Legal Update 10: Thursday, April 2, 2020 at 2:30 pm

COVID-19 Legal Issues
Frequently Asked Questions

Sponsored by: VSBIT and the Vermont Superintendents Association[1]

Table of Contents:

[1] *The content of this document is offered as a service of VSBIT and VSA and does not constitute legal advice. You should always contact an attorney regarding any specific legal problem or matter. The information in this document has been developed and reviewed by education law attorneys licensed to practice in Vermont.*

Labor and Employment (New Content: 4/2/2020)

Guidance from the Secretary of Education on

Employee Pay, Leave Time & Related Issues

The attorneys retained by VSBIT and the VSA to advise districts have identified a number of questions related to employee pay, discipline, and leave time due to the Governor's Executive Orders and AOE Guidance. The VSA, VSBA and VSBIT submitted the questions to Secretary French last week. The questions and responses from the Secretary are as follows:

Q: *How does the expectation of payment to employees during the dismissal period relate to the employer's customary management authority under state and federal law, particularly with respect to the Governor's directives to school districts during the dismissal period?*

A: The Governor has ordered that during the dismissal of schools, employees are to continue to report to work. The Agency has clarified that districts shall continue to pay employees. This is consistent with AOE guidance to districts that they must continue to pay PreK providers and independent schools regardless of whether students are in attendance. The state needs to ensure workers continue to receive pay, where feasible, as a matter of economic security and public health.

During the closure period, the district as employer has the discretion to require any employee to report to work or to require the employee to telework. In supplemental guidance, the Agency urged districts to use employees on a voluntary basis, or to utilize community volunteers, before ordering an employee to a work location against that employee's wishes. The Agency also articulated a list of conditions that exempt an employee from providing childcare services. However, the district as employer retains ultimate authority to determine location of work for employees. This discretion

must be informed by the Governor's stay at home order and VDH guidance regarding social distancing.

The Governor has designated three school functions as essential as therefore exempt, where necessary, from the stay at home order: delivery of student meals, the preparation of remote learning and the provision of childcare to essential workers. The Agency urges districts to complete these tasks with the fewest staff necessary in order to prevent further community spread.

Q: *Do expectations vary depending on whether employees are providing meals, childcare, or continuity of learning?*

A: Yes, the district determines the location of work for employees, subject to the considerations described in 1, above. The district is responsible for planning how to deliver the three essential services.

Q: *In the absence of other guidance, do the terms of the local collective bargaining agreement (CBA) apply, particularly concerning discipline and use of leave?*

A: Yes.

Q: *If the dismissal period is extended, is it AOE's expectation that all school employees are to be paid through the remainder of this contract year? If yes, under what authority is this ordered?*

A: Under the terms of the Governor's order dismissing schools, all employees are to continue to report for work and to be paid for the remainder of the contract year, as if school had continued uninterrupted. The Agency is not aware of any blanket authority allowing a district to refuse to pay an employee who reports to work (whether physically or remotely). Nothing in the Governor's orders or Agency guidance impacts a district's authority to terminate employment under the terms of the district's CBA.

Q: *If the closure period is not being counted towards the 175 student days, will state funding be provided for compensating all staff through the closure period?*

A: Additional state funding will not be provided for the compensation of staff through the closure period. Districts have already budgeted for and received education fund payments and other sources of revenue for the compensation of district staff this school year. All days from

March 18 – April 13 should be counted as contract days. The Secretary has authority to waive all days from March 18 – April 13 from the requirements of 16 V.S.A. 1071 and SBE Rule 2311. (See, SBE minutes of 3/18/2020).

Q: *If not, where will the additional funding come from to pay staff for both the school closure days and the requisite number of days to reach 175 student days? How will waiver of student days affect funding available to school districts?*

A: The decision whether or not to require make up days will be made by the Secretary at a later date. Any such decision will address this issue.

Q: *If employees are to be paid during the entire dismissal period, is the expectation that districts will apply various provisions of complex paid leave programs (CBAs, FMLA, state law, new federal benefits) in order to determine who is eligible to be paid and for how long? Is this/should this be a local determination or is it the Agency's expectation that all staff will be paid regardless of leave status?*

A: Yes, this is a local decision, subject to the caveats in 1 and 2, above.

End of Secretary French's Guidance from 4/2/2020

Q: Should we layoff some employee groups that are no longer needed when school is closed?

A: We do not recommend laying any employees off during the school closure period. A layoff would not be in accordance with the guidance we received from Secretary French, unless the layoff was contemplated *prior* to the Governor's Executive Orders of March 15 & 26, 2020. Specifically, the Secretary has determined that "schools shall continue to pay employees". The Secretary's authority in these issues is based upon the authority granted him under the Executive Orders to implement the broad parameters of each education related Executive Order.

Q: Should we require the use of appropriate and available paid leave if any employee is exempt from working on premises, and whose job cannot be done remotely?

A: Given the Secretary's bottom line statement that all school employees are expected to be paid, irrespective of whether there is work for them to do or if they qualify for one of the specific exemptions from work, it may not make sense for districts to administer paid leave

provisions during the closure period. You *can* require the use of appropriate and available paid leave if an employee is exempt or his/her job cannot be performed remotely, but we encourage you to consider how paid leave will be applied equitably across all employees in your school district and/or supervisory union. Whatever option employers choose, they should confer with legal counsel and apply a consistent and fair approach.

Q: If the employee has no appropriate paid leaves, will they go unpaid?

A: No, Secretary French's guidance is clear that no employees will go unpaid.

Q: Should we be tracking leave on a daily basis if someone is unable to perform their daily obligations assigned to them? This may mean unpaid leave for some?

A: If you have decided to track leave, then yes you should be tracking this accordingly. Note as previously referenced that no employee is to be unpaid.

Q: Should we continue to pay employees who we have no work for at this time even if they are willing and able to work? I understand food service staff and custodial staff are working rotating shifts.

A: Yes, based on Secretary French's guidance a school district is required to pay employees even if there is a lack of work for employees.

Q: Should we be requiring support staff to track their actual work hours each day and only pay them for hours worked? This could disqualify several from receiving benefits if their work hours fall below 30/week.

A: Support staff should be tracking their actual work hours each day. However, based on Secretary French's guidance, all employees should be paid, irrespective of the number of hours worked and reported on any time reporting system. Hours or days actually worked may be useful and/or necessary information in the context of workers compensation or other matters.

Q: Can we assign staff duties outside their job description (e.g., assign a para to perform food service or custodial duties; require staff to deliver food; require maintenance staff to perform custodial duties/delivery, etc)?

A: The answer to this question is highly based upon the underlying facts of each proposed circumstance. The answer will vary from one school district to another based upon these local circumstances. Important factors to consider are: what are the specifics of job descriptions; are the assignments within "job families" or across "job families;" do employees have the minimum and required skills and training as identified by the job descriptions; does the collective bargaining agreement include a management rights clause that retains broad job assignment and transfer authority to the school board. Additionally, is there a disparity in the hourly wage rates for the job classifications for the positions in play? If so, how does the school district intend to address this disparity? We recommend that a school district consult with its legal counsel in analyzing these factors and determining a course of action.

Q: What is the difference between a furlough and a layoff? How does the term affect unemployment benefits?

A: As noted in question #1 above, a layoff or furlough would not be in accordance with the guidance from Secretary French, unless the layoff was clearly contemplated *prior* to the Governor's Executive Orders of March 15 & 26, 2020. A furlough is mandatory unpaid time off from work. They generally are implemented by employers as a cost saving measure during difficult economic time or periods of the year when business is slow. During federal "shutdowns" caused by a budget impasse, nonessential federal employees are routinely "furloughed." Employees who are laid off typically have no expectation of reinstatement in the short-term because their employer has made a decision to reduce the size of its workforce. The key difference between a layoff and a furlough is that employees on furlough have a reasonable expectation that their job will resume at some point in the future when the cause of the furlough has been resolved or expired. In Vermont, very few, if any, school district collective bargaining agreements have express provisions regarding the right of the School Board to furlough employees. Under either a furlough or a layoff, employees in Vermont are eligible for unemployment benefits.

Q: Does the federal two-week sick leave apply beyond the sick leave we grant or concurrent with it?

