

Return to In-Person Learning in September? Maybe Not.

On August 12, 2020, the New Jersey Department of Education (“NJDOE”) announced that school districts will be permitted to reopen entirely remotely for the 2020-2021 school year if they are unable to open safely. Therefore, reopening with in-person instruction in some capacity will not be mandatory, as previously indicated in the NJDOE’s “Restart and Recovery Plan” released on June 26, 2020. On August 13, 2020, Governor Murphy issued Executive Order 175 (“EO 175”), in accordance with his announcement on the day before, outlining conditions that must be met for districts to be able to exercise the “all remote” option. Additionally, on August 13, 2020, the New Jersey Department of Health issued “COVID-19 Public Health Recommendations for Local Health Departments for K-12 Schools, supplementing the “anticipated minimum health standards” in the “Road Back”.

EO 175 indicates that districts that begin “all remote” must make good faith efforts and “actively strive to address any deficiencies” to resume in-person instruction, and must resume partial or full-time in-person instruction at some point during the Fall of 2020. Those districts must also submit documentation to the NJDOE a minimum of one (1) week before the first day of school, identifying any State-mandated standard(s) for reopening in-person that they are unable to meet, stating their anticipated plan to satisfy such standard(s), and providing a date on which they expect to resume in-person instruction.

Under EO 175, every district is required to submit a reopening plan to the NJDOE a minimum of thirty (30) days prior to the first day of school. This requirement will be met if the district has already submitted its reopening plan prior to August 13, 2020, so long as the plan is consistent with EO 175. Districts may submit amended plans should they now decide that it is prudent to open remotely, in view of the requirements that are contained in EO 175. Additionally, at least seven (7) days before the first day of school, the chief school administrator or a designee must certify to the NJDOE that the district has policies and procedures in place to meet the minimum health and safety standards set forth in EO 175.

Regardless of whether districts reopen for in-person instruction, EO 175 further provides that N.J.S.A. 18A:6-123(b)(2) and (4) will be waived for the 2020-2021 school year, and “student growth data based on standardized assessment or student growth percentile shall not be used as a measure of educator effectiveness in the overall evaluation of any educator.” Furthermore, any districts that participate in the National School Lunch and Breakfast Program must offer the required meals to all children, regardless of eligibility, when the school day involves at least four (4) hours of instruction in-person or remotely.

Finally, regardless of the extent to which districts may provide in-person or remote instruction, the required length of a full school day, consisting of four (4) hours of active instruction by a certified teacher (except that one continuous session of two and one-half (2.5) hours

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constitutes a full day for kindergarten), will remain the same under N.J.A.C. 6A:32-8.3. The 180-day school year requirement will also remain in effect pursuant to N.J.S.A. 18A:7F-9. Similarly, policies regarding attendance and instructional contact time must accommodate both synchronous and asynchronous instruction, and all instructional time must be provided in accordance with the New Jersey Student Learning Standards.

Districts Planning to Reopen for In-Person Instruction

In order to reopen for any in-person instruction, public and nonpublic schools must submit a certification to the NJDOE stating that they will meet the applicable health and safety standards as of the first day of in-person classes. Districts must also complete the NJDOE's "Checklist for Re-Opening of School 2020-2021" to confirm that they will satisfy the requirements in-person instruction stated in "The Road Back: Restart and Recovery Plan for Education."

Paragraph 2 of EO 175 indicates that those requirements include, but are not limited to:

1. Social distancing of at least six (6) feet "in all settings to the greatest extent practicable," or "modifications, such as a physical barrier or turning desks to face the same direction," when such distance is not possible;
2. Mandatory face coverings for students, staff, and visitors, unless one (1) or more of ten (10) possible exceptions apply;
3. Routine cleaning and sanitization of a number of specific areas and surfaces;
4. Facilitation of student hand washing at frequent intervals, or use of hand sanitizer, if soap and water are not readily available;
5. Use of face coverings, distancing "to the extent practicable," and implementation of cleaning protocols with respect to any buses used to transport students;
6. Student and staff health screenings;
7. "Implementation of enhanced social distancing and infection control protocols for music, choir, and physical education classes" held indoors, particularly if students are not wearing face coverings throughout those classes;
8. A plan for response to students and staff who exhibit COVID-19 symptoms;
9. A plan for response to students and staff who test positive for COVID-19;

10. Coordination with the local health department to support contact tracing efforts;
11. A plan for ensuring adequate ventilation of indoor facilities;
12. Social distancing and infection control during recess and physical education; and
13. Procedures for resuming “athletics programs and extracurricular, if applicable.”

