

Robbins Schwartz

FAQ: Interpreting the ISBE/IDPH Joint Guidance on the Return to School

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

Instruction

1. Is a plan with primarily remote instruction still an option for the fall?

Answer: Yes, primarily remote instruction is an option when classes begin in the fall.

While the ISBE and IDPH guidance places a strong emphasis on returning to in-person instruction, we recommend each school district conduct a thorough evaluation of their unique circumstances to determine what method of instruction to use. School districts should balance the academic and social emotional impact of continued remote learning against the safety considerations which underlie a return to in-person instruction. School districts will also need to assess data from implementation of remote learning in the spring and summer and the learning outcomes to aid in determining how to appropriately provide instruction in the fall. Remote instruction may be particularly useful in settings where social distancing will be challenging, and may be most feasible in certain settings; namely, high school settings.

In light of the emphasis on returning to in-person instruction, it is advisable for school districts to develop a thorough, thoughtful justification for why remote learning is required under the circumstances. Additionally, if using remote learning, school districts should pay particular attention to how to address the academic and social emotional impact of remote instruction on students. School districts using remote learning should also consider student populations for whom remote learning is not well suited - 504 students, special education students, English learner students, and students under 13 - and what, if any, alternatives may be available to support those students.

2. What are the consequences if a school district determines it cannot engage in in-person instruction?

Answer: ISBE's guidance does not indicate what, if any, consequences may result for school districts electing to engage in remote or hybrid instruction.

Nevertheless, school districts should engage in a thorough evaluation of their unique circumstances to determine which form of instruction is most appropriate. School districts should have a detailed, thoughtful justification based primarily on student and staff health and safety if they determine they cannot return to in-person instruction.

3. If a parent does not want to send their child to school, what obligations do districts have for instruction?

Answer: School districts may consider requests for continued remote instruction on a case-by-case basis pursuant to local procedures developed to implement Remote Learning, Blended Remote Learning, and E-Learning plans.

School districts should anticipate requests for continued remote learning from three categories of students: (1) those with health conditions (medically fragile and/or high risk); (2) those who live with individuals who have health conditions (medically fragile and/or high risk); and (3) those whose parents fear the student returning to school. School

districts will have greater obligations to support students in the first two categories. Specifically, school districts will need to provide reasonable accommodations for such students, which may include continued remote instruction.

Students in the third group, those whose parents fear the student returning to school, do not necessarily implicate any legal obligations on the part of school districts. If offering a remote learning program for students in the other groups, school districts may consider permitting students in the third category to participate. However, such is a local decision. For students permitted to participate in remote learning options, we recommend requiring parents of those students to commit to their child's participation in remote instruction for a set period of time (e.g., semester, trimester) to maintain consistency in education.

Generally, school districts should be cognizant that a requirement of five (5) clock hours per day is in place when using remote instruction. Furthermore, as these situations differ from regular homebound circumstances, we do not recommend that school districts require parents to fill out homebound education request forms. Our firm is developing a separate form for use in situations, such as those described above, where parents may request remote instruction in light of COVID-19.

4. Is the guidance regarding provision of remote learning different when it comes to special education students?

Answer: Yes, current ISBE guidance encourages school districts to engage special education students in in-person instruction on a daily basis.

In light of this, school districts may need to analyze the needs of individual special education students. This may include having IEP teams meet with a parent if he/she refuses to allow the student to return to school. These meetings can be used to determine the most appropriate method of instruction for the individual student. Our firm is providing a webinar on Friday, June 10, 2020, related to special education and return to school planning for the 2020-21 school year.

5. How should school districts utilize assessments and data to guide fall planning?

Answer: School districts should analyze the impact of remote learning on students and support them in returning to school through reintegration planning. School districts should look at grade level gaps as well as individual performance and functional gaps for students. This should include grade level integration to address missed learning standards for the entire grade and also individualized interventions based on individual student learning gaps or needs.

Assessments and progress data should guide how school districts support students upon return to school in the fall. School districts should use a range of reintegration assessments, including academic assessments, to guide fall planning related to any gaps in academics. School districts should also consider use of social emotional assessments, whether formal or informal, to analyze what impact the COVID-19 pandemic, and resultant school closures, may have had on students' social emotional functioning.