A: The Families First Coronavirus Response Act ("FFCRA") signed into law on March 18, 2020 established emergency paid sick leave for all government employees, including school employees. The FFCRA provides eighty (80) hours of such leave for full-time employees and hours worked over a two-week period of time for part-time employees, e.g. thirty (30) hours per week equals an allowance of sixty (6) hours of paid leave time. The emergency leave under FFCRA is *in addition to* any leave entitlement under a collective bargaining agreement or employer policy; the leaves do not run concurrently. There is no requirement that an employee must expend their contractual leave entitlement first.

Q: Would reducing a para's hours allow them to access any unemployment (is there a partial layoff?)

A: The Vermont Department of Labor does grant partial benefits to claimants whose earnings have been reduced due to a reduction in hours. So if the employee is no longer earning their prior wages they will be considered for partial benefits. As with any claim, there is a look back period and claimants must meet certain monetary criteria to be eligible for benefits which is determined by the VTDOL so not everyone will automatically qualify. It will depend on work history.

Q: How does unemployment work for VSBIT insurance pool members?

A: Unemployment benefit eligibility is determined by the Vermont Department of Labor. Claims will be granted to employees based on state and federal statutes which may include extended benefits and increased weekly payment amounts depending on the individual claimants circumstances. Your employees will experience no difference in the handling of their claim resulting from your entity being a member of the VSBIT pool. Employees file their claim at the Vermont Department of Labor. The claim is then forwarded to Equifax by the VTDOL. Equifax will reach out to the school contact to complete and file the separation information to the VTDOL who determines whether a benefit is to be paid. Quarterly VSBIT reimburses the VTDOL for all claims paid on behalf of the membership. If you have further questions please reach out to Chris Roberts, VSBIT Manager of Finance at chris@vsbit.org.

Q: We received a "request to bargain" over COVID-19 issues from their local Association. What should we do?

A: If you receive a request from the Association to bargain over COVID-19 closures, we strongly encourage you to contact your legal counsel before responding. There are significant consequences with both the request and the response. Many COVID-19 issues are connected to the Governor's Emergency Orders and Agency of Education Guidance, coupled with the status of the school year and how and whether the State counts "closure days" as student days.

Districts have been making a significant effort to provide pay and benefits to their employees while coping with the unprecedented health emergency caused by the coronavirus. Districts are working to understand and implement the Emergency Orders that have been issued by the President and/or Governor, supplemented by Guidance and FAQ's from specific agencies having jurisdiction.

The extent to which School Districts are obligated to bargain with the Association as to changing work conditions before such Emergency Orders are implemented in order to preserve the health of our students and staff (and that of the general public), is a matter that you should carefully review with your legal counsel. It may make sense, at the appropriate time and in the appropriate manner, to meet and discuss with the Association the impacts of the Emergency Orders, if any, on any claimed contractual right that is asserted to have been adversely impacted.

School districts as employers are functioning in extraordinary and fluid circumstances. State and Federal employment laws, local collective bargaining agreements and school districts' inherent nature as employers all are not structured to easily adapt to the current national and State conditions and the range of evolving employment issues. Working closely with your labor and employment counsel can help you ensure you are responding to this unprecedented event in an informed manner.

Q: We have been operating under the belief that it is up to an employee to disclose if they have an exemption. However, the DOH guidance says, individuals in high risk groups "should not" provide child care. Several of our child care volunteers are over 60. Should we be checking in with these volunteers or asking employees to sign off on something that says they do not meet any of the exemption criteria if they have volunteered to provide childcare as their work assignment?

A: As employers, your obligation is to inform employees that these exemptions exist and may apply to them. Each district must then determine if they will accept employees who meet the exemption criteria, but should be cautious about barring employees from working by virtue of the fact that they meet the exemption criteria, due to the possibility of age and disability discrimination claims. If an employee who meets the exemption criteria chooses to work anyway, districts should document that the employee chose to work despite being informed that they met the exemption criteria. If you have concerns regarding potential age or disability discrimination claims in individual cases, you should work with your school attorney to address such concerns.

Contracted Services Guidance from the Legal Team on March 24, 2020.

Q: Are school boards required to negotiate working conditions with the union during a state of emergency?

A: Negotiating with the association in order to establish a side letter on the impact of school dismissal on teachers and support staff has critical consequences for your collective bargaining agreement and labor relations in your school district or supervisory union. We

strongly recommend that you contact the school attorney who you consult for labor and collective bargaining matters.

Q: What do I need to know about the Families First Coronavirus Response Act?

A: The Families First Coronavirus Response Act was signed into law on March 19, 2020 by President Trump. The Act is effective within 15 days of enactment and includes special provisions regarding meals for students and special employee leave provisions available for both public and private sector employees. The leave provisions are intended to reduce the financial impact of the coronavirus pandemic on workers through establishment of Emergency Paid Sick Leave and Public Health Emergency Leave, a paid leave expansion of the FMLA.

These leave days are intended to enhance employee leave time under an employment contract, collective bargaining agreement or any applicable state or federal law. This FAQ guidance document was prepared by the National School Boards Association's Council of School Attorneys (COSA). The document is intended to provide only general guidance. If you have questions or require further guidance, please contact your school district's legal counsel.

The advice below provides very general guidance on several issues created by the March 18 – April 6 school closure; further evaluation may be necessary if the closure is extended by the Governor.

School districts as employers are functioning in extraordinary and fluid circumstances amid both a State and Federal emergency over a world pandemic. State and Federal employment laws, our local collective bargaining agreements and school districts' inherent nature as employers all are not structured to easily adapt to these national and State conditions and the range of evolving employment and collective bargaining issues. Given that environment, we can offer general guidance but, in the final analysis, Superintendents need to be guided by the provisions of your collective bargaining agreements (CBAs), Governor Scott's Executive Order, the Guidance documents from the Agency of Education and the Vermont Department of Health, advice from your legal counsel, a sense of the extraordinary circumstances of this pandemic and the employer/employee relationship that you have established through previous employment decisions. For many school districts in Vermont your district or supervisory union is one of the largest employers in your region.

During the press conference on March 15 announcing his Executive Order on School Closure, Governor Scott stated that school employees will be paid during the closure. Secretary French has provided additional guidance that hourly school employees shall be paid. French's guidance acknowledges the Vermont Department of Health's COVID – 19 guidance on employees reporting to work and states that staff should be excused from physically reporting to work in the following circumstance:

1. Staff with compromised immune conditions;
2. Staff who reside with someone with a compromised immune condition;
3. Staff suffering from anxiety and related mental health conditions;
4. Expectant staff;
5. Staff with infants;
6. Staff over 60.

The guidance further states that Superintendents *may*, at their discretion, *require staff to utilize personal and sick leave* in accordance with the SU/SD's collective bargaining agreement. However, this guidance may be revised after we have completed a review of the Families First Coronavirus Response Act signed by the President today. This guidance is applicable to both bargaining unit and non-bargaining unit employees.

Based upon the Secretary's guidance, you have discretion in the treatment of an employee who refuses to utilize their paid leave time. If an employee has exhausted his/her leave time, you may want to consider approaching the association regarding available sick leave bank (SLB) days or otherwise treat it in the same manner as other occasions when an employee has exhausted his/her leave. While there is available work, an employee who has exhausted their paid leave time is not eligible to file for unemployment compensation *unless* their employment has been terminated.

As schools implement social distancing practices and/or have so many employees working remotely, one question that arises is how should schools deliver employee paychecks. Vermont provides employees two predominant methods of receiving their paychecks: direct deposit of an "electronic check" or receipt of a "live check". Under Vermont statutes, all employers have a legal obligation to pay wages to their employees in a timely manner specified by 21 V.S.A.§342. This statue also provides that employees may give written authorization and *consent* for electronic deposit of their paycheck by the employer. In the absence of electronic deposit, the employer can make checks available for pickup at a designated location or mail the paycheck to the employee.

What happens when an employee paycheck is insufficient to cover the employee share of health and/or dental premiums? This circumstance occurs in many school districts when some long school breaks leave some school year employees with insufficient paid time to pay their portion of the insurance premium. First and foremost, we recommend that districts handle the issue the same way you handle when hourly school year employees have insufficient funds to cover their premium share. Our experience is that school districts "front the employee premium share" and recover the funds in the next or over the next several pay periods. Almost all CBAs include a provision authorizing payroll deduction of the employee share of premium expenses. This is a continuing authorization which should cover both past and present premium share obligations. If your district has never engaged in this practice, we encourage you to reach out to the local association to reach an understanding regarding the practice and the expectation for repayment.

