sharing electronic devices, toys, books, and other games or learning aids).
  - Keep each student's belongings separated from others' and in individually labeled containers, cubbies, or areas.
  - Ensure adequate supplies to minimize sharing of high touch materials to the extent possible (e.g., assigning each student their own art supplies, equipment)
  - If supplies must be shared, limit use of supplies and equipment by one group of students at a time and clean and disinfect between use.
- **Ventilation**
  - Ensure ventilation systems operate properly.
  - Increase circulation of outdoor air as much as possible (e.g., by opening windows and doors):
    - Do not open windows and doors if doing so poses a safety or health risk (e.g., risk of falling, triggering allergy or asthma symptoms).
- **Water Systems**
  - Minimize the risk of Legionnaire's disease and other diseases associated with water by taking steps to ensure that all water systems and features (e.g., sink faucets, drinking fountains) are safe to use after a prolonged facility shutdown.
  - Drinking fountains should not be used at this time if at all possible. Encourage staff and students to bring their own water to minimize use and touching of drinking fountains.
    - Schools may wish to consider utilizing water filling stations whereby multiple use water bottles could be filled and reused, with cleaning of the stations between each individual use.



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- If drinking fountains must be used, clean and sanitize drinking fountains regularly, as this is a high touch area.
  - **Physical Barriers and Guides**
    - Install physical barriers, such as sneeze guards and partitions, particularly in areas where it is difficult for individuals to remain at least 6 feet apart (e.g., reception desks).
    - Provide physical guides, such as tape on floors or sidewalks and signs on walls, to ensure that staff and students remain at least 6 feet apart in lines and at other times (e.g. guides for creating “one way routes” in hallways and classrooms).
      - School districts should factor “one way routes” into the logistics of an increase in passing time between classes and an increase in time for staff movement through the school building.
    - Use partitions to separate open spaces where there is a high risk of interaction and contact (e.g. playground, blacktop, etc.).
  - **Adequate Supplies**
    - Ensure school buildings have adequate supplies, including soap, hand sanitizer (with at least 60% alcohol), paper towels, disinfectant wipes, face coverings for those who are unable to provide their own, etc.
    - DPI and the State Emergency Operations Center (“SEOC”) will be distributing cloth masks and infrared thermometers to Wisconsin schools.
      - Each public school district and non-district charter school will receive a one-time allocation using a formula based upon enrollment.
      - Private schools will be contacted about receiving these supplies using a separate process.
      - Schools should be prepared to supplement these provided supplies, to the extent additional supplies are required.
- D. Restructuring Use of School Facilities to Maximize Social Distancing**
- **Communal Spaces**
    - School districts may consider closing communal spaces such as cafeterias, auditoriums, libraries, staff rooms, and playgrounds with shared playground equipment if possible.
    - If not possible to close a communal space, schools should consider requiring staggered use and disinfecting between use.



## Stop 4: Overall Safety Considerations

- Grid off sections of common spaces to help individuals stay in their separate classroom groups.
- Seating:
  - Reduce available seating to maximize social distancing.
  - Desks should all face one direction.
  - Table seating should have students seated on only one side of the table.
- The same strategies used to modify classroom layouts should also be used to modify other communal spaces where individuals may sit together (e.g., cafeterias, auditoriums, libraries) to increase social distancing.
- Use visual aids (e.g., painter's tape, stickers, water soluble latex paint, etc.) in hallways and entrances to communal spaces to designate the flow of traffic (e.g. one way traffic wherever possible) and mark appropriate spacing for social distancing in areas where students normally line up (e.g., library check out, lunch line, the front office).
- Use partitions to break up large open spaces (e.g., playgrounds, blacktop) to create smaller spaces in order to prevent large group gatherings.

### E. Food Service and Transportation Considerations

- **Food Service**
  - Considerations for food service workers:
    - All food service workers should wear a face mask or cloth covering and gloves when preparing and serving food.
    - Hands should frequently be washed, especially immediately after removing gloves or after directly handling used food service items. Gloves should be changed before and after preparing food.
    - Increase employee separation as much as possible in accordance with social distancing.
    - Frequently wash and sanitize all food contact surfaces and utensils.
    - Kitchen staff should have no contact with staff or students.
  - Considerations for students:
    - Have students eat lunch in their classrooms, outside, or add additional lunch times, to avoid large gatherings of students.
    - Seat students with at least 6 feet of distance between each other.
    - If a communal dining hall or cafeteria is used, arrange seating to maximize social distancing (e.g., remove every other chair, have students sit on only one side of a table, etc.).
    - Have students bring their own meals as feasible, or serve individually plated/boxed meals.



## Stop 4: Overall Safety Considerations

- Make handwashing part of the pre-lunch routine for students.
- Have hand-sanitizer readily available throughout the classroom or cafeteria where lunch is held.
- Enforce “take what you touch” to limit students touching multiple items.
- Enforce “Do not share food” policies to limit touching shared items.
- Use disposable food service items (e.g., utensils, dishes). If disposable items are not feasible or desirable, ensure that all non-disposable food service items are handled with gloves and washed with dish soap and hot water or in a dishwasher.
- All kitchen/cafeteria/dining areas should be cleaned and disinfected after use and prior to a new group of students entering for meals.
- If food is offered at any event, have pre-packaged boxes or bags for each attendee instead of a buffet or family-style meal. Avoid sharing food and utensils and ensure the safety of children with food allergies.
- For high school campuses with open lunch policies, consider changing these policies and requiring all students to remain on campus for lunch.
- Ensure plans are in place for how students participating in free and reduced meal programs will receive food in the event of a school closure or if the student is required to self-quarantine.
- For further guidance, see DPI’s [Interim COVID-19 Cafeterias and Food Service Guidance](#).
- **Transportation**
  - Once schools determine their transportation protocol, the protocol should be disseminated to students and parents/guardians. The protocol should include all relevant safety measures that students are expected to abide by when being transported.
  - Clean and disinfect frequently touched surfaces on school buses or other vehicles used by the school at least daily or between use as much as possible.
  - All drivers and passengers should practice the same safety protocols as other staff and students in schools (e.g., hand hygiene, cloth face coverings).
  - Post signage regarding techniques to stop the spread of COVID-19 (e.g. use of face coverings, washing/sanitizing hands, not touching the face) throughout the bus or other vehicle.
  - Inform students and families that students should not eat, drink, or pass items to other students while on the bus.
  - Ensure ventilation systems on all buses and vehicles are in good working order. Open windows as weather permits to increase ventilation and airflow.