The ISBE guidance also suggests school districts seek parent and student input as part of the reintegration assessment process. To that end, the guidance contains a sample parent and student survey which can be used to obtain appropriate information.

6. How should school districts document plans to address the grade level and individual learning gaps and social emotional needs as students return to school in the fall?

Answer: Individual COVID impact instructional plans intended to target larger gaps can be used to address and document both academic and social emotional needs resulting from remote learning. These individual COVID impact instructional plans should be maintained separately from IEP and 504 plans and treated more in line with MTSS plans. We also recommend use of general grade level reintegration plans targeted at entire grade levels to address standards which were missed during the spring. School districts should use assessment data discussed in question 5, as well as information from parent intake forms, to determine individual and grade level gaps. Considerations for school districts in assessing grade level and individual learning gaps are contained in ISBE's guidance.

Our firm is drafting model Individual COVID impact instructional plans.

7. Should districts include union leadership in developing the return to school plan?

Answer: We recommend that union leadership be included in discussions regarding the development of return to school plans given their role as professional educators and key stakeholders in school districts. In particular, school districts might consider including union officers, teachers, and/or support staff to develop a well-rounded plan.

It is important to note that this stage of the process is intended for developing a plan, not bargaining the implementation of the plan. For that reason, it is important to frame the process as a collaborative, development-centered exercise, and to note that the school district will separately engage in bargaining related to implementation of the plan, if requested. Given that this portion of the process is not intended as bargaining, UNISERV or field representatives should not be involved. Rather, it is important to engage with union leadership and other staff that have immediate knowledge of the school district's day-to-day operations.

8. Once a return to school plan is developed, is there a duty to bargain implementation of the plan?

Answer: Yes, school districts are obligated to bargain regarding plan implementation and the impact of any changes on wages, hours, and terms or conditions of employment. Hopefully, the bargaining process will be streamlined if union leadership is part of the plan development phase of the process.

As a note, recently passed legislation regarding the implementation of remote and blended learning plans neither creates nor removes any existing bargaining obligations.

9. How should a district respond if the union asserts that the COVID-19 pandemic makes it inherently unsafe for any type of in-person instruction in the fall?

Answer: School districts can engage in a dialogue with the applicable union(s) to explain the measures taken to implement and abide by applicable health and safety guidance published on the federal, state, and local levels. During this dialogue, school districts can rely on the ISBE and IDPH guidance, specifically the fact that it “strongly encourage[s]” in-person instruction, to support their decision to return to in-person instruction. Through this guidance, ISBE and IDPH have acknowledged that returning to in-person instruction can be done safely.

We strongly discourage school districts from entertaining union proposals that would prevent the district from taking appropriate action, including, but not limited to discipline, if employees, without medical justification, refuse to return to work due to COVID-19.

10. Is it an option for districts to livestream classroom lessons or record live instruction to allow for synchronous learning?

Answer: Yes. Per ISBE guidance, it is an option for districts to livestream classroom lessons or record live instruction to allow for synchronous learning.

From a student privacy and confidentiality perspective, there is no concern with the livestream or recording violating student record provisions because the recorded instruction and class participation is something that students would be able to access if they were in-person. Case law and guidance on this issue indicates that student comments during class do not create a student record.

From a labor and employment perspective, historically, unions have been opposed to any audio or video recording of staff in the classroom. However, given the unique circumstances of the COVID-19 pandemic, the fact that this form of instruction is intended to be temporary, and that it is only intended as an alternative option for providing instruction, school districts may be able to alleviate some of the unions’ concerns. An additional step that may make this form of learning more appealing is permitting teachers to have input regarding whether their lessons are recorded as opposed to being live streamed, as well as the details related to how each option is used. School districts should be cognizant of bargaining implications related to the use of recordings or synchronous streaming. Agreement is more likely to be reached if there is an understanding that recordings or live streamed classes will not be used to surveil employees or as part of the evaluation process. If considering this option, school districts should confer with their union in an effort to obtain agreement as soon as possible.

Other Instruction Questions

11. ISBE is now saying that previously developed emergency E-Learning plans during spring are no longer valid? Do districts need to obtain board approval?