Legal Update 10: Thursday, April 2, 2020 at 2:30 pm

This extraordinary time in Vermont schools is evolving and being shaped by other State and national events. The number of suspected and confirmed cases of the virus continues to increase. Our State and Federal legislative bodies are taking measures to respond to the crisis. Last night The U.S. Senate passed the Families First Coronavirus Response Act. We are reviewing this Act which the President signed today will provide an update on its impact on schools as soon as that review is complete.

The March 17, 2020 Governor's Executive Order on child care raised numerous legal questions related to employment, labor and governance. The legal team is working diligently to identify all the issues and develop information and guidance for the field and questions for the Agency of Education by tomorrow. We will keep you apprised of this work as it is complete.

Q: What do we need to know about FMLA and Vermont's Earned Sick Time law?

A: The Guidance provided below is excerpted from the United States Department of Labor (USDOL) web page with additional comments based on Vermont Law and is not designed to be legal advice for specific circumstances. In some cases, Vermont law provides greater benefits than the federal law and, in those circumstances, a Vermont employer must provide the more generous benefit. Many School Districts have adopted policies, collective bargaining agreements and individual contracts that must be taken into consideration as well. Accordingly, you should consult with your own legal counsel on specific questions.

In order for the Family and Medical Leave Act (FMLA) to provide job and benefit protections to an employee, the employee must first establish his or her eligibility by working:

- for a covered employer for at least 12 months.
- 1250 hours a year in the previous 12 months.
- work at a location with at least 50 employees within a 75 mile radius

If the employee satisfies the eligibility threshold, then a covered employer must provide such employee job-protected leave for specified family and medical reasons, such as the employee or a family member suffering a "serious medical condition" which may include the flu where complications arise.

A "serious medical condition" includes:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate the employee or the employee's family member (for example, unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);

Must a covered employer grant leave to an employee who is sick or who is caring for a family member that is sick with CORVID-19 and is that leave paid or unpaid?

An eligible employee who is sick or whose family member is sick with a "serious medical condition" and who works for a covered employer is entitled to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year under the FMLA. Under the Vermont Parental and Family Leave Law, if an employee has accrued paid "sick, vacation or any other accrued paid leave" they are entitled to use up to six weeks of such leave at their option. An employer, however, may have enacted policies or be subject to collective bargaining agreements or individual contracts which could expand an employee's right to paid leave for more than six weeks or or even expand the 12-week period.

Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition**.** Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. An employer, however, may adopt more generous policies in order to protect employees and the public health.

What legal responsibility do employers have to allow parents or caregivers time off from work to care for the sick or children who have been dismissed from school?

There is currently no federal law covering non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. Vermont law however, does have such a provision included in its Earned Sick Time Law, (EST) for employees who work at least 18 hours a week in a year. Under EST, employees are eligible to use their accrued sick time if the employee "cares for a parent, grandparent, spouse, child, brother, sister, parent-in-law , grandchild or foster child because the school or business where that individual is normally located during the employee's work day is closed for public health or safety reasons." If sick leave is accrued only under EST, the maximum accrued time an employee may remain out of work is limited. However, if an employer has not made this distinction in its Policy, collective bargaining agreement or individual contract, then it could be argued that the employee can use all of their accrued paid sick leave for this purpose.

Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?

It depends. If an employee is covered and eligible under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, then the employee is entitled to up to 12 weeks of job-protected leave during any 12-month period. Whether the employee is paid during this leave will be governed by Vermont law: if an employee has accrued paid sick, vacation or any other accrued paid leave they are entitled to use up to six weeks of such leave at their option.

Again, it will be important to check any applicable policies, collective bargaining agreements or individual contracts which could expand an employee's right to leave and or paid leave.

In lieu of laying off employees in this situation, the USDOL encourages you to consider other options such as telecommuting and to prepare a plan of action specific to your workplace. Contact the Department of Labor Wage and Hour Division for additional information on the FMLA or call 1-866-487-9243 if you have questions.

If an employee has already been granted an FMLA leave during the period that our school is closed and we are paying our other employees, do we still charge the employee out on FMLA leave for using their accrued sick leave?

Again, it depends. If the employer closes its school and continues to pay other employees while they are not at work and they are not required to perform any work whatsoever, the employee being charged sick leave may argue that the employer is treating him/her differently and penalizing him/her for taking FMLA leave. If, however, the school closes, pays its employees and does require some work from them, e.g. long-distance teaching, then the employer can charge sick leave to the employee on FMLA leave.

You are encouraged to review the following website for greater detail. Please remember however, that your District's own policies, collective bargaining agreements and individual contracts, if they are more generous than federal law, may require different results.

https://www.dol.gov/agencies/whd/fmla/pandemic

Q: What considerations should we be aware of for the 2020-2021 School Year regarding employment - individual offers of employment, contracts, other considerations?

A: Although employees may not be actively working, if they are on payroll, they must be treated as they always have as the new school year approaches. Seniority will accrue and steps must be given, where appropriate. Renewal rights must be respected.

One issue that may arise for employers is the issuance and return of contracts. Most collective bargaining agreements place deadlines on providing employees with contracts for the upcoming

year. The employee then has some limited time to return the signed contract, or the position is considered open.

Where, as here, paid and active employees will not be at work, districts should require that employees check district email daily for communications. There should be a written directive on the issue. Then, it will be possible for both sides to easily comply with the contract. Specifically, there will be an expectation that the employee will review district emails so that she can receive the contract on the day it is sent and then there will be no reason for the employee not to return the signed contract timely. We recommend that approximately one week before contracts are emailed to employees you send an email announcement advising employees to look for 2020-2021 employment contracts via email on xxx date. Two or three days after the contracts have been sent to all employees, send another email to all employees stating that contracts were emailed on xxx date, if they didn't receive a contract, please contact Human Resources.

Another issue for the upcoming year is the calculation of seniority. If some employees work more hours than others in the same job category, it may skew seniority calculations. Each district should carefully review the language in the collective bargaining agreements that define seniority. Some CBAs may define seniority based on hours actually worked. Others may focus on how the employer characterizes the work hours (FTE) of the position. There may be no definition, requiring a choice between the two methods. If the CBA does not define a method, carefully review your past practices regarding the calculation of FTE, especially for partial year employees. Tracking work hours during closure is important for all employees, including salaried/exempt employees if it could have an impact on seniority. It may be wise to raise the issue with your local bargaining unit and to reach consensus on how to account for closure work hours in connection with seniority.

Q: Can staff provide home-based services, such as for special education?

A: We do not encourage districts to provide home based services in most instances. Schools will not have any ability to control exposures in the home environment. That means that a district would be sending an employee to a location where there may be multiple vectors for transmission of the virus. Likewise, the employee may be contagious, exposing vulnerable children and families to the virus. The potential negative outcomes are obvious. Neither circumstance is acceptable.

There is the potential for civil litigation in the event of transmission of COVID-19. A family could pursue a claim for damages if a member became gravely ill or died because of transmission from a school employee. Likewise, a school employee could easily file a worker's compensation claim based on harm caused by home exposures while working. It might be difficult to prove the source of transmission to a specific person in a litigated case, but there are methods of expert evidence to overcome those obstacles.

Q: The association is asking for modifications to the provisions of our collective bargaining agreement that apply to eligibility for/use of our sick leave bank. What considerations should we be aware of as we consider this request?

A: Sick Leave Bank (SLB) provisions in collective bargaining agreements (CBAs) vary widely across the state. Many limit access by providing that only employees who have contributed to the SLB may be awarded additional sick days. Most SLBs limit awards for the serious illness of a staff member and/or for the sole purpose of providing the employee paid sick leave until the employee qualifies for long-term disability insurance. In almost every instance, the decision to award additional leave time is made by a committee established under the SLB provision in the CBA. A decision to extend SLB benefits to employees who are not eligible or for other purposes, should only be made after close consultation with your association. This is a negotiated benefit and in many districts the local association is concerned about donated days being given to ineligible employees or awarded for other purposes. If an agreement is reached with the association to alter the terms, it should state that it is based upon these extraordinary circumstances, be time limited, and state that it does not establish any practice or precedent.

Q: For school employee health care, if an employee is not being paid their full pay - How can they afford their share of the premium? Will the employer continue to pay their share of the premium?

