

**To: All NJEA Field Staff**

**From: Aileen O’Driscoll, Esq., Managing Attorney**

**Date: March 19, 2020**

**Re: UPDATED NJEA Guidance and FAQ: Coronavirus Disease 2019-20**

Following the outbreak of the coronavirus disease 2019 (COVID-19), state and local governments are exploring measures to prevent and mitigate transmission of the virus. Impacts on school districts throughout New Jersey are inevitable, and could be wide-reaching.

No vaccines or medications presently exist to protect against or treat the virus. Therefore, the best way to prevent infection is to avoid exposure.

In response to frequently asked questions, the NJEA has provided the following guidance with respect to the COVID-19, particularly the ways in which containment measures may affect school district operations, the delivery of educational services, and collective bargaining.

### **District Measures**

Currently, symptomology that resembles that of COVID-19 is most likely to originate in common viruses such as flu, or the common cold. Nevertheless, school districts should be collaborating with local health officials to develop an outbreak response/pandemic plan to manage the risk of COVID-19 in the workplace. Such measures might include:

- Students with fever, cough, or difficulty breathing should be separated and asked to wear a face mask until they can be sent home.
- Establishing procedures to ensure that students presenting symptoms of COVID-19 are sent home as soon as possible.
- Provide disposable wipes and sanitizer that contain at least 60-95% alcohol.
- Staff members presenting symptoms should be sent home.
- Implementation of home or remote instruction.<sup>1</sup>
- Implement flexible attendance and sick leave policies.
- Develop information-sharing systems to monitor and report on absenteeism.
- Deep-clean school premises.
  - Daily sanitizing of commonly touched surfaces (doorknobs, faucets, countertops).
  - Closing schools to effectuate enhanced cleaning.

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<sup>1</sup> On March 5, 2020, the Legislature introduced Senate Bill S2027. If passed, the bill would authorize, and require the Commissioner of Education to provide guidance on, the implementation of remote instruction in the event of health-related school closures. The text of the proposed legislation, current as of the date of this writing, is available at [https://www.njleg.state.nj.us/2020/Bills/S2500/2027\\_11.HTM](https://www.njleg.state.nj.us/2020/Bills/S2500/2027_11.HTM).

- Monitor travel histories and future travel plans of students, faculty, and staff. Ensure that students, faculty, and staff known to have traveled recently to regions marked by widespread transmission of COVID-19 adhere to after-travel precautions recommended by the Center for Disease Control (“CDC”). These include:
  - Self-quarantine at home for a 14-day period while monitoring for symptoms.
  - Practice “social distancing” by maintaining a distance of about 6 feet from others.
- Non-pharmaceutical interventions (“NPIs”).
  - School closure. NPIs would likely entail remote instruction. In such a scenario, the school district would be required to provide the requisite technological hardware and software to effectuate remote learning.
  - Cancel or postpone social events, extracurricular activities, performances, pep rallies, field trips or gatherings.
- In the event of school closure, develop plans for the delivery of routine administrative responsibilities such as payroll.
- Address whether, and how faculty and staff are to be designated essential or emergency personnel required to report to school in the event of a district shut-down.
  - Compensation for additional days worked and assignment of work duties beyond those set forth in the collective agreement.
- Develop information-sharing systems to monitor and report on absenteeism.
  - Develop plans to address how to deal with excessive absenteeism of students and staff.

If your district has not provided you with a written pandemic response plan, your local union leadership should formally request such a plan.

### **Individual Measures**

- Get a flu shot. Although a flu shot will not protect against COVID-19, it will minimize the possibility of confusing flu symptoms with those of COVID-19.
- If you are symptomatic, stay home.
- Wash hands frequently with soap and water for at least 20 seconds.
- Avoid touching your face, eyes, nose and mouth with unwashed hands.
- Practice social distancing by maintaining a distance of six feet from others.

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## Frequently Asked Questions Health Concerns

### 1. Will my school screen for COVID-19?

**Response:** Schools are not expected to screen students or staff for cases of COVID-19. Schools that report cases of COVID-19 will work with local health officials to identify cases of the virus and implement next steps. However, under N.J.S.A. 18A:16-2, a board of education has the right to require a medical examination of any employee showing evidence of abnormal health.

In addition, N.J.S.A. 18A:40-4 permits nurses who are under the direction of the county medical inspector to “examine every pupil” for “deviations in health status” subject to the rules of the State Board of Health. If such examination interferes with the pupil’s religious beliefs, the nurse is nevertheless permitted to conduct an examination “to the extent necessary to determine whether he is ill or infected with a communicable disease[.]” However, pursuant to N.J.S.A. 18A:40-4.4, a parent or guardian may, by written request, exempt the pupil from examination.