Districts Planning to Reopen Using “All Remote” Instruction

If a district is unable to satisfy the health and safety requirements for in-person instruction, as set forth in the “Checklist for Re-Opening of School 2020-2021,” the district may begin the school year with full-time remote instruction. Such a district must submit, at least one week prior to the first day of school, documentation to the NJDOE that identifies the following:

- (a) The school building(s) or grade level(s) within the district that will provide full-time remote instruction;
- (b) The specific standards in EO 175, Paragraph 2 that the school is unable to satisfy;
- (c) The school’s anticipated efforts to satisfy those standard(s); and
- (d) A date by which the school anticipates resuming in-person instruction.

EO 175 further requires Executive County Superintendents to “request periodic updates” from chief school administrators in “all remote” districts “to demonstrate that the school district is actively engaged in good-faith efforts towards the resumption of in-person instruction.”

All Districts Must Offer the Option of “All Remote” Instruction

On July 24, 2020, the NJDOE released a memorandum entitled “Clarifying Expectations Regarding Fulltime Remote Learning Options for Families in 2020-2021,” which updated and supplemented its “Restart and Recovery Plan” issued on June 26, 2020, following Governor Murphy’s approval for school districts to offer a full-time remote learning option to all students upon reopening schools for the 2020-2021 school year. The July 24th memorandum remains in effect and indicates that that school boards must “adopt policies that address, at a minimum,” the following areas:

1. Unconditional Eligibility for Full-Time Remote Learning;

2. Procedures for Submitting Full-Time Remote Learning Requests;
3. Scope and Expectations of Full-Time Remote Learning;
4. Procedures to Transition from Full-Time Remote Learning to In-Person Instruction;
5. Reporting Full-Time Remote Learning Data to the NJDOE (including the numbers of students participating in full-time remote learning by the subgroups of economically disadvantaged students; major racial and ethnic groups; students with disabilities; and English learners); and
6. Procedures for Communicating District Policy on Full-Time Remote Learning to Families.

Reopening In-Person vs. Remote: Factors to Consider

In determining whether they should reopen “all remote” or in-person for the 2020-2021 school year, school districts should thoroughly review and consider their local needs and issues regarding the following areas:

(1) Time Frame for “All-Remote” and Anticipated Date to Return to “In-Person”

Under EO 175, at least one (1) week before their first day of school, districts must provide documentation to the NJDOE stating the date on which they expect to be able to satisfy all of the health and safety standards required to resume in-person instruction, and the “anticipated efforts” each school is making to satisfy those standards. Districts should be aware that if they do not reopen for any in-person instruction at the beginning of the school year, the Executive County Superintendent will periodically seek updates to inquire about the district’s good faith efforts to make progress toward returning to in-person instruction.

(2) Labor and Bargaining Unit Issues

Districts should fully consider the extent to which providing all-remote instruction impacts any issues relevant to the local bargaining units. Each district should review its collective bargaining agreements and consult with counsel as necessary, in order to determine the proper handling of any currently existing labor issues and/or any other issues that may be raised by a bargaining unit regarding any aspect of the district’s reopening plan.

(3) Staffing and Previously Submitted Employee Requests for Leave or Accommodations

Districts should review any impacts that all-remote learning may have on staffing needs for the 2020-2021 school year, including the need for substitute staff members. Similarly, the

districts should expect to receive an increase in the number of requests for leaves of absence for child care reasons, since any district employees who have children whose schools have decided to provide only remote learning in September may now be eligible to take such leave.