A: Based on the March 17, 2020 directive from the Agency of Education, which stated, “all school employees will continue to get paid during the dismissal period,” districts should assume that employee benefits will be maintained at current levels, until further directed by the Governor.

Q: Can we require that some “essential” employees work on-site during closure?

A: Yes. If employees are not sick or otherwise entitled to leave from work by statute or contract, we can require attendance at school. Whether employees are deemed “essential” by us is largely immaterial as we have a right to insist that all employees work when they are contractually required to do so. There is no need to designate employees as essential. Our needs may change over time. So long as we are compensating employees, we can require that they work, whatever their job functions.

Under the present circumstances, it is important that schools be sensitive to the risks presented to employees. That includes taking proactive steps to make sure that the workplace is as safe as can be. Schools may consider a work from home option. However, the employer does have a right to insist that employees report to work if there is no legal reason why they may not.

Q: Do the safe working conditions provisions in the collective bargaining agreements excuse employees from working at school?

A: Probably not. Most collective bargaining agreements have safe working environment clauses. Those articles require a generally safe workplace. If the employer violates the terms, the employee/association may grieve the violation. Ultimately, an arbitrator is responsible for determining whether conditions violated the contractual safety provision. Where districts are complying with guidance from AOE and the Vermont Department of Health, it will be difficult for the local associations to demonstrate that conditions are unsafe.

Here, employees are suggesting that they do not need to report to work because they consider the workplace unsafe. That is not an appropriate procedural response, even if the conditions are unsafe. The associations may grieve the conditions as a violation of the contract if they wish, but they should not refuse to work. From a purely legal perspective, the employer could administer discipline against employees refusing to work, and then an arbitrator would have to determine if the refusal to work was justified by the allegedly unsafe conditions.

Nobody wants to engage in discipline against fearful employees under the prevailing circumstances. Where students are no longer present at school, where CDC guidance is being followed by the employers and where the employers are taking steps to make the workplace as safe as possible for the few employees at school, there should be an ability to work with local bargaining units to maintain essential operations.

Q: Can we require that employees use sick time first?

A: Maybe. If an union employee is available to work and the district does not have work or has less work for the employee, we must pay the employee all of their contractual wages. If, however, the employee is unable to work a reduced or modified schedule because he or she is sick, the employee is, legally, not entitled to wages and must use sick time for compensation.

Under Vermont law, employees are entitled to use sick time to care for their children where there has been a school or daycare closures because of safety reasons. That will be the case for many district employees. It seems reasonable to expect that those employees who are not able to work because of child care responsibilities would first use sick time before employers would provide other compensation. Likewise, if employees become sick during a time when they are scheduled to perform some work, it also appears reasonable to expect that those employees would use sick time. This is particularly true if the employees are expected to perform some work during closure. After that, the district could pay wages despite the fact that an employee is not able to work.

However, employers should apply their closure compensation policies/practices equitably. If the employer determines that it wishes to pay all employees throughout closure no matter whether

they can work, the employer should apply the rule uniformly to all employees. Otherwise stated, if a district intends to pay all employees who do not work and will not be checking in with employees to determine if they are able to work, why other are not working ought not be considered, and sick days should be left undisturbed for employees who are not available to work even though they may be scheduled to work reduced hours. Applied here, just because we know that an employee is not working because of childcare responsibilities or sickness we cannot treat them differently than other employees not working during closure.

The answer to this question is "maybe" because there is no clear law on this issue. The response is based on broad principles of contract law and may be subject to challenge. Local associations could grieve any decision to deduct from accrued sick time during closure. The risk associated with that grievance would be the return of sick days to specific employees. As always, it is best to reach an understanding with your association so that there is an agreed upon approach.

Q: Can we require employees to work outside of their job categories?

A: It depends upon your collective bargaining agreement(s) and what job categories are in question. Most collective bargaining agreements indicate working conditions for the employees, both support staff and teachers. Employers are not entitled to unilaterally impose new working conditions if they fall outside of those conditions contractually negotiated with the local bargaining unit. Doing so may constitute an unfair labor practice or violate the terms of the contract. For example, if a district asks teachers to deliver food to students instead of teaching classes, that may be a violation of the working conditions of the CBA. If each of the job categories are ESP, there is probably more latitude to require work of an employee outside his/her job category. Ultimately, the answer will depend on the terms of the CBA, job descriptions and the level of similarity between the job categories.

It is best to approach the local bargaining unit representatives and collaboratively work toward a plan to deliver essential services in a way that is reasonable to both sides. After all, the school employees will almost certainly be performing less work for the same amount of pay. There should be a willingness to demonstrate flexibility during this time of crisis.

Governance (NEW CONTENT 4/2/2020)

The Secretary of State's Elections Division has prepared a summary document for H.861, which made some changes to election law in response to the COVID-19 State of Emergency. In general, the bill removes the signature gathering requirements for candidates to be placed on the ballot, allows the legislative body of a municipality to adopt Australian balloting for an upcoming vote, and grants the Secretary of State authority, with

the Governor's agreement, to order or permit appropriate procedures as necessary in light of the Covid-19 virus.

Here is the guidance Will Senning sent out to the field earlier this week:

For those of you that have upcoming elections in the next two months (April and May), my guidance is to cancel those meetings if at all possible. It simply is not safe, given the current state of the spread of the virus in Vermont, to conduct elections at this time. Whether they are votes from the floor, or Australian ballot votes that require ballot processing and counting, the processes required at this time to conduct the election put your voters and election workers at too much of a risk from this highly contagious virus. The question, of course, is how does that work. Let me address the most common scenarios:

1. *Budget Revotes and other votes not required to be held on or before a certain date*

If you are facing a revote of your budget, there is no timeframe in the election law in which the budget revote must be held. You can cancel those warned budget revotes and wait to re-warn them (or simply wait to warn them if you have not yet). This is the case for any scheduled vote that is not required to be held on or before a certain date. You should post notice of the cancellation wherever the Warnings had been posted and otherwise take as many steps as possible to get the word out (website, Front Porch Forum, newspaper, etc.). You do not have to announce a date when the election will be held at the time you cancel – but I would advise communicating to your voters that it is your intent to hold the election as soon as possible.

Cancelling the votes now will provide time for two things. One, we see if the spread of the virus eases, the Governor's Orders are lifted, and the votes can be conducted safely in the late spring or early summer. Let's all hope so. Two, if the situation is not improving, our office in consultation with you all will have time to devise and implement appropriate procedures to allow these local elections to take place more safely. We don't know the exact nature of what, if any, those new procedures will be or what will be necessary, but this will allow us time to thoughtfully proceed.

2. Votes that By Charter, By Article of Agreement, or by law relating to petitions are required to be held on or before a certain date

Many Villages and some school districts have Annual Meetings that are mandated to be held on a specific upcoming date under their charter or articles of agreement. Other municipalities have received or may still receive petitions for reconsideration, or petitions to hold special meetings, for which a meeting must be held within a certain time. Those of you

facing these mandated votes have expressed your desire to cancel them, for all the reasons I explained above. Yesterday, we received agreement from the Governor, under the authority granted to the Secretary of State in Section 3 of the bill, to allow those of you with these mandated elections to cancel them as well, and proceed as advised above. We greatly appreciate the very quick turnaround from the Governor's office in agreeing to permit these elections to be cancelled.

As soon as possible, we will formally announce this new directive, but I wanted to make you aware of it now. The language agreed to by the Governor is as follows:

" Waiver of Mandated Upcoming Municipal Election Dates in 2020

Pursuant to the authority granted in Act 92, §3 (2020), and in agreement with the Governor:

The Secretary of State hereby permits any municipality that has an upcoming annual meeting or other election that is mandated to be held on or by a certain date, either by charter, article of agreement, other governing document, or by the provisions of 17 V.S.A. §2643 or §2661, may cancel that election and hold it on a different date in the year 2020 as determined by the municipality.

Any such cancelled election shall be held as soon as possible when it may be safely done so as deemed by the municipality, and the rights of any petitioners shall be preserved until such time as the election is held."