### 2. (UPDATED) Will my school close? For how long?

**Response:** Governor Murphy’s Executive Order No. 104 (“EO 104”) requires “[a]ll public, private, and parochial preschool program premises, and elementary and secondary schools, including charter and renaissance schools, shall be closed to students beginning on Wednesday, March 18, 2020, and shall remain closed as long as this Order remains in effect.” For additional information on who is essential to the operations of the school program, please also see the question regarding essential employees in the report to work section.

As to higher education, the EO 104 states: “[a]ll institutions of higher education shall cease in-person instruction beginning on Wednesday, March 18, 2020, and shall cease such in-person instruction as long as this Order remains in effect. The Secretary of the Office of Higher Education shall have the authority to grant a waiver to allow in-person instruction to students on a case-by-case basis where a compelling rationale to allow such access exists. The Secretary of the Office of Higher Education shall coordinate with institutions of higher education to determine appropriate student housing conditions for those students who reside in on-campus housing as their primary residence.”

The Executive Order may be viewed at: <https://nj.gov/infobank/eo/056murphy/pdf/EO-104.pdf>.

**3. What if I, or a member of my family, has been exposed to, or diagnosed with COVID-19?**

**Response:** Follow all recommendations and orders of the Center for Disease Control (“CDC”), local health officials, and your physician. N.J.S.A. 18A:40-10 states that a “teacher or pupil” who is the member of a household in which a person is ill with a contagious disease can be excluded from work until the board receives a medical certification that the teacher or pupil is no longer a risk to the school community. The statute makes no provision for compensation of the individual. Family illness days are negotiable, and the use of this law could trigger the right to seek such compensation. See the FAQ in the compensation section for more about the use of sick leave and unpaid family leave.

**4. (NEW) What if my district tells me I may have been exposed to COVID-19 and should self-quarantine?**

**Response:** The district cannot force you to self-quarantine, but you should follow and comply with the directions of the CDC, the Department of Health (“DOH”), the local board of health, and/or your personal physician and self-quarantine if that is what the agencies and/or your physician recommends. See the question in the compensation section regarding sick and family leave provisions for questions about compensation. Visit this link for a directory for the local boards of health: <https://www.naccho.org/membership/lhd-directory?searchType=standard&lhd-state=NJ#card-filter>.

**5. (UPDATED) What privacy issues may arise in connection with individuals diagnosed with, or suspected of having, COVID-19?**

**Response:** The district has an obligation to notify the local board of health of any positive cases or potential exposure. The State Epidemiologist, Dr. Christine Tan, stated at the press conference on March 17, 2020, that employers should notify and follow the direction of their respective local boards of health when it comes to notifying employees about possible exposure through contact with other employees. The local boards of health would likely direct districts to notify individuals of potential exposure at particular locations, but not reveal individual identities.

The Family Educational Rights and Privacy Act (“FERPA”) prohibits the disclosure of students’ personally identifiable information and education records without prior written consent of parents or eligible students. This includes immunization history and health records.

However, an exception to the consent requirement exists in connection with an emergency. During an emergency, disclosure of student records is permitted “if the knowledge of such information is necessary to protect the health or safety of the student or other persons[.]”

20 U.S.C. §1232g(b)(1)(I). In such scenarios, disclosure of student health information by school districts may be made in limited circumstances, e.g., to law enforcement, public health officials, medical personnel, and parents.

Further information on the application of FERPA during the COVID-19 outbreak is available from the United States Department of Education at: [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions\\_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions_0.pdf).

Regarding HIPPA, a “covered entity” under that law may disclose protected health information without authorization if necessary to treat, or coordinate treatment of a patient. A school district is not considered a “covered entity.” Covered entities consist of healthcare providers and health care plans. Although a school district is not a covered entity, members should be aware that covered entities may disclose protected information to the fullest extent necessary to “prevent or lessen a serious and imminent threat to [public] health or safety.” 45 CFR 164.512(j)(1)(i)(a).

**6. (UPDATED) What should I do if my school requires employees to sign in via hand-scanning?**

**Response:** With schools currently closed, this may only be an issue for those essential employees still reporting. However, if you are deemed “essential,” are reporting and your school requires employees to sign in via hand-scanning, alternate means for faculty and staff to check in to the work place, such as presenting a government-issued photo I.D., should be implemented. In the event that checking in via photo I.D. cannot be accommodated, the district should provide ample hand sanitizer containing at least 60-95% alcohol in connection with the check-in process.

