

COVID-19 (Coronavirus), School Closures, and Related Issues

Updated 3/15/2020

As we all work together to consider solutions for the issues caused by COVID-19 (Coronavirus), mandated school closures, and other possible scenarios, it is important to recognize that the problems, solutions, and legal ramifications may change quickly, and the answers to some important questions are still unknowable, as the rules continue to evolve.

Miller Tracy will be updating our guidance on these issues located here:

<http://millertracy.com/content/school-response-pandemic-disease-such-coronavirus>

Also, ISBE will be continually updating its guidance on the issue located here:

<https://www.isbe.net/Pages/covid19.aspx>

And here:

<https://www.isbe.net/Documents/ISBE-Guidance-to-School-Coronavirus.pdf>

The federal Department of Education issued guidance on special education matters which can be found here:

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

While these documents answer many of the questions we have received from school districts and special education cooperatives, there are several other questions that have been frequently raised. We advise schools to check back often - we will not issue guidance until we are confident such guidance is both helpful and accurate. Also, as you have questions, we are likely to update the answers here so that we can all benefit from the evolving conversation.

Open Meetings Act Issues:

Further guidance is anticipated from the Illinois Attorney General, which may include some permissive capacity for remote meetings. Please be aware that at the time of this writing, no such permission has been granted or approved, but pay close attention in the coming days as additional updates become available.

01. Can the board of education hold an emergency meeting?

Under the Open Meetings Act, boards can hold emergency meetings in certain circumstances. While the most recent ISBE guidance (3/14/2020) indicates that no requirements of the OMA have been waived as

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part of the Governor’s emergency actions, the existing OMA does have a provision for an emergency meeting.

In deciding whether to conduct an “emergency meeting”, this is likely the type of unprecedented situation where an emergency is likely to be found to exist. That being said, it is important that the discussion (and any action, if necessary) truly be related to an actual emergency and can’t be handled either administratively or at a regular or special meeting. Also, please be careful not to tack on additional non-emergency discussion or action at an emergency meeting, if the board needs to meet on an emergency basis.

5 ILCS 120/2.02 provides (in relevant part) that “notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.” Therefore, in the event of the need to conduct an emergency meeting, notice and agenda must be posted and sent to the required new media as soon as you can, even if that is less than 48 hours.

02. Can the board conduct a meeting by phone or video conference?

Under the OMA, a quorum must be physically present, and that requirement has not been waived or changed at this point. So long as a quorum of the board is physically present, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

OMA also requires that all meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public.

03. If members of the board are meeting with the union to discuss how we are handling staff responsibilities during the closure, does the OMA apply?

Pursuant to Section 18 of the Illinois Educational Labor Relations Act, the provisions of the Open Meetings Act shall not apply to collective bargaining negotiations, including negotiating team strategy sessions, and grievance arbitrations conducted pursuant to this Act. Because these discussions with the union are related to mandatory subjects of bargaining (as discussed in more detail below), these may be considered bargaining meetings which are exempt from OMA.

04. How can an administrator seek direction from a Board member during the crisis?

A majority of the quorum of the Board constitutes a meeting pursuant to Section 1.02 the Open Meetings Act. School authorities may seek input from a single Board member, or, if no committee of the Board has authority on the issue, possibly two members of the Board. An administrator can always deliver information and updates to the Board. But a school should be cautious about using a single intermediary to “virtually” hold meetings and collect input.

Student Issues:

S1. Are we required to do eLearning or some sort of continuity of education for our students?

With the mandated closures March 17-30, 2020, ISBE has not created nor required an “official” e-Learning program, but has instead asked school districts to make their best effort at continuity of education:

You have full autonomy to provide continuous learning opportunities in the way that you are able, including through technology and free online resources. We encourage you to explore and implement what works best for your school community. *Ayala Letter, 3-13-2020.*

Although ISBE’s letter does not require e-Learning, provision of other opportunities for continuity of education is “encouraged.”