For most of you, whether it is a budget revote or an annual meeting where the budget will be voted the first time, I know that you face practical and statutory deadlines to have a budget in place. This is a calculation you will need to make on an individual basis – how long in the calendar year you can wait to adopt a budget. I urge you to be creative when making that determination and be cognizant that it is the health and safety of your community against which you are balancing the requirements to have a budget in place by a certain time. ***I urge any school districts to consult with the Agency of Education, VSBA, and your district attorneys regarding the requirement to have a budget in place prior to July 1. Please remember that all of government is adjusting to this crisis, and deadlines that may be driving your decision about the need to adopt a budget, or take other action, may also be relaxed.***

Finally, for those of you who would have been electing your local officials at these scheduled annual meetings, under the election law your incumbent officers retain their position until their successors are chosen (see 17 VSA 2646), so they will retain their position until the election may be held.

Legal Update 10: Thursday, April 2, 2020 at 2:30 pm

For all these reasons my guidance is to cancel any upcoming elections in the next few months wherever possible. This will give us all time to hopefully get past the height of this virus and also to assess the need for, to devise, and to implement any special procedures to conduct these votes more safely.

I hope that this is helpful and I thank everyone for their service to their communities during this crisis.

Will Senning
Director of Elections and Campaign Finance
Vermont Secretary of State's Office
128 State Street
Montpelier, VT 05633-1101
(802) 828 – 0175
will.senning@vermont.gov

Q: What activities can a school board conduct remotely during COVID-19? Can the board negotiate remotely?

A: The open meeting law is still in effect, although the Senate approved language yesterday that made some modifications to the law during the COVID-19 State of Emergency. The Senate's language states: "Public bodies should meet electronically and provide the public with electronic access to meetings in lieu of a designated physical location. When the public body meets electronically…the public body shall use technology that permits the attendance of the public through electronic or other means. The public body shall allow the public to access the meeting by telephone whenever feasible. The public body shall post information on how the public may access meetings electronically and shall include this information in the published agenda for each meeting. Unless unusual circumstances make it impossible for them to do so, the legislative body of each municipality and each school board shall record its meetings held pursuant to this section." The bill is now before the House for consideration.

Board meetings to address employee or student discipline issues, residency determination hearings, or other quasi-judicial activities should be conducted with the advice of legal counsel.

With respect to negotiations, the Governor's Stay Home, Stay Safe order requires the suspension of in-person meetings. If the parties agree to use a specific virtual platform to continue negotiations during the COVID-19 State of Emergency, the platform should allow each side to engage in direct communication with the other party in real time, and should provide the opportunity for each side to caucus without the other side being able to observe or listen to that

conversation. There are several platforms out there that will accommodate that arrangement, but again, use of those tools will need to be agreed to by both sides.

If the parties agree to proceed with negotiations using a virtual platform, then school districts should be sure to review the latest information about the state of the Education Fund, and the projected fiscal effects of COVID-19 on school budgets in an Issue Brief prepared for the General Assembly by the Joint Fiscal Office.

Q: What are concerns for virtual board meetings and ADA compliance? What if public comment is taken through a chat feature?

A: Until the open meeting law is changed, the law still requires a physical location to be designated so the public can participate. If the Senate's open meeting law modifications pass the House (see above), then the public body shall allow the public to participate by phone "whenever feasible." To address accessibility concerns for those unable to participate by telephone, the public body could ask members of the public to let the chair know what accommodations may be necessary to facilitate participation. Once a public body has been notified of the need for accommodations, they should work with their legal counsel to determine the best approach to respond to that request.

Q: I understand that if we don't have a budget by July 1 we work off of the 87% of the previous year's budget. Once we have a budget voted on, even if it's later than July 1, can we operate on that full budget or are we penalized?

A: 16 V.S.A. 566 authorizes a school district to borrow up to 87% of the previous year's budget if a budget has not been approved by June 30. This statute is not intended to penalize districts who do not have a budget in place, it is intended to ensure a district has access to funds in order to begin operations on July 1. Once the electorate approves a budget, the district will have access to the full amount of that budget for that fiscal year. Districts should consult with their legal counsel and the Agency of Education if they are considering delaying an initial budget vote until past June 30, as statute contemplates initial budget votes occurring prior to June 15 (*See* 16 V.S.A. 422(a)).

If a town or a union district does not have a budget in place by June 30, it can expect the following (from the Agency of Education):

1. The district would be entitled to the following funds, on the dates indicated:
    - 25% of the base education amount per equalized pupil – September 10 (16 V.S.A. § 4028)
    - Any federal funds owed to the district – varies
    - State categorical grants (Small Schools Grant, etc.) – September 10

- Any fund balances and reserve accounts – immediately

2. The district is entitled to have up to 87% of the prior year's budget on hand. After subtracting out the amounts in #1 above, the school board has authority to borrow the remaining amount per 16 V.S.A. § 566 without first obtaining the approval of the voters.
3. The towns within a union district would be assigned an interim homestead tax rate of $1.00 by the Vermont Department of Taxes. The interim tax rate is divided by the CLA and levied by the town. Funds are remitted to the VT Education Fund. Towns may not disburse these funds to the district until the district has a voter-approved budget. (32 V.S.A. § 5402)

Q: We are trying to think through whether we should postpone our annual meeting. If we were to postpone, would the terms of the three board members who are up for election end or do they last until the vote has taken place?

A: They would last until the vote has taken place. For both town and union school districts, the statutory requirement is for school board directors to serve "until a successor is elected and qualified." (*See* 16 V.S.A. 423(a) and 16 V.S.A. 706k(a)).

Q: If we reschedule our annual meeting, how do we handle absentee ballots? Do we count any votes we may have received and/or do we need to start the timeline again for absentee ballots?

A: The Secretary of State's Office has advised clerks that if an election is cancelled then everything starts over, including the absentee ballot process. Clerks have been advised to retain any voted absentee ballots returned to them for the cancelled meeting for the 90 day retention period following the (cancelled) election date. Otherwise, the process starts over.

Q: How do school boards abbreviate their agendas to just those items that need to be addressed by the board in a timely manner?

A: Boards are not required by law to have specific items on their agendas, only items that require action by the board. Abbreviated agendas are perfectly reasonable, and should include action items that require immediate board action, as well as an item where the administration informs the board and the public about specific steps being taken in response to the State of Emergency. The agenda must also provide the opportunity for public comment, since the requirement to do so under 1 V.S.A. 312(h) are still in effect.

If a board has already warned an agenda that includes items that can be delayed until a later date, then the board may take action to modify the agenda to delete extraneous items as the first order of business at the meeting, pursuant to 1 V.S.A. 312(d)(3).

Q: What are the legal requirements for boards whose budgets did not pass on Town Meeting Day? Can deadlines be extended due to the circumstances? Please provide guidance/steps for boards to take.

A: It depends on whether a district uses Australian Ballot to vote on its budget, and whether they have already warned a re-vote on the budget. We will start with the Australian Ballot issue. **If Australian Ballot:** Pursuant to 17 V.S.A. 2680(c), the public body shall put together a revised budget and warn an informational meeting and vote. The informational meeting must be held at least five days from the date it publicly warned and the vote must be held at least seven days from the date of the warning. There is no deadline to hold it within a certain time frame; however, a vote should be warned in time for the electorate to approve a budget by June 30. Districts that do not have a budget in place by June 30 may borrow up to 87% of the prior year's budget pursuant to 16 V.S.A. 566.

If the district **does not use Australian Ballot**, then, pursuant to 16 V.S.A. 428, the school board shall warn a special meeting of the electorate that follows the requirement of not less than 30 days nor more than 40 days' notice between the warning and the vote.

If a district **has not already warned its budget revote**, we advise you to hold off on doing so until more is known about the scope, scale and duration of the state and federal State of Emergency. The goal should be to have a budget in place by June 30. Districts that do not have a budget in place by June 30 may borrow up to 87% of the prior year's budget pursuant to 16 V.S.A. 566.

If a district **has already warned its budget revote**, then the board should rescind the warning with a public notice that includes the reason for the delay (17 V.S.A. 2643(c)). We advise you to hold off on warning another budget vote until more is known about the scope, scale and duration of the state and federal State of Emergency. The goal should be to have a budget in place by June 30. Districts that do not have a budget in place by June 30 may borrow up to 87% of the prior year's budget pursuant to 16 V.S.A. 566.

Q: What are the implications of the State of Emergency and Governor's Order? How does that change authority/decision-making?