## Stop 4: Overall Safety Considerations

- Evaluate changes to allow for social distancing related to transportation. For example:
  - Change bus schedules to transport students in batches that align to their classroom groups (e.g. by grade level or floor).
  - Reduce the number of students per bus so that students may be seated further apart (e.g., one student per seat, use every other row). Students from the same household may sit together.
    - See [sample seating plan from DPI](#)
  - Consider using assigned seating so students know where to safely sit.
  - Use floor decals to indicate to students to remain 6 feet apart.
  - Encourage alternatives to busing, such as safe use of bike/walking routes to school.
  - Stagger arrival and drop off times of buses to limit congregating of students.
  - Encourage parent drop-off and pick-up and account for the extra time created by extra vehicle traffic.
- Ensure transportation vendors are complying with applicable guidance for busing and follow the same guidance for cleaning and disinfecting any alternative vehicles used by the district:
  - [CDC Guidance for Bus Transit Operators](#)
  - [CDC Guidance for Disinfecting Your Non-Emergency Vehicle](#)
  - [DPI Interim COVID-19 Transportation Guidance](#)

### F. Limiting Visitors and Events/Activities

- **Gatherings and Events:**
  - Schools may wish to consider limiting nonessential activities and events involving other groups, such as field trips, student assemblies, music performances, parent meetings and parent-teacher conferences, and other extracurricular activities involving large crowds.
  - Schools may wish to consider ways to substitute virtual activities of gatherings in lieu of in-person events.
  - If events are held in person, social distancing should be promoted with group size limits to the extent possible and in compliance with any state or local orders.
- **Parents and Other Visitors**
  - Nonessential visitors and volunteers should be limited in school buildings.
  - School board may wish to consider temporarily suspending board policy allowing for visitors and volunteers in schools.



## Stop 4: Overall Safety Considerations

- School districts should limit activities involving external individuals, groups, or organizations coming into the school.
- Phone conferences or virtual meetings should be utilized whenever possible for parent-teacher conferences and Section 504 and Individualized Education Program (IEP) meetings.
- Deliveries to the school should be coordinated to allow for appropriate social distancing, to occur when staff and student presence is minimal, and to avoid having delivery people enter the school, to the extent possible.
- Any necessary visitors should be subject to the same health checks and prevention tactics (e.g., face coverings, hand hygiene, social distancing) as staff and students.
- **Sharing Facilities**
  - Consider whether the school district will allow non-school groups to utilize district facilities, whether those groups are student-led clubs or community groups.
    - Ensure schools remain compliant with the Equal Access Act, which requires that federally funded schools give student-led groups equal access to meeting spaces within a school.
  - Consult with legal counsel regarding liability waivers for non-school groups using facilities and regarding placing potential limitations on use of facilities by non-school groups (e.g., limiting indoor access by only allowing for outdoor use of school facilities).
  - Clearly communicate any COVID-19 safety protocols that groups seeking use of school facilities will need to follow.
  - Review the school's facilities use policy and facilities use agreement to ensure both give the school sufficient liability protection. Consult with legal counsel as necessary.

### G. Identifying and Isolating Infected Individuals

- **Daily Health Screenings**
  - Daily health checks (e.g., temperature screening and/or health screenings to check symptoms) of staff and students may be utilized by school districts.
    - The AAP does not recommend virologic testing (nasal swab) or serologic testing (blood test for antibodies) be required in schools.
    - The EEOC prohibits antibody testing of staff members.
  - Daily temperature screenings are not mandated. Schools should work with their local health officer to determine if daily temperature screenings are appropriate based on local levels of infection.



## Stop 4: Overall Safety Considerations

- Schools should clearly establish written criteria for the threshold conditions that will cause an individual to be excluded from school buildings. This information must be communicated in advance to staff and families.
- Daily health screenings should be applied in a transparent manner applicable to all employees and students (i.e., non-retaliatory).
- Health checks should be conducted safely and respectfully, and confidentiality must be maintained.
- Records of temperature screenings:
  - Records related to an individual student's temperature check or health screening would be considered an education record that is protected under the Family Educational Rights and Privacy Act ("FERPA").
  - By acknowledging a temperature reading in real-time instead of recording the number, schools can avoid creating a record for either staff or students.
- The CDC encourages schools to use examples of screening methods in CDC's supplemental [Guidance for Child Care Programs that Remain Open](#) as a guide for screening children and CDC's [FAQs for Business](#) for screening staff.
  - Consider what accommodations students with disabilities may need for the daily health check process.
- Schools may wish to conduct health screenings using questions including, but not limited to, the following:
  - Have you been in close contact with a confirmed case of COVID-19?
  - Are you experiencing a cough, shortness of breath, difficulty breathing, or a sore throat?
  - Have you had a fever in the last 48 hours?
  - Have you had new loss of taste or smell?
  - Have you had muscle pain or chills?
  - Have had a new headache?
  - Have you had nausea, vomiting, or diarrhea?
- Temperature screening may be conducted as follows:
  - School personnel may take temperatures of staff and students with a no-touch thermometer each day before they enter or re-enter school.
    - See [CDC Guidance on Screening Children](#)
  - Alternatively, staff and students' parents/guardians may take their temperature each day before entering or re-entering school.
  - Normal temperature should not exceed 100.4 degrees Fahrenheit.
- Anyone who exhibits COVID-19 symptoms (e.g. answers yes to any screening questions or who has a fever) should not be allowed to enter school buildings and individuals who have a temperature in excess of 100.4 degrees



## Stop 4: Overall Safety Considerations

Fahrenheit should be encouraged to seek medical care and/or COVID-19 testing, per CDC guidelines.

- **Know the Symptoms of COVID-19**

- School districts should ensure staff and families are aware of the symptoms of COVID-19 in order to identify and isolate suspected cases in a timely manner.
- Possible symptoms include:
  - Fever or chills
  - Cough
  - Shortness of breath or difficulty breathing
  - Fatigue
  - Muscle or body aches
  - Headache
  - New loss of taste or smell
  - Sore throat
  - Congestion or runny nose
  - Nausea or vomiting
  - Diarrhea
  - Trouble breathing\*
  - Persistent pain or pressure in the chest\*
  - New confusion\*
  - Inability to wake or stay awake\*
  - Bluish lips or face\*

(\*Designates emergency warning signs for COVID-19 that require immediate emergency medical care)

- COVID-19 infections in children, although similar to adult infections, are often not the same. This means children carrying COVID-19 may not necessarily exhibit the same symptoms as a positive adult. Children may be less likely to have a fever or have a fever as an initial symptom. Children also may only have gastrointestinal tract symptoms.