**Compensation**

**7. In the event that school closure coincides with days in which no instruction occurs, or, conversely, in the case of remote learning, creates a larger workload, how will I be compensated?**

**Response:** Entitlement to compensation would depend upon the terms of the local collective bargaining agreement and applicable past practice. In addition, the impact of the closure and the change in school calendar would be negotiable. See Piscataway Education Association. v. Board of Education of Piscataway, 307 N.J. Super 263 (App. Div. 1998). Thus, any issues which are not covered by the collective bargaining agreement or past practice, and which implicate impact would be negotiable.

Conversely, in Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192 (2016), the Supreme Court, in describing Borough of Keyport v. International Union of Operating Engineers, 222 N.J. 314 (2014), noted that a state of emergency characterized

by temporary emergency regulations would increase the likelihood that a requirement to negotiate over otherwise negotiable issues would interfere with governmental policy, thus rendering such issues non-negotiable under In re Local 195, IFPTE v. State, 88 N.J. 393, 443 (1982). Under that analysis, the district would have a reasonable argument that otherwise-negotiable issues pertaining to remote instruction, quarantine, or compulsory leave are non-negotiable.

As districts cope with COVID-19, NJEA will advocate to the fullest possible extent to ensure that its members are treated fairly.

## 8. What about sick leave and family leave?

**Response:** If you are tenured or under contract, you may use sick days or be granted a leave. However, there exists no right to absence with pay beyond your usual sick leave. N.J.S.A. 18A:16-4. Possible areas for negotiation may include the providing of additional sick days in cases of forced exclusion, but such days are not required under the law. Since COVID-19 would be treated the same as any other illness: available sick days would be used, requests for extended leaves, with or without pay, beyond available days could be made and, depending upon local rules, sick leave bank day usage could be sought in cases involving extended absence.

The Legislature is considering a bill addressing time off work in connection with infectious diseases. Unfortunately, the text of this bill is not yet available at the time of this writing, so the scope and terms of the bill are unknown.

Regarding the Family Medical Leave Act, (“FMLA”) and New Jersey Family Leave Act (“NJFLA”), those laws may provide for unpaid leave in the event you have exhausted your paid sick leave. COVID-19 would likely qualify as a “serious health condition” entitling you to utilize any FMLA leave for which you are eligible to care for yourself or a family member diagnosed with COVID-19. NJFLA is not available for your own serious illness, but only to care for a family member. Note that these leave laws may not be invoked solely as a preventive measure to avoid exposure to COVID-19. However, medical documentation of a heightened risk of susceptibility to the virus owing to a pre-existing underlying medical condition may present an exception to this rule, albeit one subject to board review and approval. Further, medical documentation would also be required to be presented to the board even in the event of a diagnosis. The U.S. Department of Labor, Wage and Hour Division, which administers the FMLA, has issued guidance located here: <https://www.dol.gov/agencies/whd/fmla/pandemic>.

Notably, pursuant to the Governor’s Executive Order 103, the State’s Civil Service Commission recently issued revised sick leave policies affecting civil service state employees. Although the State’s revised policies apply to state workers, not boards of education, they offer useful guidance. NJEA recommends that you urge your local union representatives to engage with district leadership to advocate for the adoption and

implementation, where feasible, of emergency measures to reflect those recently promulgated by the State. Not all of these measures may be feasible in a classroom setting; however, by way of guidance, state employees are now subject to the following:

- Implement or modify flexible scheduling
- Adjust work schedules without prior approval.
- If an employee is (i) diagnosed with COVID-19, (ii) directed by a medical professional or government agency to self-isolate or quarantine due to suspicion of exposure to or diagnosis with COVID-19, and/or (iii) undergoing a period of self-quarantine or isolation pursuant to public health assessment recommendations, then the employee will not be required to utilize accumulated leave time if they provide documentation verifying the same within three work days of the initial absence.
- If an absence is caused by the need to care for an immediate family member who has been diagnosed, directed by appropriate authorities to self-isolate, or is undergoing self-quarantine, then the employee will not be required to utilize accumulated leave time if they provide documentation verifying the same within three work days of the initial absence.
- Employees who have been exposed to or diagnosed with the COVID-19 virus will not be permitted to enter the workplace until they are either medically cleared, or until the expiration of the recommended 14-day period of quarantine from the point of last exposure.
- Until further notice, employees who had previously been subjected to documentation requirements under their Appointing Authority's standard operating procedures due to excessive absenteeism or abuse of sick leave shall not be disciplined for future absences that occur as a result of their being suspected of or diagnosed with the COVID-19 virus or having to be absent to care for a family member impacted by the virus.
- Employees who are not under suspicion of having been exposed to the virus or diagnosed with the virus but wish to stay home with a child due to the closure of a preschool program, elementary or secondary school, or child care center related to COVID-19, will be required to provide documentation verifying the closing.
- If a work from home arrangement cannot be accommodated, the employee will not be required to use accumulated leave during the period of the COVID-19-related closure.
- If the employee is staying home to care for a child who is under suspicion of having the virus or has been diagnosed with COVID-19, the employee will be required to

provide documentation from a medical professional or government agency in order for the leave time procedures outlined above to apply.