(4) Transportation Contracts and Bussing Issues

Depending upon the anticipated date on which the districts expect to reopen for in-person instruction, it may be advisable to review and consider renegotiating any transportation contracts for the 2020-2021 that may be impacted by reopening plans. Districts should also consider the impact, if any, of N.J.S.A. 18A:7F-9 (e)(3) on payments to contracted service providers, including bus companies, to the extent that schools open and are subsequently required to close for more than three days as a result of a mandated health closure. Additionally, districts should be mindful of the requirement in EO 175 that students must use face coverings and social distancing must be observed “to the extent practicable” on school buses, and cleaning protocols must be implemented on school buses as well.

(5) Exposure to Liability for COVID-19 Claims

Because the State and the NJDOE have now formally permitted public schools to offer a remote-only reopening at each district’s discretion, and it is no longer mandatory that every district must reopen with some in-person instruction, districts will not be able to claim the defense of a State-mandated in-person reopening in the event of any future claims for liability related to exposure to COVID-19 in a public school setting. Nevertheless, districts should be aware that N.J.S.A. § 59:6-3 (Prevention of disease or controlling communication of disease) provides as follows: “Neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community.” Despite the protections and immunities that may be available to districts, it is strongly advised that districts discuss this issue with Board counsel in an effort to ensure that exposure to liability is minimized to the greatest extent possible.

(6) Special Education Services and Evaluations

For students with disabilities, districts should determine whether an IEP meeting or an IEP amendment is needed for full-time remote learning, and the same applies to students with Section 504 plans. Currently, districts remain legally obligated to implement each student’s IEP to the greatest extent practicable, notwithstanding that the district may be reopening “all remote” or on a “hybrid” schedule that provides both in-person and remote instruction. The testing necessary for completing Child Study Team evaluations may be conducted in-person if the district is able to ensure compliance with all applicable State-mandated health and safety standards, as set forth in EO 175 and “The Road Back: Restart and Recovery Plan for Education.” Districts should also

consider appropriate methods for providing the related services and supports necessary for students to benefit from the educational program.

(7) Educational Equity Issues

To address the ongoing educational equity issues that previously arose during Spring 2020, as a result of the need for school districts throughout the State to rapidly implement remote instruction for all students, each district that plans to start the 2020-2021 school year “all-remote” should ensure that it is equipped to deliver meaningful remote instruction, including the resources, such as internet access and computers, that students will require in order to learn from home.

(8) Facilities

Districts must determine the extent to which their buildings, classrooms, and other facilities are able to accommodate the amount of space required to comply with the State-mandated requirements for social distancing of at least six (6) feet “in all settings to the greatest extent practicable,” and/or implementing “modifications, such as a physical barrier or turning desks to face the same direction,” when such distance is not possible. While social distancing or barriers are required, EO 175 provides that the in-person dining restrictions of EO 107 are not applicable to school district cafeterias. Furthermore, the district must develop a plan for adequate ventilation of all indoor facilities, which may require a comprehensive review of each HVAC system and other equipment in each building to determine a realistic time frame for when the district will be able to confirm to the NJDOE that it has ensured adequate ventilation within its indoor facilities.

(9) Student Nutrition

If the district participates in the National School Lunch and Breakfast Program, voluntarily or not, it is obligated to offer the required meals to all children, regardless of their eligibility, whenever the school day involves at least four (4) hours of in-person or remote instruction.

Conclusion

As a general matter, the development and implementation of a school district’s reopening plan will depend heavily upon the unique local needs and circumstances that currently exist in each district. The State and the NJDOE have recognized, as reflected in EO 175, that many districts will need additional time to arrange for and implement the numerous health and safety standards required for returning to in-person instruction, and that as a result, districts must be permitted to begin the 2020-2021 school year with full-time remote instruction for all students.

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Of course, in view of the constantly changing nature of State-issued mandates and guidelines regarding the COVID-19 pandemic, school districts should be aware that the information provided herein is subject to modification at any time in the event that the NJDOE or the State adopts new guidance or rules. The Busch Law Group will continue to provide legal updates on this and other significant COVID-19 related issues as necessary. Should you have any questions or concerns, our attorneys are always available to assist you.

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