- **Reporting COVID-19 Symptoms**

- School districts may require staff and families self-report to the school symptoms of COVID-19, a positive test for COVID-19, or exposure to someone with COVID-19 within the last 14 days.
- School districts must notify relevant stakeholders of the need to notify school officials if a staff member or student becomes sick with COVID-19 symptoms,



## Stop 4: Overall Safety Considerations

tests positive for COVID-19, or has been exposed to someone with COVID-19 symptoms or a confirmed or suspected case.

- **Potential Temporary Short-Term School Closure**
  - If a student or staff member is confirmed to have COVID-19, a short school dismissal of students and most staff for 2-5 days may be required, regardless of the level of community spread.
    - Any decision about school dismissal due to a confirmed COVID-19 case should be made in coordination with local health officials.
    - Schools are not expected to make decisions regarding dismissal or canceling events on their own.
  - Short-term dismissal allows for:
    - Local health officials to better understand the impact of the current COVID-19 situation on the school
    - Custodial staff to clean and disinfect the affected facilities
    - Immediate implementation of contact tracing
  - Further action after a confirmed COVID-19 case may depend on the level of community spread and should be coordinated in collaboration with local health officials..
  
- **Isolate and Transport Those Who are Sick**
  - School districts should consider designating an isolation room or area to separate anyone who has COVID-19 symptoms at school.
    - For students who become ill at school, a staff person (wearing a cloth face covering and eye protection), must supervise the student while waiting for the parent/guardian's arrival.
    - The designated isolation room should have as few objects as possible and be easily disinfected (i.e., no cloth sofas or chairs) and should not be a room that includes a locking mechanism/is capable of being locked.
    - The student must be able to have adequate access to restroom facilities, drinking water, scheduled meals, and required medications.
    - The isolation room should only be used for a limited period of time
  - Individuals who are sick should immediately go home or to a healthcare facility depending on the severity of their symptoms.
  - School districts should establish procedures for safely transporting anyone who is sick to their home or to a healthcare facility. If you are calling an ambulance or bringing someone to the hospital, try to call first to alert them that the person may have COVID-19.



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- **Advise Staff and Families of Sick Students of Home Isolation Criteria**
  - Sick staff members or students should not return until they have met the [CDC's criteria to discontinue home isolation](#):
    - Individuals who believe they had COVID-19 and had symptoms, but did not get tested, may be around others after:
      - 3 days with no fever (without using medication to lower fever);
      - Respiratory symptoms have improved (e.g. cough, shortness of breath); and
      - 10 days have passed since symptoms first appeared or individual receives two negative test results in a row, at least 24 hours apart.
    - Individuals who tested positive for COVID-19 but did not have symptoms may be around others after:
      - Individual continues to have no symptoms; and
      - 10 days have passed since test or individual receives two negative test results in a row, at least 24 hours apart.
  - Staff or students who were in “close contact” with someone who has COVID-19 should stay home for 14 days. If symptoms develop, follow the above criteria to discontinue home isolation.
    - The CDC and OSHA define “close contact” as being within 6 feet of an infected person while not wearing the recommended PPE or having direct contact with infectious secretions while not wearing recommended PPE (such as sharing a drinking glass or eating utensil or touching an item that may have the infected person’s germs (e.g., dirty tissues).
    - Close contact generally does not include brief interactions, like walking past a person.
- **Notify Health Officials and Close Contacts**
  - Notify local health officials, staff, and families immediately of any case of COVID-19 while maintaining confidentiality in accordance with the Americans with Disabilities Act (“ADA”) and the Family Education Rights and Privacy Act (“FERPA”).
  - Work with local health officials to initiate contact tracing and identify potentially exposed staff and students.
    - Individuals who had close contact with the individual diagnosed with COVID-19 should stay home for 14 days and self-monitor for symptoms, and follow CDC guidance if symptoms develop.



## Stop 4: Overall Safety Considerations

- Individuals who are not considered exposed by local health officials should self-monitor for symptoms. If symptoms develop, the individual should immediately notify the school and stay home.
- Create a template in advance, working with your local health official, for recording contact tracing for active cases. See DPI's sample [Exposure Tracking Form](#).
- Implement proactive methods to assist in contact tracing, which may include:
  - Divide students into small, closed classroom groups. Use the same teachers and support staff with the same group of students each day. Consistent groups serve to limit spread in the case of an infected individual.
  - Use assigned seats in all classes, on busses, at lunch, and at other activities. Consistency of student interactions will assist in contact tracing measures.
  - Keep lists, or have the ability to quickly create a list, of each student/staff member's close contacts at school. This is made easier if each individual interacts only with a predictable group of staff and students each day.
  - Track the reason for each student and staff member's absence (e.g., Did the individual have symptoms? Is the individual quarantining due to close contact with a positive COVID-19 case? Or is the individual absent for a reason unrelated to COVID-19?).
  - Identify and train a staff member to be responsible for gathering and tracking absence data, tracking illnesses, and identifying potential "clusters" of cases.
- **Cleaning and Disinfecting after Confirmed/Suspected COVID-19 Case**
  - After a person suspected/confirmed to have COVID-19 has been in a school facility, close off areas used by the sick person and open outside doors and windows to increase air circulation in the area. Do not use these areas until after cleaning and disinfecting.
  - Wait at least 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the sick person, especially frequently touched surfaces.
  - Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning and disinfecting process, including handling trash.
    - If gowns are not available, coveralls, aprons, or work uniforms can be used. Reusable (washable) clothing should be laundered afterwards.
    - Clean hands after removing gloves.



## Stop 4: Overall Safety Considerations

- If it has been more than 7 days since the person with suspected/confirmed COVID-19 has been in the facility, additional cleaning and disinfection is not necessary.
- Ensure safe and correct use and storage of cleaning and disinfection products, including storing products securely away from students.