Due to the present ISBE guidance permitting learning without penalty to days, it is important that school districts are not required to follow the rules and statutory requirements for eLearning in 105 ILCS 5/10-20.56.

S2. If we do eLearning, what are the legal requirements?

First, “do your best.” Second, note the special education issues discussed below.

In addition, employee issues related to eLearning or other continuity of education discussed below.

Due to the present ISBE guidance permitting learning without penalty to days, it is important that school districts are not required to follow the rules and statutory requirements for eLearning in 105 ILCS 5/10-20.56.

S3. Are we required to continue meal service?

No, but ISBE is strongly encouraging it:

ISBE has already obtained the USDA waiver to provide meals during school closures, including to children under 5. Please make every effort to provide meals for all children who need them, no matter their resources and no matter what school they attend, in the way that works best for your community, such as grab-and-go or delivery. *Ayala Letter, 3-13-2020.*

S4. If we decide to continue meal service, what are the requirements?

For employee concerns, see the information provided below. Otherwise, ISBE has advised the following:

ISBE has already obtained the USDA waiver to provide meals during school closures, including to children under 5. Please make every effort to provide meals for all children who need them, no matter their resources and no matter what school they attend, in the way that works best for your community, such as grab-and-go or delivery. Districts will need to complete a one page waiver that takes less than 10 minutes:

www.isbe.net/Documents/ISBE-66-98.pdf. Please send to ISBE at CNP@isbe.net as soon as possible.

School districts that do not participate in the federally funded school lunch or breakfast programs do not need to submit the waiver and are encouraged to also provide meals to children who may need them. ISBE is working with community organizations such as the major food banks who are working with their networks to assist in areas where potential meals may be needed.

Participation Requirements

- Meals must meet the meal pattern requirements.
- Meals offered to children age 18 and below, or enrolled in school, are reimbursable. • There is NO reimbursement for meals offered to adults, although school may offer such meals for purchase.
- Daily counts are required by meal service type. Please make sure that you are collecting this data on a daily basis.
- Schools should consult local Department of Public Health for questions related to food safety requirements.

Implementation Guidance

- Ensure all the students' nutritional needs are addressed. This includes students with allergies and other food restrictions. Make sure to mark the food appropriately.
- Create multiple geographically located food distribution centers where necessary. Students are not allowed to eat inside the school.
- Ensure that all necessary personnel are stationed to maximize student and staff safety and that all distribution sites are supervised.
- Explore distribution strategies that will avoid large gatherings of people and make social distancing possible.
- Students can receive two meals a day (one breakfast, one lunch, or one snack in any combination). Both meals can be distributed at once either via pick-up, drive-up or delivery.
- Only parent/guardians/students themselves may pick up food. Children do not need to be accompanied by an adult to receive food.
- Allow ample and reasonable amount of time for meal pick-up for each meal service, recognizing that families may be experiencing challenges during this time.
- Use multiple modes of communication to inform students and families of available food service, including time, location, and method of distribution.

- Consider multiple methods of distribution, such as drive up; walk up; satellite locations, such as libraries, churches, park districts, and youth centers; home delivery via bus routes; and other options.

S5. ISBE guidance encourages an administrator to be present at all schools. What happens if students with no other place to go show up?

Schools should work with community resources both to advertise that schools are closed by order of the Governor, and to provide parents who need assistance with securing safe spaces for their children with information on available community resources. Schools should also be careful to assure staffing and supervision necessary that buildings and those present are safe. Schools should not resort to serving as daycare with minimal and insufficient supervision for children present.

Special Education Issues:

SE1. If schools are closed, whether or not using continuity of learning opportunities, do special education and related services required by a student's IEP have to be made up?

As it appears that the days of closure from March 17-30, 2020, are going to be approved as Act of God days (which mean those days are not required to be made up), then a direct make-up is not likely to be required (although specific ISBE guidance on this question would be appreciated). However, there are still FAPE issues that could arise. For example, the IEP team may have to consider extended school year (ESY) services if the length of the closure would cause progress to be significantly jeopardized and/or cause excessive regression.