Answer: It is a best practice to have the Board ratify a school district’s remote learning or blended remote learning plan. When school districts developed these plans last spring,

they were completed quickly with the purpose of supporting remote learning for the remainder of the 2019-2020 school year. The statutory provisions currently in place allow for development and approval of formal E-Learning plans (which existed prior to COVID-19), as well as remote and blended remote learning plans to meet learning needs. While the remote and blended remote plan may be approved by the Superintendent and posted to the website, we recommend that at some point the Board ratify the plan. School districts should have a process for assessing the plans utilized during the spring so that they may be enhanced for the fall, particularly if a school district is going to maintain remote learning or a blended approach to minimize liability for continuing remote learning and ensure that the plan is equity-driven for all learners.

Our firm has drafted a model board resolution affirming a school district's transition to school plan for the 2020-2021 school year and addressing liability and existing policy considerations.

Screening

- 12. How can a district satisfy the requirement for temperature and symptom screening, or self-certification and verification for all students, staff and visitors entering school buildings and utilizing school district transportation?**

Answer: There are several options for school districts to meet this requirement.

ISBE and IDPH are recommending daily screening related to CDC-identified symptoms, including a temperature check/screen. The temperature and symptom screening can be completed at home before entering a school building with a self-certification and verification for all staff, students and visitors entering school buildings or utilizing school district transportation. Districts that are not utilizing a self-certification and verification process should conduct temperature and symptom checks at the school building.

ISBE previously indicated that an annual form would be permissible to fulfill the student self-certification and verification requirements. However, ISBE subsequently walked that guidance back and indicated in its most recent FAQ that a self-certification may not be completed at the beginning of the year for the entire year. Nonetheless, a self certification form on an annual basis *could* be valid depending on how it is structured and what it contains. For example, an annual self certification and verification form may be valid if it confirms the symptom screening process is to be completed by parents/guardians each day prior to sending their child to school and also expressly requires parents/guardians to keep their child home and immediately report to the district if their child is experiencing any symptoms of COVID-19. School districts should also prominently display a poster at all entries listing the symptoms of COVID-19 and providing notice that by entering the building an individual is self-certifying that he/she has no symptoms.

The same requirements for self-certification and verification also apply where students are taking the bus. School districts should consider reviewing their vendor contracts and confirming with monitors and drivers that they are complying with the ISBE guidance.

School districts should consider the nature of the guidance and the equity impact. When considering the technology divide, it may be onerous and impractical to expect all families to complete an electronic form daily. Furthermore, there are numerous issues which may arise with a daily form itself (e.g., recordkeeping/maintenance, failure for parents to complete on a daily basis). For these reasons, the annual certification and verification form described above may be more appropriate. Finally, depending on the age of a student and maturity level, they may be able to self-certify, even under the age of 18.

Our firm has drafted a model form for complying with this self-certification and verification requirement, including different options for school districts depending on whether they want to implement an annual or daily certification process.

Regarding employees and visitors, similar options to those available for students exist. In particular, a school district can require employees and visitors to engage in temperature and symptom self-screening prior to entry into its facilities or it can rely on individuals self-certifying that they are not experiencing a temperature or other symptoms. If a school district obtains medical information as a result of its screening process, it should be cognizant of privacy and confidentiality requirements related to that information under the law.

13. Liability exposure for districts based on screening process implementation decisions- is there greater liability exposure for how you comply/don't comply?

Answer: Under the ISBE and IDPH guidance, school districts have discretion in how to conduct the screening process. Pursuant to the Illinois Tort Immunity Act, school districts will likely be immune from liability for claims arising from this discretion (i.e. choosing one screening process over another screening process, or choosing not to implement a certain screening process). For example, if a school board or administration exercises that discretion and chooses self-certification and verification, the school district will likely be immune from claims alleging that the school district was negligent for failing to use thermal scanners. While top-of-the line equipment used for screenings may identify more positive cases and thus mitigate liability, practically speaking school districts must consider real-world implications (i.e., costs, record keeping) when determining how to implement a screening process. Our firm also recommends that school districts consult their insurance carriers to discuss coverage related to COVID-19 and any related items.

14. Can a student utilize a sticker indicating completion of a self-screening at home or receive a sticker upon entry to a school building to indicate they have been screened while those without a sticker are directed to go to the nurse for a screening?

Answer: While school districts should consider how they will manage the symptom screening and temperature check process, the use of a sticker system may be problematic in that the sticker visually identifies and highlights a student which may create equity and confidentiality issues. School districts should consider other options rather than using stickers because of these potential issues.