**9. (UPDATED) What about compensation for hourly workers and stipend positions now that the schools have closed and/or moved to remote instruction?**

**Response:** Compensation for hourly workers will depend on the terms of each collective agreement. Although the Fair Labor Standards Act (“FLSA”) covers hourly employees, the law does not require employers to provide compensation when a work site is shut down through no fault of the employer.

There is a possibility that hourly workers who are unable to work during the school closures would be eligible for unemployment benefits in certain situations. According to the Department of Labor and Workforce Development (DOLWD), individuals who are out of work because their employer with voluntary closed or was ordered to close will be eligible for unemployment benefits. DOLWD has also stated that workers’ whose hours have been reduced would be eligible for reduced benefits. DOLWD is advising individuals to review their website and to apply for benefits online for quicker processing, as they are experiencing record numbers of applications. See <https://www.nj.gov/labor/worker-protections/earnedsick/covid.shtml>.

While school boards most likely would not be required to compensate hourly workers for days not worked on account of an emergency shutdown, NJEA will advocate to the fullest possible extent to ensure fair compensation in the event of school closure. Possibilities include advocating for hourly workers to be included in any district plans for remote instruction, so that they can continue to work and get paid. Additionally, the NJEA is advocating for the inclusion of a provision that would provide for pay for public school employees during school closures and/or remote instruction in pending legislation. It is NJEA’s position that all districts have budgeted for all salaries and benefits for the 2019-20 school year and should therefore issue payroll on a regular basis.

As for stipend positions, such as coaching and other extracurricular positions, the extent of cancellations of such activities, and for how long, remains to be seen. Members should be advised to work (or not work) in those positions as directed. Payment for that work will depend upon the particular contractual terms, and any issues with payment can be addressed in the grievance arbitration and any other available forums once more is known. If the activities or a portion of the activities do not take place, the district may have defense to a payment claim, but this is a novel question without any presently controlling authority, and again may depend upon the particular contractual provisions.

## Reporting to Work

**10. (UPDATED) What if I am called into work, even though students are dismissed/other staff does not have to report or is working remotely/my children's schools are closed? Who is an essential employee that the district can require to report to work?**

**Response:** Health and safety is our first priority – see the responses to the FAQ speaking to sick and family leave in the compensation section if reluctance to report stems from a diagnosis, heightened risk of susceptibility to COVID-19, or order from a public health official to quarantine, or arises from the need to act as a caregiver for a family member in one of those situations.

EO 104 states: “The Commissioner of the Department of Education (“DOE”), in consultation with the Commissioner of DOH, shall be authorized to permit schools to remain open on a limited basis for the provision of food or other essential, non-educational services, or for educational or child care services if needed in emergency situations after consultation with the Commissioner of DOH.” Employees should only be called to report to school buildings consistent with EO 104. It remains to be seen what in emergency situations the Commissioners of Education and Health will allow educational or child care services to be provided in schools.

The NJDOE has issued the following statement regarding essential employees: “When developing and updating its emergency preparedness plan, each district will need to consider their specific circumstances to determine which personnel would be considered essential and need to perform some duties during a closure. It is likely that certain staff would be needed in most districts, such as the chief school administrator, to oversee and coordinate operations; the school business administrator, to maintain business office operations; information technology staff, to assist staff using remote access and to implement any online instruction; staff involved in the preparation or delivery of food; and custodial and maintenance staff, to provide access to district facilities, and to clean and sanitize buildings *as needed*.” (emphasis added).

Other than the above statements in EO 104 and from the NJDOE, we have located no New Jersey school law mandates defining who are considered “essential employees” that the districts may require to report to work. The Commissioner of Education has stated that they are working on developing such a definition. The Commissioner has also stated that they will begin requiring the districts to submit to the NJDOE a list of employees they have deemed essential, along with a rationale for that designation. The NJDOE will review those submissions. In the meantime, if you believe non-essential staff is being asked to report to work, contact your UniServ field representative. The Commissioner has stated that instances of non-essential staff being called to report to work should be reported to county superintendents.

