MT-PEC
Frequently Asked Questions (FAQ)

Fall 2020 Guidance for
K-12 Public Schools Re-Opening

September 1, 2020

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Introduction

The educational organizations who are part of MT-PEC have developed and distributed this FAQ to assist local school boards, administrators, business officials, and staff as they reopen schools for the 2020-2021 school year in the midst of the COVID-19 Pandemic.

This publication will be regularly updated as the MT-PEC organizations continue to field questions from their respective memberships. If you need legal advice on a specific matter you are addressing, please follow-up with district counsel on assistance/legal advice on specific legal matters.

I. GOVERNOR/COUNTY HEALTH DIRECTIVES/ORDERS

TOPIC: REQUIRED COMPLIANCE BY DISTRICTS AND SCHOOL OFFICIALS

Q1: Is our District required to comply with the Governor's Directives and/or County Health Directives/Orders?

A1: Yes. Montana's Public Schools are required to comply with directives from the Governor's Office and/or directives/orders issued by County Health Officials.

While some individuals are contending that the Governor's Mask Requirement is unconstitutional, until such time as a Court would make such a ruling, schools are required to comply with both the Governor's Directives and/or County Health Directives/Orders. In reference to the constitutionality of the Governor's powers under Title 10, MCA, the Montana Supreme Court has ruled as follows:

"A statute is presumed constitutional unless it "conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." Gazelka v. St. Peter's Hosp., 2018 MT 152, ¶ 6, 392 Mont. 1, 420 P.3d 528 (quoting Powell v. State Comp. Ins. Fund, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of the statute bears the burden of proof. Mont. Cannabis Indus. Ass'n v. State, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. If any doubt exists, it must be resolved in favor of the statute. Mont. Cannabis Indus. Ass'n, ¶ 12."

The U.S. Supreme Court's decision in South Bay United Pentecostal Church v. California also suggests the Court will give substantial latitude to the Governor's emergency powers during a pandemic like this.

"The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. Currently, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency . . .

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905). When those officials "undertake [ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Marshall v. United States, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 545 (1985)."

In reference to County Health Boards and County Officials, here are the statutory powers and duties of local health officers and local boards of health:

*50-2-118. **Powers and duties of local health officers**. In order to carry out the purpose of the public health system, in collaboration with federal, state, and local partners, local health officers or their authorized representatives shall:*
(1) make inspections for conditions of public health importance and issue written orders for compliance or for correction, destruction, or removal of the condition;
(2) take steps to limit contact between people in order to protect the public health from imminent threats, including but not limited to ordering the closure of buildings or facilities where people congregate and canceling events;
(3) report communicable diseases to the department as required by rule;
(4) establish and maintain quarantine and isolation measures as adopted by the local board of health; and
(5) pursue action with the appropriate court if this chapter or rules adopted by the local board or department under this chapter are violated.

Section 50-2-116, MCA provides the following authority for county departments of health:

*50-2-116. **Powers and duties of local boards of health**. (1) In order to carry out the purposes of the public health system, in collaboration with federal, state, and local partners, each local board of health shall:*
(a) appoint and fix the salary of a local health officer who is:
(i) a physician;
(ii) a person with a master's degree in public health; or
(iii) a person with equivalent education and experience, as determined by the department;
(b) elect a presiding officer and other necessary officers;
(c) employ qualified staff;
(d) adopt bylaws to govern meetings;
(e) hold regular meetings at least quarterly and hold special meetings as necessary;
(f) identify, assess, prevent, and ameliorate conditions of public health importance through:
(i) epidemiological tracking and investigation;
(ii) screening and testing;
(iii) isolation and quarantine measures;
(iv) diagnosis, treatment, and case management;
(v) abatement of public health nuisances;
(vi) inspections;
(vii) collecting and maintaining health information;
(viii) education and training of health professionals; or
(ix) other public health measures as allowed by law;
(g) protect the public from the introduction and spread of communicable disease or other conditions of public health importance, including through actions to ensure the removal of filth or other contaminants that might cause disease or adversely affect public health;
(h) supervise or make inspections for conditions of public health importance and issue written orders for compliance or for correction, destruction, or removal of the conditions;
(i) bring and pursue actions and issue orders necessary to abate, restrain, or prosecute the violation of public health laws, rules, and local regulations;
(j) identify to the department an administrative liaison for public health. The liaison must be the local health officer in jurisdictions that employ a full-time local health officer. In jurisdictions that do not employ a full-time local health officer, the liaison must be the highest-ranking public health professional employed by the jurisdiction.