15. Can a district require COVID-19 testing before allowing employees to return to in-person teaching this fall?

Answer: It depends on which form of testing is being required. Employers may validly require returning employees to undergo viral testing to determine if they have an active case of COVID-19. However, the Equal Employment Opportunity Commission has noted that employers cannot require employees to undergo antibody testing as it would not produce results which are job related and consistent with business necessity.

School districts should note that if employees are required by the district to undergo testing before returning, or at any point, then the district will likely be responsible for any out-of-pocket expenditure associated with that testing.

Safety Measures

16. Must face coverings be worn at all times when individuals are inside a school building, including when an employee may be alone in their classroom or office?

Answer: Yes, based on the ISBE and IDPH guidance, as well as the associated FAQs, face coverings must be worn at all times when an individual is inside of a school building. The guidance does not provide a definition of what constitutes a “school building,” but the conservative view would be that such includes all district-owned property, including administrative offices. There are a few exceptions to the face covering requirement. Such exceptions include: individuals who are age 2 or under; individuals for whom face coverings are medically contraindicated; when consuming food or beverage; individuals participating in band activities requiring use of their mouths; and, when outside, if 6 feet social distancing can be maintained.

17. Can face shields be worn in lieu of or in addition to a face covering?

Answer: A face shield, alone, cannot be used in lieu of a face covering unless a face covering cannot be tolerated due to a medical or disability related condition. IDPH has said that a face shield does not provide enough protection. IDPH recommends that individuals using face shields should be warned that they are not considered adequate protection. However, a face shield in addition to a face covering is acceptable.

It is recommended that school districts require a medical note or other documentation substantiating an individual’s claimed need to use a face shield or other accommodation in place of a face covering. Furthermore, it is recommended that those using face shields in place of face coverings strictly adhere to social distancing requirements at all times.

In those situations where visualization for instructional purposes is important (e.g., English learners), the guidance recommends using video instruction where possible.

18. Should a district implement a policy or procedure requiring face coverings?

Answer: Yes, school districts should, at a minimum, have procedures addressing the requirement for face coverings and school districts may meet this requirement with a policy

as well. The procedure, handbook language, and/or policy should address expectations for students, staff, and visitors, and the consequences for refusing to wear a face covering. School districts should consider how to communicate requirements and expectations for wearing face coverings through website postings and/or other communications.

Our firm has developed a model policy on face coverings for school districts.

19. What options does a district have if an employee refuses to wear a face covering?

Answer: The options available to a school district vary depending on the underlying circumstances.

In particular, school districts should ascertain whether there is a medical or disability related condition related to the individual's refusal to wear a face covering. In those cases, the school district may need to consider a potential accommodation. An accommodation in these circumstances does not, necessarily, mean allowing the individual to work in-person without a face covering. Instead, other alternatives (e.g., telework) may exist. Employers should also be aware of the possibility of employees refusing to wear face coverings due to religious beliefs.

In case of employees refusing to wear face coverings without a legally protected basis for such refusal, districts may revert to the disciplinary process. However, it is advisable for school districts to tread carefully in pursuing discipline given the sensitivities related to COVID-19.

20. How should districts respond if a student refuses to wear a face covering or if a parent refuses to allow their child to wear one?

Answer: If a student refuses to wear a face covering, or a parent refuses to allow a student to wear one at school, school districts may consider barring the student from coming to school until the student complies with district policy. School districts may consider whether to offer remote instruction in that situation. Regarding options for discipline, school districts should first consider addressing the refusal to wear a face covering or not meeting expectations for use of a face covering, such as regularly removing the covering, with typical behavioral interventions and then appropriate disciplinary measures as necessary. Notably, the current ISBE and IDPH guidance indicates that face coverings need not be worn outside if social distance is maintained. The guidance does not address use while participating in athletic activities.

School districts' policies or procedures concerning face coverings should address these requirements. See question 16.

21. Would an accommodation regarding face coverings for a special education student also require medical documentation?

Answer: Current ISBE guidance indicates that school districts may require medical documentation for students with conditions who may have difficulty breathing while wearing a face covering. For students with IEPs, 504 plans, or health plans, the school

likely already has medical documentation related to the student's underlying health condition and information that would allow the school district to consider the request and any reasonable accommodations without additional medical documentation. School districts do not need to require additional medical documentation in those scenarios.