### **H. Navigation Tips for a Successful Journey**

- Review board policies related to facilities, use of facilities by outside groups, and visitors/volunteer policies.
- Review and revise contracts related to use of facilities.
- Review and revise contracts for custodial/maintenance services.
- Develop and implement procedures for the cleaning and disinfecting procedures to be utilized for school facilities.
- Make decisions regarding food service preparation and delivery and review and revise contracts accordingly.
- Review and revise student codes of conduct and staff handbooks to comport with policy revisions.



## Stop 5: Vendor Contracts

### Stop 5: Considerations for Negotiating Vendor Contracts

As school districts move forward with planning for the 2020-21 school year, school districts must position themselves in a way that allows maximum flexibility in managing ever-changing conditions. Vendor and service agreements, particularly as to school bus transportation, are a critical part of the overall plan to create flexibility. As we all saw at the end of the 2019-2020 school year, districts struggled with the interpretation and application of busing, food service, janitorial service and other contracts when it became apparent those services were either not needed, significantly reduced or modified significantly in terms of scope. We cannot predict what will be needed from our contractual partners in the upcoming year, but we can position ourselves to ensure that we have maximum flexibility in our contractual relationships.

What follows is an outline of considerations for school districts reviewing current and anticipated contracts. While the outline is informed in large part by the negotiation process that unfolded last school year with transportation and food service providers, it is equally applicable to all vendor and service contracts in the district.

**A. Assessment of District Need, *i.e.*, what goods and services will a district need to ensure are available during the upcoming school year?**

- School districts have any number of contracts with services providers, including transportation, food services, custodial services, school resource/police liaison officer, student activities, and related service provider agreements.
- As an initial matter, school districts should assess the level of need for such services based on the individual district's school reopening plan.
- If a school district will be utilizing a modified school day/week schedule in 2020-2021 (or if instruction continues only online), then it can be expected school districts will need to immediately engage with vendors to modify the terms of their long-term agreements.
- Similarly, if extra-curricular activities are curtailed, it can be expected the districts' needs will be similarly reduced. For example, the modified school day may require 50% fewer transportation routes with no sports.
- With respect to transportation contracts, social distancing may require fewer children on each bus, but require more buses per route and an increased number of routes to be run to make up the difference.
- With respect to food service, the manner in which students are provided with meals may be fundamentally altered. If not altered immediately, the need for alteration may arise, which requires a thorough review and potential modification to the existing contract.



## Stop 5: Vendor Contracts

- School districts may need to increase the availability of technological resources for the delivery of virtual instruction such that additional equipment may be required.

### B. Open Discussions with Vendors and Service Providers.

School districts need to engage their vendor and service provider partners sooner rather than later, and work toward a mutually beneficial understanding as to how the 2020-2021 school year will work in relation to the particular goods or services being provided.

- It behooves districts to have an open and good faith dialogue with their partners, especially those districts that have longer-term agreements, and especially with respect to those agreements that are set to expire soon. Like it or not, we are “all in this together,” and so a negotiated resolution is usually best. For some districts, this may require a renegotiation of their contract for the rest of the term to include the flexibilities necessary to address changing conditions and that will better encompass the school district’s plans, while at the same time allowing the vendor to keep its doors open.
- In embarking on such negotiations, many of the same issues that arose in the Spring will also be considerations to keep in mind in addressing longer-term solutions

### C. Application of the CARES Act

- One of the few statutory guidelines comes from the CARES Act, which suggests that a school district should pay its contractors to the extent practicable:

#### **Section 18006**

A local education agency, state, institute of higher education, or other entity that receives funds under the “Education Stabilization Fund,” shall **to the greatest extent practicable**, continue to pay its employees **and contractors** during the period of any disruptions or closures related to coronavirus.

- This language has been relied upon by vendors and service providers during the period of school closure as a means to pressure districts into full payment for services even though services were not fully provided as contemplated by contract. It is important to note, however, that the CARES Act contains no language providing for enforcement of the mandate. Nor does the CARES Act expressly link eligibility for Education Stabilization Funding directly to whether a district pays its vendors or service providers during the closure. Rather, school districts must in good faith attempt to maintain payment.



## Stop 5: Vendor Contracts

- While the language of Section 18006 was directed primarily at the continuation of vendor payments during the remainder of the 2019-20 school year, vendors and service providers will likely attempt to apply this language going forward into the next school year, to suggest that districts must continue to pay in accordance with contracted arrangements. Nonetheless, the language of Section 18006 is vague and far from a mandate, thus leaving a lot of discretion to the districts—it is up to the individual district to determine what level of payment constitutes the “greatest extent practicable.” That number may vary greatly from district to district, even as school resumes in some form, since districts still are dealing with a high level of uncertainty regarding funding for next year.

### D. Contract Considerations

- Boilerplate contract provisions that have historically found their way into agreements between school districts and vendors or service providers are not cut out for the circumstances and uncertainty presented by the COVID-19 landscape.
- Contract provisions should be reviewed with a critical eye to ensure the greatest level of legal protection for school districts. The following provisions should be closely scrutinized:
  - Force Majeure Clauses. Some contracts include a “force majeure” clause (a/k/a “act of God”), that allows for cancellation of a contract due to unforeseeable circumstances outside of the parties’ control. Parties to an agreement may negotiate who bears the risk of “acts of God” through a force majeure clause.

A strong force majeure provision will at minimum define (1) what constitutes a force majeure (*e.g.* fire, flood, war, pandemic outbreak), (2) what happens when a force majeure event occurs, including what remedies the parties have (*e.g.* the parties are excused from performance, the obligations are delayed until the event ends, etc.), and (3) what is required from the parties to invoke these remedies (*e.g.* sending notice to the other side).

- Limitation of Liability. Limitation of liability clauses are included in contracts to do exactly as the name implies – limit the liability of a party. These provisions may be used effectively to limit a school district’s liability in the event of the district’s inability to perform under the contract. Limitation of liability clauses may limit special, indirect, or consequential damages, including loss of profits, among other potential limitations.