Despite the above, there is PERC precedent supporting the principle that when a state of emergency exists, employers may deploy their workforces in the manner they deem best to respond to that emergency. If there is a contractual obligation to work, the employer has the prerogative to require an employee to be present. Thus, if members are directed to report, they are susceptible to disciplinary action if they fail to report.

That being said, the association should advocate that as a matter of health and safety, only truly essential staff, such as the staff needed to carry out the purposes identified in EO 104 and staff identified in the NJDOE guidance, be required to report (for example, food service, IT, custodians performing essential work such as sanitizing). There is a possibility for an argument that if the assignment affects an imminent threat to health and safety, attendance might not be required, or it would be a negotiable topic, though this exact situation is untested. Practical considerations, such as public, political, and media pressure may therefore be more effective than legal arguments in this regard.

**11. (NEW) Can my district require food service staff to deliver meals to students in need? If so, what are my rights and liabilities?**

**Response:** Executive Order 104 ensures that “all students will continue to have access to a quality education, in addition to school meals that are provided or subsidized for students from low-income families.” Further, Executive Order 104 states that no district may enforce any rule or regulation that conflicts in any way with the Executive Order or the achievement of its provisions.

Pursuant to N.J.A.C. 6A:23A, travel for district business in the form of food delivery under Executive Order 104 would likely qualify as an “emergent circumstance.” Such travel may be effectuated by either a district vehicle, or personal vehicle. In the case of the latter, reimbursement for expenses related to the use of a privately-owned vehicle, while negotiable, must conform to the limits set forth in N.J.A.C. 6A:23A and N.J.S.A. 18A:11-12.

In the event that an injury occurs in connection with an off-premises district assignment, you will be covered by workman’s compensation only to the extent you incur injury within the scope of your assigned work-related duties. This may include travel, where applicable. In addition, the Commissioner of Education has held that a board may, when an individual’s own auto is involved in an accident, require the individual to first look to his own insurance carrier for coverage. See Lottie Bernstein v. Woodbridge Board of Ed 1980 SLD (decided August 25, 1980).

If you are directed to deliver meals to students in need in a manner that requires you to work additional hours beyond those normally assigned in a school day, your local should seek to negotiate additional compensation.

**12. (NEW) What if I am scheduled to be returning from a leave of absence?**

**Response:** Some members have been out of work on leaves of absence and are scheduled to return to work at this time, or sometime in the recent future. If their return date has been previously approved by the district, and in the cases of medical leave, the member is cleared medically to return to work, then they should return to work. If they are in a position that is working remotely, they should contact the district to be set up to begin that remote work, and they should be returned to payroll. Members in this situation who are not permitted to return to work should contact their UniServ field representative. If they are in a position that requires reporting to a school building, see the FAQ regarding employees being called to report in this section. If they are in a position that is neither called to report or directed to work remotely, see the FAQ regarding hourly workers in the Compensation section.

**13. (NEW) What if I want to return from my leave of absence earlier than planned?**

**Response:** For leave dates that have already been approved by the board, the board can decide to permit you to return from your leave earlier than anticipated (assuming medical clearance to work in the event it is a medical leave), but it does not have to allow you to return prior to your return date.

**14. (NEW) Will I be assigned to conduct a home visit to perform occupational or physical therapy to students in need of such services during the closure?**

**Response:** On March 17, 2020, the New Jersey Department of Education issued revised guidance on the delivery of educational and other services during the closure. A district's emergency plan must ensure that continuity of instruction is provided to all categories of students, including those with disabilities, "to the maximum extent possible." The DOE recommends that districts develop "[a]ccommodations and multiple means of conducting assignments" for students with disabilities. The DOE acknowledges that such programming may take the form of targeted compensatory instruction after schools reopen.

In addition, the Executive Order states that, in order to continue the same level of education during the closure, local districts, working with the Department of Education, "shall have the authority and discretion to determine home instruction arrangements as appropriate on a case-by-case basis to ensure all students are provided with appropriate home instruction, taking into account all relevant constitutional and statutory obligations."

In light of guidance from the DOE and Executive Order, if are assigned to conduct home instruction or home visits deemed necessary to preserve the continuity of educational services during school closures, and you refuse to comply, you may be subject to discipline.