22. Are districts required to offer remote instruction if a student refuses to wear a face covering or a parent refuses to allow their child to wear one?

Answer: No. However, school districts may remove students refusing to wear face coverings, without an underlying medical or disability based-reason, to a remote learning situation.

23. Are exceptions for face coverings permissible for special education students with identified needs, such as those with significant communication disorders, sensory needs or autism?

Answer: Yes, there will be permissible exceptions and accommodations to the required use of face coverings for which school districts will need to plan.

School districts are obligated under Section 504 to provide students with reasonable accommodations to access their education in a manner similar to their non-disabled peers. IEP and 504 teams may meet or communicate with parents to amend plans relative to accommodations for face coverings. There are a wide variety of face coverings which school districts may explore as potential reasonable accommodations. Other potential reasonable accommodations which school districts may consider include not requiring a face covering, but requiring additional PPE coverings for other staff working with the student or utilizing intervention strategies such as working with a student to increase their tolerance to a face covering. Additional considerations school districts should keep in mind when responding to requests for accommodation are the student's age, ability to social distance, and ability to tolerate the use of face coverings.

Safety Measures - COVID-19 Return to School/ Work Scenarios

24. Individuals who had close contact with someone who tested positive for COVID-19 or someone who is suspected of having COVID-19.

Answer: Return after 14-day quarantine period from the date of last contact with the individual.

Our firm has developed a chart for ease of use in addressing such absences. The chart is available on our website.

Source: IDPH "Releasing COVID-19 Cases and Contacts from Isolation and Quarantine" (5/26/20) and stated in ISBE FAQ (6/30/20).

25. Individuals who test positive for COVID-19 or are suspected of having COVID-19, AND had symptoms.

Answer:

Symptom-based strategy. May return after: (1) at least 10 days have passed since symptom onset; (2) at least 72 hours since resolution of fever (w/out medicine); and (3) improvement of respiratory symptoms.

Test-based strategy. May return after: (1) Fever free (without medicine); (2) improvement in respiratory symptoms; and (3) two negative COVID-19 tests in a row, with testing done at least 24 hours apart.

Our firm has developed a chart for ease of use in addressing such absences. The chart is available on our website.

Source: CDC “Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Setting” (5/29/20) linked in ISBE FAQ (6/30/20), and IDPH “Releasing COVID-19 Cases and Contacts from Isolation and Quarantine” (5/26/20).

26. Individuals who test positive for COVID-19, but have NO symptoms.

Answer:

Time-based strategy. May return after at least 10 days have passed since the date of the first positive COVID-19 test.

Test-based strategy. May return after two negative COVID-19 tests in a row, with testing done at least 24 hours apart.

Our firm has developed a chart for ease of use in addressing such absences. The chart is available on our website.

Source: CDC “Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Setting” (5/29/20) linked in ISBE FAQ (6/30/20).

27. How should a school district respond where an individual exhibits one or more symptoms of COVID-19, but is not suspected of having COVID-19? Example: A teacher experiences allergies every September, including a cough and runny nose. She experiences the same symptoms this September.

Answer: It *may* be possible for such an employee to return to work earlier than the timelines associated with isolation and/or quarantine due to COVID-19; however, it is recommended that school districts require evidence of an alternative reason for the symptoms and/or documentation from a health care provider certifying that the individual is safe to return to work before permitting them to do so.

28. How should districts respond to union demands for PPE for certain types of employees like nurses and custodians?

Answer: Our firm recommends that school districts provide PPE which is appropriate for the particular tasks associated with a position in accordance with applicable federal, state, and local health and safety guidelines. In particular, the Center for Disease Control and Prevention has published guidance explaining what types of PPE are appropriate for certain employees--including nurses and custodians--and/or particular tasks.

29. Can the district require custodians to clean and disinfect classrooms after a COVID-19 exposure?

Answer: Yes, school districts can require custodians to clean and disinfect classrooms that have been subject to COVID-19 exposure; however, when doing so, the district and custodians should abide by applicable federal, state, and local health and safety guidelines for performing this cleaning and disinfecting. In particular, custodians should be provided with appropriate PPE, the classroom should be vacated and well ventilated for as long as possible--ideally at least twenty-four (24) hours--before starting to clean and disinfect, and custodians should be provided with cleaning and disinfecting supplies which align with applicable health and safety guidelines.