A: Under 20 V.S.A. §§ 9 & 11, the Governor has extensive powers over the State of Vermont and the instrumentalities of the State when a State of Emergency has been called due to an "all-hazards event…that causes or may cause substantial damage or injury to persons or property within the bounds of the State in any manner." When a State of Emergency has been called, the Governor has the following powers that are relevant to the current COVID-19 directives from the Governor to local school officials:

- To utilize the services and facilities of existing officers, and agencies of the State and of the cities and towns thereof; and all such officers and agencies shall cooperate with and extend their services and facilities to the Governor as he or she may request.
- To use and employ within the State, from time to time, and as he or she may deem expedient, any of the property, services, and resources of the State, for the purposes of responding to the emergency.
- To enter into a contract on behalf of the state for the lease or loan, on such terms and conditions and for such period as he or she may deem necessary to promote the public welfare and protect the interests of the state, of any real or personal property of the state government, or the temporary transfer or employment of personnel thereof to any town or city of the state.
- To perform and exercise such other functions, powers and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.

As long as the State of Emergency is in effect, then, the Governor arguably has sweeping powers with respect to the use of school facilities, services and personnel. There are limitations to that power, but those limits will likely have to be set by either the General Assembly or the courts. No case law in Vermont addresses the limits of the Governor's emergency powers vis a vis local decision-making and use of personnel.

Hence, while the State of Emergency is in effect, local decisions that deviate from the Governor's directives should be made in close consultation with the Agency of Education and/or the Agency of Human Services. School boards should seek the advice of legal counsel if they decide to pursue a course of action that is inconsistent with the Governor's directives. These statutes and powers are designed to ensure the health and safety of Vermonters, so any concerns you have at the local level about the effects of the directives on the health and safety of your students and employees should be conveyed immediately to the Agency of Education so that they can evaluate the circumstances of your school district and work with you to determine an appropriate course of action.

Q: What resources are out there to help us better understand the requirements of the Open Meeting Law in the current environment?

A: The Open Meeting Law is still in full force and effect for all municipalities and public bodies in the State of Vermont during the State of Emergency. The Vermont League of Cities and Towns has a useful resource that provides some information about virtual and emergency meetings beyond what is addressed below.

Q: Can school boards hold meetings virtually? If so, what are the requirements of the Open Meeting Law?

A: Yes. The open meeting law (1 V.S.A. 312(a)(2)) allows a public body to hold its meetings electronically, so long as several conditions are met:

- The agenda for the meeting must specify a physical location where members of the public may go to listen to the meeting and participate
    - NOTE: You cannot prevent members of the public from coming to the physical location or require them to participate remotely, but you can encourage remote participation by members of the community and provide information about how they can access the meeting remotely on the agenda.
- One member of the public body or its designee must be physically present at the meeting
- All votes must be taken by roll call
- All members of the public body participating remotely must be able to hear all proceedings and identify themselves when speaking

---

Q: Can we reschedule our annual meeting if it is scheduled to take place this spring?

A: Yes. The Secretary of State's office has confirmed that a public body may rescind its warning for an annual school district meeting under 17 V.S.A. 2640(a), which states, "When a municipality fails to hold an annual meeting, a warning for a subsequent meeting shall be issued immediately, and at that meeting all the officers required by law may be elected and its business transacted."

If a board decides to reschedule its annual meeting it should rescind the meeting warning and immediately warn it for another date within the 30-40 days required by 17 V.S.A. 2642. In the event COVID-19 remains a health and safety threat to communities on the date of the new meeting, the school board can follow the same process to push out the meeting date again. Every effort should be made to hold the annual meeting prior to June 15, as required by 16 V.S.A. 422(a).

Special Education

NEW Question and Answers on Addressing the Needs of Students with Disabilities During School Closure due to a Novel Coronavirus Outbreak from the Agency of Education

---

NEW TEMPLATE letter to families regarding special education and related services during school closure from the Agency of Education.

Legal Update 10: Thursday, April 2, 2020 at 2:30 pm

NEW GUIDANCE from the Agency of Education on FAPE During School Closure

---

Q: What are the current obligations of school districts for providing FAPE and Special Education for the time period of March 18 to April 6, 2020?

A: At the outset it must be stated that legal concepts governing the obligations imposed upon LEAs/school districts remain fundamentally unchanged. As set forth by the U.S. Department of Education's Office of Special Education Programming, each school district/LEA remains responsible for ensuring "to the greatest extent possible" that "each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA, or a plan developed under Section 504." OSEP March 2020 Q & A (https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/#Q-A-1)

Accordingly, where a school is shut down and provides no educational services to any of its students, there will be no obligation to provide special education services, or a FAPE. Conversely, if a school district provides educational opportunities of any type to general education students, then it must "ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE." OSEP March 2020 Q & A, Answer A-1.

So, for example, to the extent a school district provides educational packets, electronic lessons, telephone check ins from teachers, or some hybrid model for general education students; by extension students with disabilities then are entitled to a district plan of how to provide special education and related services in an alternative method.

It is expected that each school district will arrive at different methods, individualized for each student, to accomplish alternative delivery of FAPE (i.e., internet based, hard copy packets, a hybrid, etc.) and that a one-size =-fits-all response cannot be accomplished, nor is desired. We encourage you to continue to collaborate with your colleagues on brainstorming different methods which work for the students in your programs.

Q: Do we need to document the provision of services and alternative programming during this time period?

A: Absolutely. Best practices for enforcement and accountability continue through this period. Schools should put in place a system/process that will be used during this time period for documenting the provision of services. This is important for three reasons: (1) for school districts to be able to appropriately assess any future need for compensatory services; (2) for school districts to demonstrate the provision of services and programming to individual students during this period; and (3) for school districts to justify funding, if needed. It is our expectation

that there may be some cross over between typically "general ed" teachers and special education teachers who will be providing programming or services to students with disabilities. To that end, all teachers/related service providers should be documenting the programming that they are providing to students.

Additionally, there may be a point later down the line where the IEP team will need to discuss the need for compensatory education for individual students. Documentation of what was provided following March 18, 2020 until school buildings re-open for regular school days will help inform that discussion.

Q: What do I do about evaluations?

A: While CASE is advocating strongly for OSEP to address the timeline issues, the special education regulations and the rules and timelines under IDEA have not changed. You should discuss with your special education attorney any questions you may have regarding how to manage this area. If OSEP provides updated guidance, we will pass it along to the field.

Q: Past April 6, 2020 – What should we do?

A: In the event that school buildings remain closed past April 6, 2020, there will be a shift in the required intensity of alternative programming, and we will need to more directly address the potential need for modifying IEPs and 504 Plans, how to respond to timeline concerns, how to process due process and Administrative Complaints, etc. As we move forward in this uncertain time, we will continue to provide guidance on the legal implications for schools on these matters.

Q: What about staffing for programs?

A: There is an added layer of complexity confronting the creation and provision of services during this period – the availability of staffing and the requirement that services <u>not</u> involve in-person contact with students. As a practical matter, schools must recognize that where services could have been offered, but simply were not provided due to unavailability of staff, compensatory services may be required at a future date. Documentation of those shortfalls and absences therefore must be maintained so that data-informed decisions can occur at the appropriate time.

NEW GUIDANCE FROM OCR on Web-Based Accessibility for Students with Disabilities

Legal Update 10: Thursday, April 2, 2020 at 2:30 pm

The Office for Civil Rights (OCR) at the U.S. Department of Education released today a webinar on ensuring web accessibility for students with disabilities for schools utilizing online learning during the Coronavirus (COVID-19) outbreak. In addition, OCR published a fact sheet for education leaders on how to protect students' civil rights as school leaders take steps to keep students safe and secure. These resources will assist education leaders in making distance learning accessible to students with disabilities and in preventing discrimination during COVID-19 response effort.

We strongly encourage your special education leadership teams to review the seven-minute webinar in the link above or here:

https://www.youtube.com/watch?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=&v=DCMLk4cES6A.

We have received a number of questions about the provision of special education services during school closure. At this time, we are waiting for the Agency of Education to issue guidance and/or responses to questions raised by the Vermont Council of Special Education Administrators before we respond to special education questions. For now, please ensure your teams have reviewed:

- VCSEA Questions and Recommendations for Students with Disabilities
- U.S. Department of Education's Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak

Student Issues (New Content: 3/27/2020)

Q: Is there some legal restriction on recording a zoom meeting with either: (1) One single student; or (2) a group of students?