## Stop 5: Vendor Contracts

- Termination Language. Most contracts include language with respect to a party's need to terminate a contract early. School districts may need to consider whether such language allows a school district flexibility in the event a district finds itself unable to perform.
- Merger/Integration Clauses. Such a provision is key to include in order to foreclose arguments that prior contracts, agreements, or oral/written statements should be considered in interpreting the contract at hand. The provisions become especially relevant when contract addenda are utilized to reflect a change in the parties' relationship.
- Hold Harmless Provision. Hold harmless provisions demonstrate an agreement between the parties whereby either one or both parties agree not to hold the other party responsible for loss, damage, or legal liability that may arise under the agreement. Such provision may be utilized to limit a school district's liability.
- Dispute Resolution. Agreements should be closely reviewed to determine whether the agreement dictates the manner in which disputes will be resolved, and whether the procedure set forth in the agreement forecloses a school district from the full spectrum of legal recourse. It is best to avoid agreeing to arbitration and instead require disputes be resolved in the state court for your county.
- Remedies. Remedy provisions may serve to limit a school district's ability to seek all available legal remedies under the law. These provisions should reflect a school district's legal rights with respect to redress under the law.
- Assignment. Assignment provisions may allow a vendor to assign the vendor's rights or ability to control the agreement to another party.

### **E. Public Purpose Doctrine.**

- All vendor contracts should be reviewed with an eye on the public purpose doctrine.
- This doctrine requires school districts to ensure that they receive some sort of value for their expenditures of taxpayer moneys.
- The doctrine provides school districts with the backstop they need to ensure they are receiving an appropriate value for the expenditure of public funds.



## Stop 5: Vendor Contracts

### **F. Relations with the Vendor or Service Provider.**

School districts must continue to account for the relationships they need or want to maintain with their vendor and service provider partners beyond the pandemic. Once schools return to full operation and a semblance of normalcy is restored, school districts will need to ensure the services that are required to keep school districts fully operational continue to be available. This consideration is very much a “case by case” evaluation. Some districts may have been working with a particular vendor for many years, and do not want to do anything to sour the relationship moving forward; some relationships may be terminating soon such that the district will be exploring other options and the district does not need to continue with that same vendor. School districts may also want to consider whether there are any other vendors available that could provide the same service

### **G. Vendor Access to Relief Funds.**

With the passage of the CARES Act, federal financial relief is made available to vendors and school districts alike. The provisions of the CARES Act must be considered as a part of future negotiations with vendors. Requiring vendors to, in good faith, take advantage of the CARES Act or other relief sources can alleviate a school district’s financial burden. Moreover, including a payback provision in vendor contracts to allow districts to be reimbursed on some level for a vendor taking advantage of CARES Act or other reimbursement funding will provide further financial relief to school districts.

### **H. Navigation Tips for a Successful Journey**

- School districts should assess needs with respect to the services provided by outside vendors.
  - Organize and catalog all outside contracts
  - Review contracts for consistency
- To the extent school districts have yet to enter into, or are currently negotiating, contracts for services, school districts must carefully review such agreements to account for the uncertainty the lies ahead.
- To the extent contracts with services providers have already be entered into, school districts should undertake a review of such contracts to determine whether addenda to such agreements are required to provide the district with protection from the possibility of additional school closures or disruption of services.



## Stop 6: Open Meetings

### **Stop 6: Open Meetings Law Compliance and Virtual Meetings During COVID-19**

The Wisconsin Open Meetings Law requires that “all meetings of all state and local government bodies shall be publicly held in all places reasonably accessible to members of the public and shall be open to all citizens at all times.” Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84.

The Open Meetings Law applies to any meeting that is: (1) for the purpose of conducting governmental business; and (2) involves a sufficient number of members of the body to determine the body’s course of action on the business under consideration. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1997). Therefore, the Open Meetings Law applies to school board meetings conducted during COVID-19. *State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ.*, 2017 WI 70, 376 Wis. 2d 239, 898 N.W.2d 35.

Upon schools closing in March 2020, many school boards moved their meetings to a virtual platform. As the State has re-opened, some school board meetings are moving back to being conducted in-person.

Under current orders,<sup>1</sup> school boards can conduct in-person meetings during the crisis. Nevertheless, all individuals attending an in-person meeting should be aware of social distancing requirements and any applicable Local Health Order. School boards should also continue to comply with all requirements of the Open Meetings Law.

Given current health and safety concerns and compliance with local health guidelines, some school boards continue to conduct meetings virtually. School boards continue to inquire as to whether the Open Meetings Law allows virtual meetings to be conducted and, if so, what specific compliance issues surround virtual meetings. As virtual board meetings continue as the pandemic lingers, school boards should audit board policies and practices to ensure compliance with the Open Meetings Law.

#### **A. Virtual School Board Meetings Permitted During COVID-19**

So long as virtual meetings are permitted under school board rules and policies, school board meetings may be conducted virtually. The Open Meetings Law permits meetings to be held in places that are reasonably accessible to members of the public, not just to publicly owned places. Therefore, virtual meetings, by teleconference or by videoconference, are permitted under the Open Meetings Law for the purpose of conducting school board meetings, so long as the teleconference or videoconference is reasonably accessible to members of the general public, and complies with the Open Meetings Law requirements in other respects.<sup>2</sup> This



## Stop 6: Open Meetings

includes the provision of a conference line and dial-in number in order to monitor a phone call meeting and/or a live-stream available for viewing by the public on a video conference platform.

It is recommended that school boards thoroughly vet the technology used for virtual meetings. Some platforms provide better security than others. Likewise, some platforms are more effective at controlling participation of both government officials and the public (mute, unmute, chat features, etc.). It is important to remember that the public has a right to monitor meetings of governmental bodies, but there is no right for the public to participate in such meetings absent a Board policy requiring participation.

### **B. Additional Notice Requirements for Virtual Meetings During COVID-19**

In addition to the general notice requirements set forth in Wis. Stat. §19.84(1)(b)—requiring providing at least 24 hours’ notice of the time, date, place, and the subject matter of the meeting—the DOJ’s guidance suggests there are additional notice requirements for virtual meetings under the Open Meetings Law. Specifically, DOJ guidance indicates the notice for virtual meetings must also state the school board meeting will be held remotely and include instructions for how the public may access the meeting. This includes providing the telephone number, video conference link, and any necessary passcodes or other login information to allow the public access to the meeting. The agenda should also include this information to help ensure the meeting’s accessibility to the public. Best practices dictate that the notice contain a name and contact number for a designated staff member that can be contacted in the event that a member of the public is unable to participate in the remote meeting to allow the school board to evaluate its potential obligation to accommodate participation.