30. What should a school district keep in mind if it wants to hire an outside vendor to perform cleaning and disinfecting of classrooms after a COVID-19 exposure?

Answer: If the school district's custodial staff are part of a union, be cognizant of the fact that a school district can not assign-out bargaining unit work without agreement by the union. This should be discussed with the union, if this is contemplated.

School districts should also confirm that the vendor's scope of work, use of cleaning and disinfection products, and PPE for employees comply with the applicable federal, state, and local health and safety guidelines. Additionally, the contract should require the vendor to comply with all school policies related to COVID-19, including but not limited to wearing of face coverings and self-screening. If the contract exceeds \$25,000, the district may need to bid the contract but exceptions, including the emergency exception, may apply. Districts should also consult with their insurer to determine if such disinfection after a COVID-19 exposure is covered.

31. Are partitions between desks required under the guidance from ISBE and IDPH?

Answer: No. Partitions may be used between desks or in other ways as a safety precaution to provide additional separation between students and/or, in certain circumstances, such as when staff administer in-person assessments to students for evaluation purposes. However, partitions between desks are not specifically required in any circumstances. Additionally, partitions may not be used in lieu of face coverings, and districts should not rely on partitions between desks in lieu of social distancing when possible.

32. Can a school divide its gyms, field house, cafeteria or auditorium to allow more than 50 students to use the room at one time? How about outdoor areas?

Answer: Under the ISBE and IDPH guidance, schools are required to “[p]rohibit more than 50 individuals from gathering in one place;” however, it does not define what constitutes “one place.” The related FAQs slightly clarify this point by providing examples of “one space” including, “one school bus, one classroom, or areas of a hallway,” and also noting that the capacity restrictions do not apply to the whole school building. Nevertheless, it is likely that school districts can separate certain large areas of their facilities (e.g., field houses, gymnasiums) to accommodate more than one group of fifty (50) students, particularly if it has previously used partitions and dividers of such spaces. If a school district elects to separate a large area in this fashion, it is advisable that the district use methods of separation intended to provide ample protection against the potential spread of COVID-19 (e.g., substantial distance between groups, partitions providing as close of a complete seal as possible).

33. How do school districts transport their students if students cannot maintain IDPH recommended social distancing on school buses?

Answer: The ISBE guidance and subsequent FAQ confirmed that the recommended six (6) feet of social distancing is not required on school buses. Instead, districts “should allow as much space as possible between each individual on a bus” and districts “should apply the most feasible social distance guidelines.” Nonetheless, districts can have up to fifty (50) individuals (including the driver and any monitors) on a bus.

Because social distancing cannot be maintained, school districts must implement other safety measures. All persons on the bus must wear face coverings at all times and students, as well as monitors and drivers, must undergo symptom and temperature checks before boarding the bus. As with the screening measures for entering a school building, this screening can be performed with a self-certification verifying that the individual does not have any COVID-19 symptoms. Districts should consider requiring signage on the bus listing the COVID-19 symptoms, confirming self-certification, providing seating assignments to group students from the same household, and monitoring students at school loading and unloading zones.

34. What strategies should school districts consider to protect themselves through the Illinois Tort Immunity Act?

Answer: The majority of the guidance provided by ISBE and IDPH uses operative words or phrases such as “should,” thereby allowing school districts to make their own determination about the implementation of methods to mitigate the spread of COVID-19. When the guidance provides open-ended options or recommendations, school districts have discretion to determine how to best handle their unique circumstances and, as such, would likely fall within the discretionary immunity segment of the Illinois Tort Immunity Act. To support a tort immunity defense based on discretionary immunity, districts should consider documenting the various safety options considered and why they selected the chosen option (e.g., complying with ISBE’s recommendation for in-person instruction, cost considerations, etc.).

While school districts are provided apparent discretion in implementing COVID-19 mitigation strategies, it is still advisable that they engage mitigation strategies to the best of their ability in order to further provide a defense should the district be subjected to legal action in the future. Additionally, in the limited areas where ISBE's guidance uses directives such as "must" (face coverings for example), districts should follow such directives as the discretionary immunity defenses may not apply.