**15. (NEW) Can a night-shift custodian (or other personnel) be required to travel between 8pm and 5am to work a night shift despite the Executive Order’s direction prohibiting travel during these times?**

**Response:** Executive Order 104 requires non-essential businesses to close between the hours of 8:00pm and 5:00am. However, private citizens are merely “encouraged”—not ordered—to refrain from travel during those times. Thus, work-related travel during 8pm and 5am is permitted under the current Executive Order. Moreover, given the need for vigilant sanitizing and decontamination during the outbreak, custodial services are critical. It is therefore unlikely that members traveling to perform custodial duties during curfew hours would encounter adverse action by law enforcement. Consequently, a board may require critical staff to travel to schools during curfew hours to perform job duties during the closure. In addition, since school closures now permit custodial duties to be completed during daytime hours, in light of the current curfew, it may be worthwhile to request that, until schools resume normal operations, custodial duties may be performed during daytime hours. For further discussion of essential versus non-essential employees in a public school setting, please refer to the first question in this reporting to work section, above.

**16. (NEW) Can personnel such as guidance counselors and therapists be required to report to school during the closure? What about home visits?**

**Response:** Executive Order 104 states that schools will be permitted to “remain open on a limited basis for the provision of food or other essential, non-educational services, or for educational or child care services if needed in emergency situations after consultation with the Commissioner of [the Department of Health].” Thus, if the board, together with the Department of Health, determine that therapy or counseling services constitute essential non-educational services, or educational services “needed in emergency situations,” these personnel may be required to report to school premises. As of yet, the Department of Health has issued no guidance as to which personnel might satisfy the requirement of the Executive Order. NJEA will closely monitor developments as to this issue.

**17. (NEW) Can staff be required to work during the scheduled spring break?**

**Response:** Yes. With certain limited exceptions not applicable to this question, the setting of a school calendar is the district’s managerial prerogative. The district is permitted to unilaterally change the school calendar, including cancelling spring break. The impact of a change in calendar, such as the impact on child care or scheduled vacations, is negotiable. Additionally, if the addition of work days during spring break exceeds the number of work days set in the collective bargaining agreement, there may be an entitlement to additional compensation, depending upon the contractual language and the circumstances.

## **Remote Instruction**

**18. (UPDATED) Will remote instruction count toward the 180-day teaching requirement?**

**Response:** The New Jersey Department of Education (“NJDOE”) has stated that any day in which a district affected by a health-related school closure provides home instruction shall count as a day in which the board of education has provided public school facilities toward its compliance with the 180-day requirement in accordance with N.J.S.A. 18A:7F-9. The provision of home instruction services should continue to be guided by N.J.A.C. 6A:16-10.1 and the district’s emergency closure school preparedness plan. The Commissioner of Education has relied on this provision to state that he has the discretion to waive the 180-day requirement.

As to virtual or remote instruction specifically, a bill has been proposed in the Legislature that would count such instruction towards the 180-day requirement if the instructional program is approved by the Commissioner of Education. That bill passed the Assembly on Monday, March 16, and will be before the Senate on Thursday, March 19th.

**19. In the event I am assigned to teach remotely, is the district responsible to furnish and maintain the requisite technology?**

**Response:** The district should bear responsibility to ensure that students and faculty are equipped with all necessary platforms, programs, software, hardware and I.T. support to effectuate remote learning. If staff were required to obtain equipment to provide distance learning, in our opinion compensation for the costs of the equipment would be negotiable.

**20. Can educators be required to video tape or otherwise record lessons to be transmitted to students for viewing at home?**

**Response:** If members are directed to record lessons, they should be instructed to follow directives, or they will risk disciplinary action. It is unlikely that educators have a 4<sup>th</sup> Amendment based reasonable expectation of privacy in recorded lessons, as such a right is not supported under current case law for in-person class instruction. Further, we are unaware of any legal basis for an educator to assert ownership over the lessons unless there is a specific, written agreement to that effect. Under the general rule regarding copyrighted works created in the scope of employment, known as the “works for hire” doctrine, the employer owns the copyrighted work, unless there is a written agreement to the contrary.

Additionally, see the FAQ in the compensation for a discussion of the negotiability of increased workloads.

**21. How should I contact students during virtual instruction/school closures?**

**Response:** Methods of contact with students should be delineated in the emergency preparedness plans created by the districts. Members should compare that plan to the district policy or policies regarding contact with students and seek clarification with the district where they differ. Members should be conscious to use methods of contact that insulate themselves from any appearance of inappropriate contracts with students, such as contacting students in groups as oppose to individually, contacting them using methods that are easily monitored by parents or guardians (such as speaker phone or conferencing methods that parents or guardians would be able to listen in on), or other methods approved by the district. Face timing, texting, one on one communication, and use of personal student numbers should be avoided in favor of using house or parent/guardian numbers and district approved methods of contact.

If video conferencing or lesson recording is part of the remote instructional plan, remember to be aware of your attire and surroundings while visible by others

**22. (NEW) What are my responsibilities while working remotely?**

**Response:** You should refer to your district’s plan. While you are working remotely, remember that you are on work time, and should be working. Even if your social media is not public, it is still likely viewable to coworkers and others.