### **C. Special Accommodations and Consideration for Conducting Virtual Meetings**

- Appropriate Accommodations May Be Necessary  
As the DOJ has advised, a school board conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even infeasible for one or more individuals who would like to observe a meeting to do so remotely. For example, school boards may need to make appropriate accommodation for people without telephone or internet access or who are blind, deaf, or hard of hearing in order to facilitate reasonable access to the meeting for such individuals. School boards should consider alternative methods of accommodation for such individuals in order to evaluate their potential obligation to provide reasonable access to the virtual meeting. Ultimately, however, Wisconsin Courts apply a reasonableness standard to the actions taken by a school board to accommodate public access. Only reasonable, not total, access by the public is required under the



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law. *Badke v. Village Board of Greendale*, 173 Wis.2d 553, 580-81, 494 N.W. 2d 408 (1993). A school board that makes a good faith effort to reasonably accommodate those with access issues — especially in light of the pandemic — will likely remain in compliance with the Open Meetings Law and Title II of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments (such as school board meetings).<sup>3</sup> However, the DOJ has advised that the ultimate determination will depend on the facts of each circumstance, so school boards should consult with legal counsel should any difficult accommodation issues arise before conducting the meeting or denying the accommodation request.

- Alternative Dial-In Option

The DOJ has advised that when conducting a videoconference or internet-based meeting, the school board should strongly consider providing the public with an alternative telephone dial-in option for observation so that lack of internet access is not a barrier to observing the meeting. This alternate dial-in option should be included in the notice as well as in the agenda, as described above.

- Recording and Posting of Meetings Encouraged

If a school board typically records meetings, it should continue to do so. The DOJ advises that when possible, the school board may consider recording and posting the meeting on its website as soon as practicable after the meeting concludes to ensure that their meetings remain open and accessible to the public. While posting a recording is not a substitute for real-time monitoring of the meeting under the Open Meetings Law, it provides an additional level of access to the public and shows a good faith attempt to maintain openness. School boards must also remain mindful of their responsibility to ensure accessibility for all individuals of recorded meetings, such as individuals with disabilities who may be hard of hearing and require subtitles, sign language, or other reasonable accommodations under Title II of the ADA.

- Meeting Procedures

There are no required additional or special procedures for meetings conducted virtually. However, at the beginning of each meeting, the DOJ advises that the board president should encourage all members to identify themselves before they begin speaking and not to speak over one another. This will help all those listening to the meeting better understand who is speaking. When it comes to voting, votes on any matters other than the truly routine should be conducted by roll call vote. Likewise, members should be required to announce when they are temporarily absent from a virtual meeting. Finally, it is important that the board president maintain decorum and order to allow for the orderly transaction of business. Best practice dictates that the board president (in consultation with others) develop a script to announce these



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procedures prior to taking up the order of business so the members of the board and the public will have a better understanding of how to conduct themselves.

- Public Comment and Direct Participation

School boards should continue to follow board policy and their typical practices regarding public comment and direct participation by the public in virtual meetings. Direct participation and public comment are not required under the Open Meetings Law. Instead, the Open Meetings Law only requires the ability of the public to monitor meetings of governmental bodies in a meaningful way. Nevertheless, some school boards may have written into their local policies or rules providing for a public comment period. In order to ensure maximum efficiency during a virtual meeting, a school board may wish to consider temporarily suspending or amending its policies to require that public comment be submitted electronically beforehand.

- Situations Where Virtual Meetings May Be Inappropriate

While virtual meetings that otherwise comply with the Open Meetings Law requirements are permissible, the DOJ has cautioned that remote access to an open meeting is not always appropriate. For example, where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be appropriate because important aspects of the discussion or deliberation would not be communicated to the public (or the elected officials). Best practices prescribe that any meeting that requires the use of plans, drawings, or charts be conducted by videoconferencing means featuring a “screen-share” option so that viewers and meeting participants can follow the discussion meaningfully. Handouts or materials that are relevant to the discussion should be distributed electronically in advance of the meeting to all participants upon request, and this should be set forth in the notice. As noted above, the technology should be thoroughly tested and vetted to avoid technical problems during the meeting. School boards should consult with legal counsel if any doubtful situations arise.

In addition, and prior to the pandemic, the Attorney General advised against holding meetings that involve quasi-judicial functions by videoconferencing. If such a situation arises, consideration must be given as to how to hold an appropriate in person “hearing” with appropriate safeguards.

Virtual meetings may also not be appropriate for meetings involving a closed session if adequate safeguards cannot be implemented to ensure only those who are permitted to participate in the closed session have access to the closed session portion of the virtual meeting (*e.g.*, ensuring elected officials do not use a cell phone to broadcast a closed session video meeting). This is particularly true if the closed



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session discussion relates to privacy interests of employees or students or strategic financial discussions involving bargaining or negotiation considerations.

- Ensuring a Quorum in a Virtual Meeting

In order for a school board meeting to be a valid, a quorum must be present. *Showers*, 135 Wis. 2d at 102. Many school boards maintain rules and policies that require the physical presence of a board member in order to be counted towards the quorum. In a virtual meeting, where board members are not physically present, it will be difficult, if not impossible, to obtain a quorum under such rules. In order to address this concern, school boards must review their policies and rules to determine whether the physical presence of a board member is required for purposes of a quorum. Once school boards make the determination that board policy or rule requires physical presence, in order to allow for virtual board meetings, the school board should temporarily suspend or amend its policies and rules explicitly allowing for participation of a board member by virtual means. This will allow the school board to obtain a quorum in a fully virtual meeting and eliminate concerns about the validity of any quorum.

If a meeting is required under the school board's policies or rules to pass a resolution or amendment, then the school board will have to comply with the existing quorum rules prior to passing the resolution or amendment by means of an in-person meeting, and otherwise comply with all other Open Meetings Law requirements, such as notice. After the resolution or amendment to allow for virtual participation by board members has passed, the school board may conduct virtual meetings going forward.

- Avoiding Nonpublic Comments and Walking Quorums During Virtual Meetings

The Open Meetings Law applies whenever a quorum of the school board is present. *Showers* at 102. Therefore, all communications and discussion by board members that take place during a virtual meeting must be made publicly in a manner accessible to the public attendees of the meeting. Board members should avoid private texting by cell phone or internet-based chat programs and exchanging emails or other private electronic communications while debating.