A: There is no legal restriction on recording a zoom meeting, although we would advise that parents be informed that zoom meetings will be recorded and be provided with an opportunity to "opt out" of having their children recorded, particularly if the recording will involve multiple students. Under FERPA, if more than one student is recorded in a video, the parents of each student may be able to view the entire video if it cannot reasonably be redacted or segregated in a manner that preserves the meaning of the record.

According to the U.S. DOE' s FAQ's on Photos and Videos Under FERPA, as with any other "education record," a video recording of a student is an education record when the video is: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. The same recorded video could constitute an education record of more than one student, if more than one student appears in the video.

When a video is an education record of multiple students, in general, FERPA requires the educational agency or institution to allow, upon request, an individual parent of a student (or the student if the student is an eligible student) to whom the video directly relates to inspect and review, or "be informed of" the content of the video. FERPA generally does not require the educational agency or institution to release copies of the video to the parent or eligible student.

In providing access to the video, the school district must provide the parent of the student (or the student if the student is an eligible student) with the opportunity to inspect and review or "be informed of" the content of the video.

If the educational agency or institution can reasonably redact or segregate out the portions of the video directly related to other students, without destroying the meaning of the record, then the educational agency or institution would be required to do so prior to providing the parent or eligible student with access.

On the other hand, if redaction or segregation of the video cannot reasonably be accomplished, or if doing so would destroy the meaning of the record, then the parents of each student to whom the video directly relates (or the students themselves if they are eligible students) would have a right under FERPA to inspect and review or "be informed of" the entire record even though it also directly relates to other students.

Q: Are there copyright issues if teachers read books on Facebook, YouTube, etc.?

A: Yes. The Copyright Act (17 U.S.C. 106) grants copyright owners a bundle of rights, which includes the exclusive right to reproduce their work, publicly perform it, and create works based on it. Reading a book online would be a clear case of copyright infringement, unless the book was published in the United States before 1923 (which would place it in the public domain).

The TEACH Act of 2002 made some changes to the Copyright Act in order to reflect the expanded use of technology to deliver education remotely. The TEACH Act facilitates and enables the performance and display of copyrighted materials for distance education by accredited, non-profit educational institutions that meet the TEACH Act's qualifying requirements. Under the TEACH Act instructors may use a wider range of works in distance learning environments; students may participate in distance learning sessions from virtually any location; and participants enjoy greater latitude when it comes to storing, copying and digitizing materials. However, in order to qualify for this flexibility, the following criteria must be satisfied: the institution must be an accredited, non-profit educational institution; the use must be part of mediated instructional activities; the use must be limited to a specific number of students enrolled in a specific class; and the use must either be for 'live' or asynchronous class sessions.

Posting videos of books being read aloud onto open social media platforms such as YouTube and Facebook would likely not be permitted under the TEACH ACT or the Copyright Act.

However, many children's publishers have temporarily altered their copyright policies in response to the nationwide shift to distance learning. Simon & Schuster, HarperCollins Children's Books, Macmillan, Little, Brown Young Readers, Penguin Random House, Scholastic, Candlewick, Lee and Low, HMH, Abrams, and Lerner have all put out guidelines for use during the coronavirus pandemic that has shut down schools across the country. The School Library Journal is maintaining a list of the publishers that have modified their policies, along with the specific requirements established by the publisher. Please be sure to review these carefully and comply with the conditions each publisher has established when considering which books to read aloud and which platforms you may use to do so.

Q: What FERPA considerations should we pay attention to as we consider leveraging technology to provide synchronous learning experiences for students? Some people are planning only asynchronous learning for privacy reasons. It would be especially helpful to get some guidance on this before teachers start planning their lessons for continuing learning or using Zoom now to check in with students.

A: The Student Privacy Policy Office at the US DOE released a useful resource this week on the topic of FERPA and virtual learning. In terms of synchronous virtual learning experiences, the guidance states: "Under FERPA, the determination of who can observe a virtual classroom, similar to an in-person classroom, is a local school decision - as teachers generally do not disclose personally identifiable information from a student's education record during classroom instruction. FERPA neither requires nor prohibits individuals from observing a classroom." If, however, asynchronous videos are used to send messages back and forth between teachers and students, then educational records would be created, and FERPA would apply. This FAQ on Photos and Videos Under FERPA has useful guidance regarding FERPA requirements and digital educational records such as videos. See also our FERPA and liability answers in 4(c) of this document.

Q: Should we be tracking student progress on work that is being completed by students during the initial closure period? What legal issues should we be aware of if we do/ do not?

A: There have been conflicting messages at the State level regarding what sort of academic services schools should be providing during the initial closure period. When issuing his directive for the closure of schools, the Governor tasked schools with both (1) ensuring "maintenance of education" during the initial closure period; and (2) creating a continuing education plan if schools are dismissed for an extended period. Yet the Agency of Education has stated that during the initial period of closure, the expectation is that schools are not

providing any academic or extracurricular services to general education or special education students.

In light of these conflicting messages, it is no surprise that schools that are providing academic work for students during the initial closure period don't know whether they should be tracking student progress on that work. Under these circumstances, best practice would be to track student progress on the work being completed during the initial closure period for purposes of future educational planning, but not to grade this work or to consider it in demonstrating individual student proficiency.

It's likely that students and families have similar questions about how work will be assessed and graded during the period of school closure. To the extent that some students understood work during this period to be "optional," schools will only run into trouble by using this work for grading purposes. There should be clarity put forth to all students moving forward – even if school are dismissed for an extended period, and continuing education plans are implemented - that work completed by distance learning will be tracked, assessed, and considered in student grades.

For now, tracking student progress can be used by teachers to develop their educational plans, should school closure extend beyond the initial period. Teachers will be able to synthesize what types of activities work well for engaging students at home, and can alter their plans for future programming (pursuant to the Governor's directive for a continuing education plan if schools are dismissed for an extended period) based on a greater understanding of what level of information students are capable of taking in and understanding through the remote learning model. Tracking student progress on work being completed by students with disabilities during the initial closure period is important as LEAs begin to consider what individual distance learning plans will look like for students on IEPs. Tracking student progress during this initial closure will give schools a better understanding of the student's ability to access distance learning and what types of supports they will need. Additionally, this information may be helpful as LEAs begin to gather data to establish a "baseline" for students with disabilities, which they will need to refer to in future discussions about the need for compensatory services when assessing any educational benefit that was missed during the period of school closure. (See AOE guidance on compensatory service considerations in light of COVID-19.)

Q: What liability do we have if we exceed the guidelines set by the state for childcare (no more than 10 children to a group) due to insufficient staff?

A: It is unlikely that school districts would have any liability for activities related to providing child care during this emergency. The provision of child care to essential persons by schools was initiated under Governor Scott's directive pursuant to his emergency powers. By statute, school districts engaged in emergency service or response activities likely have full immunity, except in the case of willful misconduct or gross negligence. In other words, by attempting in

good faith to comply with State requirements related to response activities, you would not be liable for exceeding state guidelines or the consequences of exceeding those guidelines.

Q: Are there concerns with FERPA when using Google Hangouts and Zoom?

A: Districts should ensure their user agreements with technology vendors include provisions that address student data privacy and FERPA compliance. If you have questions about the agreements your district has in place with a vendor, you should contact your IT Director or the Agency of Education's Director of Technology. You can also access information through the Student Data Privacy Consortium here.

School employees who will be using virtual platforms such as Zoom or Google Hangout to meet to discuss student issues should take care to ensure they are controlling access to the meeting to only those with "legitimate educational interests" with respect to the students involved. Employees who will be communicating with students virtually in their homes should take care not to disclose any information or records they obtain from students using that platform, just as they would not disclose information or records they obtain from students in the classroom.

Q: When using Google Hangouts what is the liability for the educator if these "conversations" are not being recorded?

A: It is possible that there could be liability exposures when adults interact with students via video conferencing. For example, there could be a claim that the adult violated the district's HHB policy with improper remarks. However, the exposures are limited by the nature of the medium to claims of verbal misconduct. There are routinely greater exposures inherent in the work of teachers and administrators when having personal contact with students. Teachers should mitigate the risk by being careful to use appropriate language and to terminate contact if there are any meaningful concerns about the tone of the conversation with a student. If the teacher is concerned, she should generate a writing to memorialize the video conference.

Q: What is the general legal advice for how teachers should be contacting students from their personal phones, etc.? We have many students without internet access.