(k) subject to the provisions of 50-2-130, adopt necessary regulations that are not less stringent than state standards for the control and disposal of sewage from private and public buildings and facilities that are not regulated by Title 75, chapter 6, or Title 76, chapter 4. The regulations must describe standards for granting variances from the minimum requirements that are identical to standards promulgated by the board of environmental review and must provide for appeal of variance decisions to the department as required by 75-5-305. If the local board of health regulates or permits water well drilling, the regulations must prohibit the drilling of a well if the well isolation zone, as defined in 76-4-102, encroaches onto adjacent private property without the authorization of the private property owner.

(2) Local boards of health may:

(a) accept and spend funds received from a federal agency, the state, a school district, or other persons or entities;

(b) adopt necessary fees to administer regulations for the control and disposal of sewage from private and public buildings and facilities;

(c) adopt regulations that do not conflict with 50-50-126 or rules adopted by the department:

(i) for the control of communicable diseases;

(ii) for the removal of filth that might cause disease or adversely affect public health;

(iii) subject to the provisions of 50-2-130, for sanitation in public and private buildings and facilities that affects public health and for the maintenance of sewage treatment systems that do not discharge effluent directly into state water and that are not required to have an operating permit as required by rules adopted under 75-5-401;

(iv) subject to the provisions of 50-2-130 and Title 50, chapter 48, for tattooing and body-piercing establishments and that are not less stringent than state standards for tattooing and body-piercing establishments;

(v) for the establishment of institutional controls that have been selected or approved by the:

(A) United States environmental protection agency as part of a remedy for a facility under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, et seq.; or

(B) department of environmental quality as part of a remedy for a facility under the Montana Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7; and

(vi) to implement the public health laws; and

(d) promote cooperation and formal collaborative agreements between the local board of health and tribes, tribal organizations, and the Indian health service regarding public health planning, priority setting, information and data sharing, reporting, resource allocation, service delivery, jurisdiction, and other matters addressed in this title.

(3) A local board of health may provide, implement, facilitate, or encourage other public health services and functions as considered reasonable and necessary.

Q2: What are the consequences to school districts, public school officials and local communities for non-compliance?

A2: There are significant consequences for any district, including its property taxpayers, as well as the strong potential of personal liability for trustees and staff without the protections of indemnification and defense should the district proceed in deliberate violation of the Governor's order regarding masks in public schools located in counties with four or more active cases of COVID. The following are some of the more significant potential outcomes:

1. A violation of an order issued pursuant to the Governor's powers during a declared emergency would likely be considered negligence per se. Pandemic coverage is virtually nonexistent in the market right now, so any expenses associated with defending a claim of negligence would be borne by the district out of its general fund.
2. If the plaintiff prevails, the cost of any judgement would be paid from the imposition of a non-voted levy on the district property taxpayers pursuant to section 2-9-316, MCA.
3. Individual trustees and staff could also be sued personally and would likely not be afforded the benefit of indemnification and defense pursuant to section 2-9-305, MCA, which excludes indemnification and defense in cases where the individual violated any provision of Title 45, Chapters 4 through 7.
4. The deliberate violation of the Governor's order would appear to meet the definition of section 45-7-401, MCA, official misconduct. That statute reads as follows:

   45-7-401. Official misconduct. *(1) A public servant commits the offense of official misconduct when in an official capacity the public servant commits any of the following acts:*
   (a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;
   (b) knowingly performs an act in an official capacity that the public servant knows is forbidden by law;
   (c) with the purpose to obtain a personal advantage or an advantage for another, performs an act in excess of the public servant's lawful authority;
   (d) solicits or knowingly accepts for the performance of any act a fee or reward that the public servant knows is not authorized by law; or
   *(e) knowingly conducts a meeting of a public agency in violation of **2-3-203**.*
   (2) A public servant convicted of the offense of official misconduct shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.
   (3) The district court has exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.
   (4) A public servant who has been charged as provided in subsection (3) may be suspended from office without pay pending final judgment. Upon final judgment of conviction, the public servant shall permanently forfeit the public servant's office. Upon acquittal, the public servant must be reinstated in office and must receive all backpay.
   (5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect an impeachment or removal.
5. Official misconduct as described above is a statutory basis for recall under section 2-16-603, MCA. It is also a crime as noted in section 45-7-401(2), MCA.

TOPIC: EXCEPTIONS TO GOVERNOR'S MASK MANDATE

Q3: What are the general exceptions to the Governor's July 15, 2020 Mask Directive?