Many videoconferencing platforms include chat functions that are viewable by all meeting attendees if the attendee clicks on the chat box. In the interest of openness and efficiency, school boards should minimize or avoid the use of the chat function during the meeting. Not all users may be familiar with the nuances of the platform, and may not be aware that information is being communicated in the chat box. Additionally, messages exchanged on the chat platform, by text message, or through



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other transmissions likely constitute records under Wisconsin's Public Records Law subject to public inspection. In turn, such messages must be appropriately retained by the elected official or the school district and produced if requested and subject to disclosure by law. Many virtual platforms may not allow for retention of messages exchanged on them, making compliance with Wisconsin's Public Records Law difficult as it relates to retention and production of such messages.

The Open Meetings Law also applies to a walking quorum. A walking quorum is a separate gathering of groups of the governmental body, less than a quorum size, who agree, either tacitly or explicitly, to act uniformly to reach a quorum. *Showers*, 135 Wis.2d at 92. A walking quorum may violate the Open Meetings Law. To avoid walking quorum concerns in a virtual context, board members should refrain from separate discussion in virtual "break-out" rooms that are not accessible to all attendees. Board members should also avoid all offline discussions during the virtual meeting outside of the virtual meeting platform itself. For example, if board members are attending the virtual meeting in the same office space, they should not engage in face-to-face discussions outside of the virtual meeting to discuss district business.

### D. Navigation Tips for a Successful Journey

- School boards wishing to move board meetings to a virtual platform should examine their policies and rules to determine whether virtual meetings are permitted.
- If school board meetings are not permitted to be conducted virtually, school boards wishing to conduct virtual meetings should amend their rules and policies to allow for virtual meetings within the parameters of the Open Meetings Law and board policy and rules.
- The school board should be careful to follow all existing policies and procedures for amendments, including the need to have a valid quorum consistent with rules and procedures. For example, if the school board wishes to amend the rules and a physical quorum is required, any amendment should be enacted during a physical meeting.
- School districts should evaluate their virtual platform for accessibility and functionality to minimize technical issues during meetings before holding any virtual meetings.
- School districts should carefully evaluate all accommodation requests related to access of virtual meetings and, if necessary, consult with legal counsel before granting or denying the request.



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- School districts should evaluate board policies and rules regarding the method and manner of public comment and revise accordingly to accommodate the virtual platform.

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<sup>1</sup> As of this writing, neither the Department of Health Services nor the Department of Public Instruction has indicated that a statewide restriction on school or local government body meetings will be implemented.

<sup>2</sup> The Wisconsin Department of Justice (“DOJ”) has provided guidance indicating that remote participation by members of the public complies with the Open Meetings Law in two recent Open Government Advisories. (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-coronavirus-disease-2019-covid-19-and-open-meetings>; <https://www.doj.state.wi.us/news-releases/office-open-government-advisory-additional-information-regarding-covid-19-and-open>)

<sup>3</sup> School districts have an obligation to accommodate individuals with disabilities with respect to school board meetings, including meetings held in a virtual environment and streamed to the public. Under Title II of the ADA, school districts must provide auxiliary aids or services that enable effective communication. This obligation is ordinarily triggered upon a request for accommodation by an individual with a disability. However, when a school board conducts a virtual meeting, a school district must proactively ensure meetings are accessible to individuals with disabilities. Accessibility features of virtual platforms should be considered by districts, such as use of subtitles, speech-to-text, closed captioning, etc. Additionally, meeting notices should include information as to who to contact for accommodation. Background materials for the meeting may be made available prior to the meeting. Requests for accommodation should be immediately addressed and accommodations provided. Under Title II, school districts are required to give primary consideration to the type of auxiliary aid or service requested by the individual, and thus, such requests should be honored to the extent the accommodation does not fundamentally alter the nature of the board meeting, result in an undue financial/administrative burden, or an equally effective accommodation is available.

**Appendix A**  
**Sample Template**

**Daily Reminders for Staff and Students**  
**COVID-19 Safety Protocols**

All students and staff must follow the below health and safety protocols in order to prevent the spread of COVID-19 through our school community.

Staff members should keep this sheet at hand and issue the below reminders to students at regularly established intervals throughout the school day to ensure compliance. At a minimum, staff should remind student of these protocols any time there is a transition (e.g., upon arrival, before changing to a new activity, before and after students leave the classroom, before and after lunch or recess, before dismissal).

Daily COVID-19 Reminders for Students and Staff:

1. MASKS

- a. Masks must be worn at all times while inside the school building and out
- b. Masks must cover both the mouth and nose.

2. HAND SAFETY

- a. Wash hands with soap and water for at least 20 seconds throughout the school day.
- b. If soap and water is not available, use hand sanitizer.
- c. Do not touch the front of your mask or your face.
- d. Do not share objects with others.
- e. Cough or sneeze into a tissue. Immediately throw away the tissue and wash your hands.

3. PHYSICAL DISTANCING

- a. Stay 6 feet apart from other students and staff whenever possible. This means if both people have their arms stretched out, they should not be able to touch each other.

- 4. [Schools should insert any additional reminders as needed, based on the school's individual COVID-19 policies.]

## Appendix B Resources

*How to Wear Cloth Face Coverings*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-wear-cloth-face-coverings.html>.

*Print Resources*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc>.

*K-12 Schools and Child Care Programs*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html?Sort=Date%3A%3Adesc>.

*Considerations for Youth Sports*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/youth-sports.html>.

*Cleaning and Disinfection for Community Facilities*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>.

*When You Can be Around Others After You Had or Likely Had COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 26, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html).

*Considerations for Schools*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html>.

*Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

*Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.

*General Business Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>.

*Communication Resources*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/communication/index.html>.

*Cleaning and Disinfecting Your Facility*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>.

*Guidance for Child Care Programs that Remain Open*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-childcare.html#ScreenChildren>.

*Cleaning and Disinfection for Non-emergency Transport Vehicles*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/disinfecting-transport-vehicles.html>.

*What Bus Transit Operators Need to Know About COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/bus-transit-operator.html>.

*Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools.html>.

*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, DEPARTMENT OF EDUCATION (March 12, 2020), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

*FERPA & Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FAQs)*, DEPARTMENT OF EDUCATION (March 2020), [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/ferpa%20and%20coronavirus%20frequently%20asked%20questions.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/ferpa%20and%20coronavirus%20frequently%20asked%20questions.pdf).

*Non-Contact Infrared Thermometers*, U.S. FOOD AND DRUG ADMINISTRATION (April 23, 2020), <https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/non-contact-infrared-thermometers>.