Even though direct make-up is not likely to be required, the IEP team will still need to look at the student's overall progress and consider any additional needs related to FAPE. The Department of Education guidance linked above notes: "If a child does not receive services during a closure, a child's IEP team (or appropriate personnel under Section 504) must make an individualized determination whether and to what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost."

SE2. If schools are closed, but the school district elects to use continuity of learning opportunities, how do we meet the IEP requirements for students with disabilities?

First and foremost, we should highlight the language from the Department of Education's guidance: "If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE."

So, if a school district decides to use some other means of continuity of education to continue to instruct all students during a closure, the district will need to make sure that an IEP student's educational needs are met to enable him/her to benefit from this instruction as well. School districts cannot simply provide general educational services virtually (or through other non-technology means like work packets) without

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considering the needs of students with disabilities. Both special education and general education staff must understand that the decision to continue providing educational services in some form of continuity of learning option will implicate special education obligations.

With the mandated closures March 17-30, 2020, ISBE has not created nor required an “official” e-Learning program, but has instead asked school districts to make their best effort at continuity of education:

You have full autonomy to provide continuous learning opportunities in the way that you are able, including through technology and free online resources. We encourage you to explore and implement what works best for your school community. *Ayala Letter, 3-13-2020.*

For a school district that does elect to use a formally-approved e-Learning plan (under the existing statute, 105 ILCS 5/10-20.56) for future closures, it is probably the IEP team (either through an IEP meeting or an IEP amendment) that would determine the nature and extent of services on formally-approved e-Learning days for IEP students.

Both the federal and Illinois guidance suggest that the plans for an IEP student on a formal e-Learning day should be determined by the IEP team. For most IEP students (who spend most of their typical school day in general education), their e-Learning plan likely is the same as their non-disabled classmates, with some additional considerations for special education and related services. For others, that is clearly a more complicated question.

There are obvious challenges with providing e-Learning to early childhood and early elementary students, as well as to students whose disability provides challenges to implementing e-Learning. This answer presumes, of course, that the school district has overcome the barriers to e-Learning access that may apply to all students (such as socio-economic or geographic barriers). Districts are actively working to find solutions to these problems.

SE3. If schools are closed (whether or not continuity of learning is in place), how do we meet required timelines for IEP annual reviews, evaluations, and other deadlines?

For the mandated closures March 17-30, 2020, ISBE noted that “to the extent practicable, districts should continue to meet any obligations relating to convening IEP meetings and complying with timelines for due process hearings and mediations. Schools may avail themselves of alternate means of meeting, including telephone or videoconference.”

For annual review deadlines and other deadlines that are date-dependent (i.e. an annual review that must be completed by May 1), the school district must still make sure that the meetings are happening by the required deadline. The ISBE guidance indicates the same: “ISBE continues to expect that all districts will comply with requirements to timely convene IEP meetings for students. Schools may wish to avail

themselves of the opportunity to ensure parent participation at meetings via alternate means, including telephone or videoconference, which are allowable under the Individuals with Disabilities Education Act.”

At any point that schools are open, school districts should continue to have IEP meetings as usual, taking into account the recommendations on hand-washing, not shaking hands, sitting further apart, and other social distancing. It is prudent to inform parents of their option to participate by phone or video conference, and schools can encourage remote participation if the school finds it is necessary or if recommended by the health department.

For deadlines that are not date-dependent, such as an evaluation timeline (i.e. parent consented to an evaluation on February 20th, and the evaluation and EDC/IEP must be completed within 60 school days), the answer depends on whether school is open or closed. For school closures, the closure days would toll the 60 school days, so that the deadline would be pushed back accordingly.

SE4. What if some school districts in a cooperative are closed, but others remain open? How will students in cooperative programs be served?

Due to the statewide closure, this question may have less impact for the period from March 17-30, 2020, but may become relevant again if any or partial closures remain in place after March 30th.