A: Calls to students should be scheduled for a time period when the teacher will be on site at the school if at all possible. However, if a teacher will be using their personal phone to contact students they should utilize the "block a number" function if using their cell phone. For AT&T, Sprint, T-Mobile and Verizon the blocked number function is enabled for each outgoing call by 1. Dial *67, 2. Dial the number you want to call, 3. Hit the send or call button. Sprint also permits callers to block caller id information ongoing and can be activated by contacting Customer Service Chat.

Q: What confidentiality issues should school districts be aware of as they consider meal delivery to student homes and/or the development of distance learning plans?

A: School districts should maintain the procedures they currently have in place to protect the disclosure of student information. Generally, the question will be whether disclosure to employees or outside agencies involves disclosure to individuals with a legitimate educational interest, who are subject to the requirements listed below.

FERPA requires school districts to obtain parental permission (if a student is under 18) prior to the disclosure of personally identifiable information (PII), unless an exception applies. A school district may disclose personally identifiable information from an education record of a student without consent if the disclosure meets one or more of the following conditions:

- The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
- A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party:
    - Performs an institutional service or function for which the agency or institution would otherwise use employees;
    - Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
    - Is subject to the requirements of §99.33(a) governing the use and redisclosure of personally identifiable information from education records.
- A school district must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests.

Another exception is that a school district may disclose directory information, which is "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address…" (34 CFR 99.3).

School districts are required, on an annual basis, to list the types of directory information the district will disclose and provide an opportunity for parents/guardians to opt out of disclosure. School districts may not disclose directory information for students whose parents have opted out of disclosure (34 CFR 99.37). School districts may not disclose directory information, such as addresses, if they did not list that as a specific piece of information that would be disclosed by the district in its annual FERPA notice.

Another exception is disclosure in the event of a health or safety emergency. However, "when making a disclosure under the health or safety emergency provision in FERPA, educational agencies and institutions are specifically required to record the articulable and significant threat to the health or safety of a student or other individual that formed the basis for the disclosure and the parties to whom the agency or institution disclosed the information" 34 C.F.R. § 99.32(a)(5). More guidance to school districts regarding disclosures pursuant to the health or safety emergency, and specifically COVID-19, can be found here.

Q: How do the 2015 AOE Mandatory HHB Policies and Procedures apply during the school closures/remote learning programs required in response to COVID-19? Do obligations imposed by the HHB policies and procedures on schools continue through this period?

A: The short answer is yes. The definitions of bullying and harassment were amended in 2012 to expand the reach beyond the school day and school locations, in certain circumstances that will keep them in force during this period. Student activity (with respect to hazing, harassment and bullying) and teacher/adult activity (harassment), engaged in out of school, either during school hours or after hours, during either school closure or a future period of remote instruction/learning can still implicate and trigger school obligations as outlined immediately below. The timelines for investigations, however, will be affected based on whether or not remote learning – and thus a "school day" is occurring (see later discussion).

For **"bullying"** the definition contemplates student behaviors that occur outside of the school day and/or school environment. What is additionally required in those instances is that behaviors otherwise violative of the definition also be shown to "clearly and substantially" interfere with the victim's "right to access educational programs." It is a higher threshold, but it is nevertheless still possible.

For **"harassment"** the definition can apply to behaviors of either students or staff/teachers that occur either during a period of school closure OR after school converts to remote access learning to the extent that such behaviors either:

(1) have the intent (the harasser is trying to accomplish) of objectively and substantially undermining and detracting from or interfering with a student's educational performance OR access to school resources OR creating an objectively intimidating hostile or offensive environment OR

(2) have the effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance OR access to school resources OR creating an objectively intimidating hostile or offensive environment.

During this period of time creation of an intimidating hostile or offensive environment while possible will likely be more difficult to achieve than impacts on educational performance or access to school resources. All, however, are theoretically possible.

For "**sexual harassment"** the definition again can apply to behaviors of either students or staff/teachers either during a period of school closure OR after school converts to remote access learning to the extent that such behaviors either:

> Are explicitly or implicitly a term or condition of a student's education, academic status or progress; OR
>
> Submission to or rejection of such conduct by a student is used as a component or basis for decisions affecting that student.

During a period of remote access (where accessibility for coordination and answering questions, etc, is important) the opportunities for adults/staff/teachers to engage in "quid pro quo" harassment, while altered and perhaps factually unique, remain.

For the remainder of the definition, sexual harassment between students (or non employee third parties) requires (absent quid pro quo harassment) proof of a hostile environment such that the "harassing conduct is severe, persistent and pervasive so as to deny or limit the student's ability to participate in or benefit from the educational program on the basis of sex." Again, when school is closed or has converted to distance learning the creation of the necessary "hostile environment" may prove to be a higher threshold to meet, but it nevertheless may still be possible under the right factual circumstances.

For "**hazing"** the student activity must be shown to be committed "in connection with, pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization which is affiliated with the educational institution." There is no time or location limitation on such behavior so long as it can also be shown to be "intended to have the effect of, or should reasonably be expected to have the effect of, endangering the mental or physical health of the student." As a practical matter during school closure or remote learning extra curricular activities will be suspended thus reducing the opportunities for students to engage in behaviors that can be considered as "connected" to their membership in a club or sport. But the opportunities will not be eliminated. It's still possible a student could invoke their membership in such an organization while engaging in the behavior and potentially trigger application of the hazing prohibition to their conduct.

Q: What impact, if any, will there be on the timelines imposed under the HHB Procedures?

A: The Model Procedures require that investigations be initiated within one **school day** of the triggering level of knowledge, (III.A.) and be completed (III.F) and reported out to affected families (III.H.) within five **school days** each respectively.

So, while the schools are closed, but not yet operating through remote learning, any information that comes to the attention of an Administrator which might trigger the obligation to investigate (Section III.A) should be handled as though it were learned over the summer. **That is, the requirement to investigate won't be triggered until school is back in session OR schools convert to remote learning**. That is because "one school day" will not have passed. Schools MAY investigate but the legal requirement requiring it will not be triggered.

Once any investigation is begun, again the timelines speak in terms of "school days." **So, again, if an investigation is begun and that happens before remote learning is in session then there are not formal deadlines because no "school days" will pass.** I would use the five days as a benchmark, and I would inform families in writing of your intentions and keep them updated but there is no legal deadline.

Once remote learning is underway I would consider school days to be the days that remote learning is in sessions and the "school day" timelines would apply.

Where parents of accused students seek board appeals the procedures speak in terms of "days" which is read to mean calendar days. A HHB board appeal hearing should be conducted by zoom or some other form of technology. For information on how to hold a board meeting electronically, please see VLCT's FAQ on how to hold an electronic board meeting at https://www.vlct.org/resource/open-meeting-law-and-covid-19-response-faqs

Q: If HHB policy obligations continue, and if once remote learning begins we must investigate, how can we safely investigate?

A: Investigations during this period (school closure OR remote learning) will need to be conducted without in-person interviews. Phone interviews or interview by Skype, etc. will need to occur. If arranging for phone interviews, etc. cause delays, school investigators should employ the use of "delay letters" and cite to those challenges when explaining the need for more time to meet deadlines.

Any phone/skype interviews need to be conducted with the same care and consideration for FERPA protections and confidentiality as in-person interviews. Parents should not be allowed to listen-in as school investigators will necessarily be discussing other students in the course of their interview. Investigators will also need to be sure to access relevant school records in a safe manner (discipline, attendance, progress reports).

Operations

Q: Many districts are planning to use school buses to deliver meals to students during the closure. NH has just declared that illegal since no students are on the buses, the buses should not be delivering meals and stopping traffic along regular student routes. Does VT law prohibit school buses from operating when no students are on board?

A: Vermont law does not limit the use of school buses to the transportation of students. As such, school districts may legally use school buses to deliver meals and/or instructional materials to students. As of today, March 18, 2020, the Commissioner of Motor Vehicles has authorized the usage of the "Eight Way Light System" when school buses are making deliveries to school age children. Although the Commissioner's letter focuses upon meals for students, it is reasonably applicable to the delivery of instructional or related materials. Absent this special authorization from the Commissioner, Vermont law does limit the use of the alternately flashing

red lights school bus lights to times when school children are being received onto or discharged from the bus. 24 V.S.A. §1283 (a)(4). It is recommended that a copy of the Commissioner's letter be kept on board each school bus used for such deliveries. If further information is required, please contact Pat McManamon at (802) 828-2078 at DMV.