Districts should also consult with their insurer to discuss any applicable policy exclusions and coverage requirements.

Fear of Returning

35. How should a district respond to an employee who has a general fear of returning to work, but no underlying medical condition or other vulnerability?

Answer: School districts should consider meeting with the employee and engaging in a dialogue to understand the situation fully. General fear of returning to work due to COVID-19 is not a legal basis for an employee to remain out of work. School districts can attempt to resolve an employee's fear based on information obtained through discussion with that individual, but the district is not obligated to allow employees to remain out of work. It is important to have a protocol in place to ensure that school districts have a plan and procedure for how to respond when individuals request to stay away. To avoid potential liability, school districts should ensure that their responses to concerns raised by employees are consistent.

36. How should districts address employees they know are experiencing medical conditions that may make them more vulnerable if exposed to COVID-19?

Answer: A school district's response in this situation depends on the information available to it. Under the law, employers are obligated to respond when employees present a request for disability-related accommodation; however, employers are not obligated to wait for employees to make such a request. Instead, if an employer has information indicating there is a potential need for accommodation, school districts may initiate a discussion related thereto. If a school district initiates a conversation regarding potential accommodation, it should approach the situation with caution given the sensitivity of the subject matter. Discussions between school districts and employees about medical considerations should be carefully planned in consultation with human resources. School districts cannot prevent employees from working if they can otherwise do their job.

37. As a means to mitigate liability should districts consider not allowing employees over a certain age (say age 50 and older) to return to work if there will be in-person instruction?

Answer: No. This method of attempted mitigation is not acceptable under applicable discrimination laws and school districts cannot prevent employees from working if they can otherwise do their job.

38. What leave applies first if an employee is unable to work or telework because of a requirement to self-isolate after testing positive for COVID-19?

Answer: Several forms of leave (e.g., sick leave, personal leave) may be available to employees; however, leave under the federal Emergency Paid Sick Leave Act must be applied *before* other forms of leave may be used. Notably, employees who are unable to work onsite or telework for a COVID-related reasons are entitled to up to two weeks (80 hours) of emergency paid sick leave at full pay provided by the district. Thereafter, any other applicable forms of leave would apply. Our firm can assist school districts in developing a policy to address the new, temporary federal leaves available to employees through December 31, 2020 -- including emergency paid sick leave and the emergency expansion of FMLA.

Our firm has created a leave chart for ease of use that is available on our website.

39. If an employee is able to telework and the duties they perform can be done remotely, do any leave laws apply?

Answer: No, if the employee is able to telework and perform their duties, then they are not entitled to leave provided by law. However, if he/she meets the applicable requirements, an employee may elect to take sick or personal leave.

40. Should districts keep a telework option open to avoid Families First Coronavirus Response Act (FFCRA) leave implications?

Answer: The determination of whether a school district should maintain a telework option to avoid leave implications under the FFCRA is one that should be made by each district on a case-by-case basis dependent upon their unique circumstances.

41. Scenario: A school secretary needs to be absent every Tuesday and Thursday because those are remote learning days at her son's school, so she cannot send him to school on those days.

What, if any, leave applies to this situation?

Answer: The secretary would potentially be eligible for leave under the emergency expansion of FMLA provisions of the Families First Coronavirus Response Act. Such leave is only available when childcare/schools are closed due to COVID-19 related reasons, the employee has worked for the employer for at least thirty (30) days, and the employee certifies that no other suitable person will be caring for the child. Eligible employees are entitled to take up to 12 weeks of leave--the first two (2) weeks being unpaid (but note that emergency paid sick leave would apply) and the remaining up to ten (10) weeks being paid by the District at two-thirds ($\frac{2}{3}$) of the employee's applicable rate of pay. If the individual can telework, this leave would not apply. This emergency expansion of FMLA provision expires on December 31, 2020.

Must the District permit intermittent leave under this scenario?

Answer: An employer may, but is not required to, offer this leave on an intermittent basis.

Our firm has created a leave chart for ease of use that is available on our website.

Other Fear of Returning Questions

42. Who pays for the doctor when a school district sends or tells an individual to go to seek medical care?

Answer: If a school district tells an individual to seek medical care, then the district will be responsible for paying any out-of-pocket cost associated with such treatment. It is advisable for a school district to use language which establishes an option for the employee to decide whether to seek treatment (e.g., the employee “may” wish to consult/confer with a health care provider).