**23. (NEW) What concerns, such as privacy, might arise in connection with remote access?**

**Response:** The burden to secure the necessary hardware and software to facilitate secure, remote access to work computers and emails lies with the district. If you will be utilizing the district’s hardware and software, be aware that, although the access provided by the district must be secure, you have little to no expectation of privacy while utilizing hardware and software provided and owned by the district. This pertains regardless of whether the use is work-related or personal.

If you are directed to use your own computer or devices to work remotely, compensation may be negotiable for use of those devices and your internet services. Additionally, members should be cautioned regarding their use of those devices. Commingling both work and private uses on the same devices arguably lowers an individual’s privacy interests in those devices. To guard against that, members should be sure to keep personal and work use as separate as possible — by continuing to use separate email accounts, avoiding use of personal accounts during work time, refraining from private use while logged onto district servers, etc.

**24. (NEW) What if I am working remotely and want to protect my personal contact information?**

**Response:** You should refer to your district’s plans for remote instruction, as well as its’ usual policies, for the approved methods and any restrictions for contacting students and parents. If using your personal phone number, technology exists to mask or set up alternative phone numbers. However, you should check with the district’s plan and policies before taking these measures and seek clarification from the district if you are unsure whether use of these methods is permitted

**25. (NEW) Can students receive services such as speech-language services, occupational therapy, and counseling through telepractice?**

**Response:** Not typically. While it was permitted for a time, such permission was rescinded effective September 1, 2019. However, it may be permitted during these extreme circumstances, as both state and federal guidance would seem to permit districts to attempt to provide such services in this situation through a remote modality if appropriate to the student’s needs. When schools reopen, compensatory services as determined appropriate by the IEP team would need to be delivered to compensate for inadequate or missed services while the schools are closed to students.

### Observations & Assessments

**26. (UPDATED) What is the impact on State assessment and accountability systems, i.e. compliance with ESSA requirements for K-12 schools?**

**Response:** This is not intended to be an exhaustive response. Rather, this is to notify you that the U.S. Department of Education (“U.S. DOE”) has issued guidance, available at <https://oese.ed.gov/files/2020/03/COVID-19-OESE-FINAL-3.12.20.pdf>. In summary, the federal DOE has stated that it will consider a one-year waiver for districts on a targeted basis for the following:

- For assessment requirements, possible waivers for districts whose entire testing windows are impacted by school closures. Districts are encouraged to be flexible with their testing windows by adjusting or extending them.
- For requirements regarding school accountability under EDEA where districts/schools are identified as in need of comprehensive or targeted support and improvement, possible waivers for districts if the school is closed for a significant portion of the year.
- For 95% assessment participation rate requirement, possible waivers for districts who can administer assessment but require flexibility in accountability systems.
- For accountability system requirements, possible waivers for districts to exclude chronic absenteeism.

NJDOE has also issued FAQs which state that they are working with the U.S. DOE to develop guidance for long-term testing interruptions, investigating the possibility of extending testing windows, and working with local school districts to address individual concerns. Those FAQs are available at [https://www.state.nj.us/education/topics/COVID19%20Frequently%20Asked%20Questions%20\(FAQ\)%20Related%20to%20School%20Emergency%20Preparedness%20Plans.pdf](https://www.state.nj.us/education/topics/COVID19%20Frequently%20Asked%20Questions%20(FAQ)%20Related%20to%20School%20Emergency%20Preparedness%20Plans.pdf). We expect the NJDOE to issue updated guidance on testing and assessments, so keep an eye on their website.

The NJEA is actively advocating for the suspension of the statewide assessment system requirements for the 2019-20 school year.

**27. (UPDATED) How will school closures affect teacher observations and post-observation conferences?**

**Response:** We expect the Commissioner of Education to issue guidance as early as Monday, March 23<sup>rd</sup> addressing teacher evaluation questions. Check the NJDOE’s website for the most up to date information.

Due the inability of district personnel to conduct in-class observations during extended school closures, it is likely that the Commissioner of Education will relax the requirements in connection with classroom observations. Currently, however, the Commissioner has issued no such guidance. NJEA will continue to monitor guidance from the Commissioner and inform membership accordingly.

If you underwent an observation shortly before school closures went into effect and remain within the 10-day period to conduct a post-observation conference, you may, if under tenure, elect to conduct a post-observation conference remotely. Although non-tenured staff are not afforded the same option, in light of the COVID-19 outbreak, it is possible that districts may relax this requirement and conduct post-observation conferences remotely. NJEA will closely monitor any guidance from the Commissioner on this subject and advise membership in due course. In sum, until the Commissioner advises otherwise, the rules and regulations surrounding teacher observations remain in effect.