The best solution to this would be for school districts within a cooperative to consider this issue when deciding to close, and help create consistency in programming for students.

Otherwise, each school district is going to have to take responsibility for its own students. If District A remains open, but a District A student attends a classroom in District B/Cooperative that is closed, then District A will be responsible for determining how to serve the student. Because it is unlikely that the student can be served by District A during that period without a change to the IEP, the most likely outcome will be that District A will have to provide compensatory services once the closure is over.

As noted in the Department of Education guidance:

If a public school for children with disabilities is closed solely because the children are at high risk of severe illness and death, the LEA must determine whether each dismissed child could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services. The Department understands there may be exceptional circumstances that could affect how a particular service is provided.

If a child does not receive services during a closure, a child’s IEP team (or appropriate personnel under Section 504) must make an individualized determination whether and to

what extent compensatory services may be needed, consistent with applicable requirements, including to make up for any skills that may have been lost.

If the reverse is true (the home District is closed, but the service District/Cooperative is open), then the student may elect to continue to attend his or her program. The home district may have to consider transportation options in this situation.

SE5. When would the school district be required to provide homebound instruction, and how to we accomplish that if the student may have been exposed or contagious?

In a situation where the school district remains open, but a student is medically unable to attend school because of exposure to or diagnosis of coronavirus, then homebound instruction may be necessary. Remember that homebound eligibility is contingent upon receipt of the required medical certification.

The ISBE guidance notes: “E-learning days are meant to be used for schoolwide or districtwide events rather than for individual students. However, such a student might qualify for homebound instruction, completed strictly through telecommunications or the internet.”

Similarly, the Department of Education guidance notes:

It has long been the Department’s position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child’s placement and the contents of the child’s IEP, if warranted. Further, if the IEP goals will remain the same and only the time in special education will change, then the IEP Team may add an amendment to the IEP stating specifically the amount of time to be spent in special education. If a child with a disability is absent for an extended period of time because of a COVID-19 infection and the school remains open, then the IEP Team must determine whether the child is available for instruction and could benefit from homebound services such as online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities, to the extent available. In so doing, school personnel should follow appropriate health guidelines to assess and address the risk of transmission in the provision of such services. The Department understands there may be exceptional circumstances that could affect how a particular service is provided.

School Calendar Issues:

CI. Are we going to be required to use the remaining Emergency Days?

ISBE is expected to give additional guidance on this in coming days, but preliminary indications from ISBE appear not to require emergency day exhaustion, in favor of complete Act of God relief for all days.

C2. *Are all of the days going to be approved as Act of God Days?*

It seems so, according to Dr. Ayala's statement on March 13, 2020 and additional guidance issued on March 14, 2020, which said:

All days that a school is closed pursuant to the Governor's Executive Order 2020-05 will be counted Act of God Days. Emergency Days will not be used. At this time, these Act of God Days do not need to be made up at the end of the school year.

We continue to await further guidance for how that will be applied.

C3. *Will we have to make up anything for Act of God Days?*

ISBE's longstanding guidance (as noted in the 2019-2020 School Calendar guidance document) has noted that Act of God Days count toward the required number of student attendance days in the Public School Calendar and are not required to be made up.

C4. *Will we have to cancel the scheduled Spring Break in April?*

Not necessarily, but ISBE is encouraging it: "If your district's spring break is scheduled outside of this window, please consider moving your spring break to within this timeframe [between March 17 and March 30]." *Ayala Letter, 3-13-2020.*

Please also carefully consider the possible collective bargaining implications of changes to the school calendar.

Employee Issues:

E1. *Will teachers be paid?*

All matters related to wages, benefits, and terms of conditions of employment are mandatory subjects of bargaining, so it is advisable to be in regular communication with your union about all decisions regarding employee's pay, duties, and other matters during the closure.

However, pay close attention to any existing CBA language or past practice on this issue. Districts have varying practices, and the right answer in your district may be different than your neighboring districts.