43. What is the nature of the ISBE and IDPH return to school guidance, is it legally binding?

Answer: The ISBE and IDPH guidance is not law or legally binding rule. It was issued by two state agencies which do not have the authority to enact law or rules outside of the formal rulemaking process. However, it should be noted that relevant Executive Orders issued by the Governor in accordance with his emergency management authority--namely Executive Orders 2020-40 and 2020-44--indicate that school districts are required to abide by the guidance published by ISBE and IDPH. School districts should consider their local conditions, ability to provide instruction in-person, hybrid and/or remote learning while implementing safety measures, and the impact of remote learning on students when making decisions consistent with ISBE and IDPH guidance.

44. What about use of the word “must” regarding guidelines? Can failure to follow these items negate the Tort Immunity Act?

Answer: The use of the word “must” in the guidelines has the potential to impact school district’s ability to rely on discretionary immunity under the Illinois Tort Immunity Act for those items which “must” be followed. However, for areas that are discretionary--such as those employing the operative term “should”--using rational approaches to decision making can minimize any risk under the discretionary immunity provisions.

45. Do you recommend that Board members participate in the transition planning team task force?

Answer: Including a board member on a transition planning team could be useful for school districts; particularly, given that their involvement would support the defense that the team is engaged in policy making and thereby protected under the Illinois Tort Immunity Act. However, if a school district desires to include a board member on its planning team, the district should be cognizant of Open Meetings Act implications and

proceed accordingly. Specifically, the planning team should not be a Board-created committee, and, no more than two (2) board members could serve on the planning team.

Additional questions received during Webinar

46. In light of mandated use of face coverings at all times in school buildings, is social distancing required in classrooms?

Answer: Yes, as much as possible. The Phase 3 ISBE/IDPH guidance struck a new tone compared with the prior guidance. With the renewed focus of getting as many students back to in-person instruction as possible, ISBE altered its prior language surrounding compliance with the 6 feet social distancing guidelines in classrooms. In the prior guidance document, ISBE indicated that social distancing should be observed to the greatest extent possible to ensure 6 feet physical distance from other persons at all times. Now the ISBE guidance and FAQ indicates that social distancing should be observed “as much as possible.” The FAQ goes on to specifically indicate that “desks do not need to be spaced 6 feet apart; however, it is recommended that excess furniture be removed from classrooms to allow for as much space as possible in between desks.”

ISBE also confirmed such an approach in its webinar where they stated that if your classrooms cannot accommodate the desks being 6 feet apart, that is acceptable, and having students utilize face coverings will help address the safety considerations of not using 6 feet of social distance in the classrooms. Noting the importance of in-person instruction, ISBE’s webinar also stated that 6 feet of distance is not possible at all times throughout the school day.

47. If a district does not have the ability to have sports/activities/club activities, is the district required to pay the applicable coaches and sponsors?

Answer: Whether a school district is required to pay coaches and sponsors for sports/activities/club activities which the district is unable to hold may vary depending on the circumstances. Specifically, pay requirements will largely depend on the existence of a contract for coach/sponsor duties and what that contract contains. It is advisable that school districts temporarily refrain from agreement and ratification of new contracts for coaches and sponsors related to activities which may not occur due to COVID-19. Our firm can assist in analyzing specific circumstances to determine districts’ pay obligations under existing contracts and how to approach potential new contracts.

48. How should a district address health and safety guidance from federal, state, or local agencies relative to allowing individuals who recently traveled internationally to return to work?

Answer: School districts as employers can validly ask whether employees have traveled abroad within the fourteen (14) days preceding their return to work. Current guidance provides that individuals who have traveled internationally must quarantine for a period of 14 days.

49. **How should individuals who previously tested positive for, but have since overcome, COVID-19 be treated relative to face covering usage and exposure to individuals currently suspected or confirmed as having COVID-19?**

Answer: The guidance does not provide an exception for face coverings for those who have already overcome COVID-19; therefore, they should be required to use these coverings in the same manner as any other person. Furthermore, as it is uncertain at this time whether an individual can contract COVID-19 more than once, those who previously overcame the virus, but are exposed to someone with a suspected or confirmed case of the virus should be excluded in the same fashion as any other person.