### Miscellaneous

**28. Will school districts provide instruction for children with disabilities?**

**Response:** The United States Department of Education (“U.S. DOE”) has made clear that in the event a school district implements remote learning or other alternative means of delivering education due to emergency school closures, school districts must ensure that students with disabilities, special needs, and unique learning requirements receive equal access to the instruction, if any, provided to the general student population. This includes remote learning as provided to other students during closure. It also includes, in the case of home-bound students, home-bound learning. However, if no instruction is provided to the

general student population during a closure or emergency event, the district is under no obligation to provide instruction to students with special needs. All services must be consistent with a student's IEP, and IEP teams must consider compensatory services when the student returns to school.

For additional guidance, please refer to the U.S. DOE guidance available at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>.

The NJDOE has stated, in its FAQs, that districts' plans must include home instruction and services consistent with all students with disabilities' IEPs, to the extent possible, including preschoolers with disabilities if the district has a state funded program. Districts must offer special education services to the extent possible, and IEP teams may need to consider compensatory services and adjustments to IEPs when students return to school.

**29. (NEW) If an individual is non-renewed, how are Donaldson hearing timelines and requirements affected?**

**Response:** When an individual is non-renewed, the case law known as *Donaldson* gives that individual the right to request a statement of reasons and an opportunity to appear before the board, if they elect to. As stated in response to the question regarding holding board meetings, see the next question, boards may still hold their meetings electronically provided they comply with OPMA requirements of public notice and accessibility. Therefore, they could hold *Donaldson* hearings electronically. There is nothing currently suspending the *Donaldson* timelines, but given the extreme circumstances, it would not be surprising for a court or other authority to excuse relaxation of these timelines.

**30. (NEW) Can local boards of education still hold their regular meetings?**

**Response:** Executive Order No. 104 provides that all gatherings in the state shall be limited to 50 of people or fewer. It is a disorderly person's offense to contravene that order, though police and prosecutorial discretion will be exercised.

It is likely that if Boards do hold their meetings, they will do so by providing the public with streaming options so that they can limit the number of people gathered to under 50 while still complying with the Open Public Meetings Act ("OPMA"). If this is the case, the Boards must provide proper notice of the meeting and provide for public access and ability to comment through the streaming service. The Department of Community Affairs has issued guidance which can be found here: <https://www.nj.gov/govconnect/news/general/#1> and the New Jersey School Boards has published its opinion on <https://www.njsba.org>.

It is likely boards will hold meetings as they have not received an extension on the timelines to submit their budgets.

**31. Does the Civil Service Commission’s guidance and FAQs for state employees apply to public school employees?**

**Response:** No. The Civil Service Commissioner’s guidance and FAQ documents do *not* apply to public school employees. However, that guidance may be used in your negotiations and conversations with school districts. Helpful provisions regarding sick leave are discussed above in the response to the question addressing sick leave in the compensation section of this guidance. The full CSC guidance and FAQ is available here: <https://www.state.nj.us/csc/employees/covid.html>

**32. (NEW) The CDC and the White House have both recommended that there be no gatherings over 10 people. Does this override New Jersey’s 50-person gathering rule?**

**Response:** No. This is guidance, adherence to which is recommended but voluntary; it does not preempt the Governor’s Executive Order.

**33. (NEW) Where can I access a school district’s emergency response plan and information about a district’s remote instruction plans?**

**Response:** All New Jersey public schools have been advised by the NJDOE that its’ emergency response plan must be posted on its’ website so that it is accessible to staff and parents. If one is not posted, please contact your local association leadership, who will in turn contact your NJEA UniServ field representative.

The outbreak of COVID-19 is rapidly evolving. Recommendations may change and develop frequently. Therefore, students, parents, faculty and staff are encouraged to monitor updates by the CDC and the Department of Education as well as future guidance from the NJEA.

Additional resources on COVID-19 are available from the United States Department of Education at: <https://www.ed.gov/coronavirus>.

Updated guidance from the New Jersey Department of Education was issued on March 17, 2020: [https://www.nj.gov/education/topics/COVID19%20Frequently%20Asked%20Questions%20\(FAQ\)%20Related%20to%20School%20Emergency%20Preparedness%20Plans.pdf](https://www.nj.gov/education/topics/COVID19%20Frequently%20Asked%20Questions%20(FAQ)%20Related%20to%20School%20Emergency%20Preparedness%20Plans.pdf)