It also appears that there may be pressure from the State to carefully consider how this issue will be handled so as to not disadvantage employees.

E2. *Will non-certified staff be paid?*

As noted above, all matters related to wages, benefits, and terms of conditions of employment are mandatory subjects of bargaining, so it is advisable to be in regular communication with your union about all decisions regarding employee's pay, duties, and other matters during the closure.

As you pay close attention to any existing CBA language or past practice on this issue, recognize that issues for hourly employees are different than salaried employees like teachers and administrators.

Districts have varying practices, and the right answer in your district may be different than your neighboring districts.

It also appears that there may be pressure from the State to carefully consider how this issue will be handled so as to not disadvantage employees.

E3. Should anyone be reporting to work?

ISBE has asked that, minimally, a skeleton staff be present in case of student need:

We are also asking that at least one administrator stay on-site during the regular hours of the school day in case children whose parents cannot be home or children experiencing homelessness need a safe place to go. Please exercise social distancing in all situations.
Ayala Letter, 3-13-2020.

Beyond that, we will need to have sufficient staff to handle meal prep and delivery (based on your district's local decisions on how it will handle that issue), continuity of education (based on your district's local decision on how it will handle that issue), and maintaining other legal requirements (i.e. FOIA, financial and payroll obligations, IEP meetings, and other requirements that must still be met during this closure).

Schools should be aware of and consider health and safety concerns for staff reporting to work, and should discuss and take extra precautions to address such concerns both for community who may be invited to the school and for staff who may be on site. Schools should be careful to consider the social distancing intentions of the closures, and be mindful of the safety concerns in subjecting employees and communities to gathering.

E4. Can we require teachers to come in and prepare continuity of educational services or other educational materials/packets?

All matters related to wages, benefits, and terms of conditions of employment are mandatory subjects of bargaining, so it is advisable to be in regular communication with your union about all decisions regarding employee's pay, duties, and other matters during the closure. There appears nothing that prohibits an employer from compelling work so long as collective bargaining concerns are appropriately addressed, but a school district should be careful to consider both the effects of such compulsion in light of neighboring schools' decisions and the way decisions will be bargained, if necessary.

Schools should be aware of and consider health and safety concerns for staff reporting to work, and should discuss and take extra precautions to address such concerns both for community who may be invited to the school and for staff who may be on site. Schools should be careful to consider the social distancing intentions of the closures, and be mindful of the safety concerns in subjecting employees and communities to gathering.

E5. Can we require food service or other personnel to work for nutrition purposes?

All matters related to wages, benefits, and terms of conditions of employment are mandatory subjects of bargaining, so it is advisable to be in regular communication with your union about all decisions

regarding employee's pay, duties, and other matters during the closure. For personnel not in a bargaining unit, you can require them to work.

Schools should be aware of and consider health and safety concerns for staff reporting to work, and should discuss and take extra precautions to address such concerns both for community who may be invited to the school and for staff who may be on site. Schools should be careful to consider the social distancing intentions of the closures, and be mindful of the safety concerns in subjecting employees and communities to gathering.

E6. What if some people are required to report to work and others are not?

All matters related to wages, benefits, and terms of conditions of employment are mandatory subjects of bargaining, so it is advisable to be in regular communication with your union about all decisions regarding employee's pay, duties, and other matters during the closure.

E7. If an employee is on approved unpaid leave, does the employee get paid during the absence?

It depends. Has the school previously had a situation during which an Act of God day was granted (such as during a heavy snow and cold event) and an employee was on unpaid leave? Did the school pay for that time, or did it not pay for that time? Although unlikely that a collective bargaining agreement provision answers the question, it is also important to review the agreement carefully.

E8. What if a subcontractor lays off staff and refuses to supply labor for delivery of meals and other imperatives the school chooses to engage?

The only way to answer the question is by examining the contractual relationship between the parties. It is conceivable that a contractor could be in fundamental breach if it refuses to perform to the terms of the contract, but it is important to also examine the remedies available and whether the school's predicament changes the analysis.