Occupational Safety and Health Act of 1970, OSHA 3990-03, *Guidance on Preparing Workplaces for COVID-19* (2020), <https://www.osha.gov/Publications/OSHA3990.pdf>.

Occupational Safety and Health Act of 1970, OSHA 4045-06, *Guidance on Preparing Workplaces for COVID-19* (2020), <https://www.osha.gov/Publications/OSHA4045.pdf>.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LIST N: DISINFECTANTS FOR USE AGAINST SARS-CoV-2 (COVID-19) (2020), <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2-covid-19>.

*Masks and Thermometer Allocations to Schools*, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION (June 15, 2020), <https://dpi.wi.gov/administrators/e-mail/mask-and-thermometer-allocations-schools>.

DEPARTMENT OF HEALTH SERVICES, *ADDITIONAL SERVICES DUE TO EXTENDED SCHOOL CLOSURES* (2020), <https://dpi.wi.gov/sites/default/files/imce/sped/pdf/bul20-01.pdf>.

DEPARTMENT OF HEALTH SERVICES, REOPENING SCHOOL BUILDINGS RISK ASSESSMENT TOOL (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Reopening\\_School\\_Building\\_Risk\\_Assessment\\_Tool.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Reopening_School_Building_Risk_Assessment_Tool.pdf).

DEPARTMENT OF HEALTH SERVICES, RETURNING TO SCHOOL AFTER COVID-19 (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Returning\\_to\\_School\\_After\\_COVID-19.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Returning_to_School_After_COVID-19.pdf).

DEPARTMENT OF HEALTH SERVICES, SCHOOL HEALTH SERVICES INTERIM COVID-19 INFECTION CONTROL AND MITIGATION: TOOLKIT (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/School\\_Health\\_Services\\_Interim\\_COVID-19\\_Infection\\_Control\\_and\\_Mitigation\\_Toolkit.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/School_Health_Services_Interim_COVID-19_Infection_Control_and_Mitigation_Toolkit.pdf).

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, EDUCATION FORWARD REOPENING WISCONSIN SCHOOLS (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Education\\_Forward\\_web.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Education_Forward_web.pdf).

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, INTERIM COVID-19 CAFETERIAS AND FOOD SERVICE GUIDANCE (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interim\\_COVID-19\\_Cafeterias\\_and\\_Food\\_Service\\_Guidance.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interim_COVID-19_Cafeterias_and_Food_Service_Guidance.pdf).

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, INTERIM COVID-19 TRANSPORTATION GUIDANCE (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interim\\_COVID-19\\_Transportation\\_Guidance.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Interim_COVID-19_Transportation_Guidance.pdf).

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, PPE CONSIDERATIONS FOR SCHOOLS (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/PPE\\_Considerations\\_for\\_Schools\\_docx.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/PPE_Considerations_for_Schools_docx.pdf).

WISCONSIN ECONOMIC DEV. CORP., GENERAL GUIDANCE FOR ALL BUSINESSES (2020), <https://wedc.org/wp-content/uploads/2020/06/COVID-19-GENERAL-Guidelines-ENGLISH-1.pdf>.

WISCONSIN ECONOMIC DEV. CORP., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 PROFESSIONAL SERVICES INDUSTRY (2020), [https://wedc.org/wp-content/uploads/2020/06/COVID-19-Professional-Guidelines\\_cl.pdf](https://wedc.org/wp-content/uploads/2020/06/COVID-19-Professional-Guidelines_cl.pdf).

WISCONSIN ECONOMIC DEV. CORP., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 PUBLIC FACILITIES (2020), [https://wedc.org/wp-content/uploads/2020/06/COVID-19-Public-Facilities-Guidelines\\_cl.pdf](https://wedc.org/wp-content/uploads/2020/06/COVID-19-Public-Facilities-Guidelines_cl.pdf).

CAROLYN STANFORD TAYLOR, INTERIM COVID-19 INFECTION CONTROL AND MITIGATION MEASURES FOR SCHOOLS (2020), [https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/05\\_21\\_20\\_Interim\\_Guidance\\_for\\_School\\_Infection\\_Control\\_and\\_Mitigation\\_Measures\\_002.pdf](https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/05_21_20_Interim_Guidance_for_School_Infection_Control_and_Mitigation_Measures_002.pdf).

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, GUIDANCE FOR OPENING UP HIGH SCHOOL ATHLETICS AND ACTIVITIES (2020), [https://www.nfhs.org/media/3812287/2020-nfhs-guidance-for-opening-up-high-school-athletics-and-activities-nfhs-smac-may-15\\_2020-final.pdf](https://www.nfhs.org/media/3812287/2020-nfhs-guidance-for-opening-up-high-school-athletics-and-activities-nfhs-smac-may-15_2020-final.pdf).

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, GUIDANCE FOR SUMMER ACTIVITIES (2020), <https://www.wiaawi.org/Portals/0/PDF/Health/Covid/WIAA-Reopen-School-Sports-Summer.pdf>.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, WIAA SUMMER GUIDE SPORT SPECIFIC (2020), <https://www.wiaawi.org/Portals/0/PDF/Health/Covid/WIAA-SummerGuide-Sport-Specific.pdf>.

WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION, WILSON BALL CLEANING RECOMMENDATIONS (2020), <https://www.wiaawi.org/Portals/0/PDF/Health/Covid/WilsonBallCleaningRecommendations.pdf>.

*COVID-19 Planning Considerations: Guidance for School Re-entry*, AM. ACAD. OF PEDIATRICS (June 25, 2020), <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>

*Board Approves Winter Sports Changes, Adjusts Rules & Policies in Wake of Pandemic*, WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION (June 24, 2020), <https://www.wiaawi.org/News/News-Article/board-approves-winter-sports-changes-adjusts-rules-policies-in-wake-of-pandemic>.

Adam T. Schwalje & Henry T. Hoffman, *Wind Instrument Aerosol in Covid Era*, UNIVERSITY OF IOWA HEALTH CARE (June 10, 2020), <https://medicine.uiowa.edu/iowaprotocols/wind-instrument-aerosol-covid-era-covid-19-and-horns-trumpets-trombones-euphoniums-tubas-records>.

*Army Band COVID-19 Risk Mitigation for Large Groups*, WEST POINT BAND (June 3, 2020), <https://www.westpointband.com/westpointmusicresearchcenter/army-band-covid-19-risk-mitigation-for-large-groups.html>.