A3: The Governor's Face Covering Directive applies to all K-12 Public Schools in counties with 4 or more active COVID-19 cases. Students, staff, volunteers, and visitors are not required to wear a mask or face shield under the following circumstances:

- children under the age of five. All children between the ages of two and four, however, are strongly encouraged to wear a face covering in accordance with the provisions of this Directive. Children under the age of two should not wear a face covering;
- persons consuming food or drinks in an establishment that offers food or drinks for sale;
- persons engaged in an activity that makes wearing a face covering impractical or unsafe, such as strenuous physical exercise or swimming;
- persons seeking to communicate with someone who is hearing impaired;
- persons giving a speech or engaging in an artistic, cultural, musical, or theatrical performance for an audience, provided the audience is separated by at least six feet of distance;
- persons temporarily removing their face covering for identification purposes;
- persons required to remove face coverings for the purpose of receiving medical evaluation, diagnosis, or treatment; or
- persons who have a medical condition precluding the safe wearing of a face covering.

For additional exceptions specific to K-12 public schools communicated to the MT-PEC partners by the Governor's Office and included in the Governor's FAQ, see Q&A#4 below.

TOPIC: ADDITIONAL EXCEPTIONS TO GOVERNOR'S FACE COVERING MANDATE SPECIFIC TO TEACHERS AND STUDENTS

Q4: Are there other exceptions to the Governor's Mask Requirement that are specific to teachers and students?

A4: Yes, in addition to the general exceptions for wearing a mask set out in Q&A#3 above, McCall Flynn, Governor Bullock's Policy Education Advisor has communicated the following additional exceptions to the Governor's July 15, 2020, Face Covering Directive. Some of these are also included in the Governor's FAQ:

1. **Teachers:**
    a. Teachers may remove their masks when providing instruction in the front of a classroom provided the teacher is separated by at least six feet from any student or others in the classroom.
    b. Teachers may remove their masks when they are in their respective classrooms and where there are no students present.
2. **Students:**
    a. Teachers may allow students to remove their masks or face shields if students are seated at their desks in a classroom and six feet of distance is strictly maintained between each of the students. If a teacher is working one on one with a student, both teacher and student must wear a mask or face shield. If students are working in small groups, the students must be wearing masks or face shields.
    b. Students may also remove their masks when giving a presentation and where socially distancing is maintained by at least six feet from others.
    c. Students may remove their masks when they are practicing or playing band wind instruments under the exceptions noted above in Q&A #3 which apply to: (1) persons engaged in an activity that makes wearing a face covering impractical or unsafe, such as strenuous physical exercise or swimming; and (2) persons giving a speech or engaging in an artistic, cultural, musical, or theatrical performance for an audience, provided the audience is separated by at least six feet of distance.

TOPIC: GATHERINGS OF LESS THAN 50 PEOPLE

Q5: How should school districts handle recess time?

A5: The Governor's July 15 Directive states that organized outdoor activities are defined as any gathering of 50 or more people for an activity or event organized or sponsored by a business or person, or that takes place on the property of a business or person. The Governor's August 12 Directive to include schools clarifies that school-related outdoor activities are considered organized outdoor activities. A gathering of less than 50 people would not be subject to the Directive, though we strongly encourage the use of face coverings when social distancing is not possible. In all other school settings, face coverings are required unless an exception from the July 15 Directive applies (*e.g.*, consuming food, strenuous physical activity, etc.).

TOPIC: COUNTY HEALTH DIRECTIVES/ORDERS

Q6: Can our County Health Department order or direct stricter mandates than the Governor's Office?

A6: The Governor's directive on face coverings specifically provides the county departments of health may impose more stringent requirements than those contained in the Governor's directive. The county departments of health have authority to issue formal written orders. Their verbal recommendations do not carry the weight of a formal directive. If you don't know whether the county department of health is giving you a recommendation or an order, it is best to ask them to produce the order.

TOPIC: COLLABORATION BETWEEN PUBLIC SCHOOLS AND COUNTY OFFICIALS

Q7: Do county officials have an obligation to provide information to a school district relating to a COVID-19 infection in their schools?

A7: Yes. A county that refuses to provide information to a school district relating to a COVID-19 infection in their schools is violating the spirit if not the letter of the law above and will likely incur significant liability for the county if, as a result of their failure to notify the school district, other students or staff become infected.

Montana's public schools have struggled for a long time in some areas of the state in gaining recognition of the importance of a seat at the table with other local governments and state agencies addressing the health and safety of children. We previously opened things up quite a bit in drafting and helping pass Senate Bill 348 (Senator Fred Thomas) in the 2013 Legislature as it relates to youth in need of supervision. We opened things up further in the 2019 Legislature in drafting and helping Senator Thomas pass Senate Bill 35. Among the sections of law we amended in that bill was section 52-2-211, MCA, which provides as follows. Note the language highlighted in yellow.

> **52-2-211. County or regional interdisciplinary child information and school safety team.** (1) The county commissioners of each county shall ensure the formation of a county or regional interdisciplinary child information and school safety team that includes representatives authorized by any of the following:
>
> (a) the youth court;
>
> (b) the county attorney;

(c) the department of public health and human services;
(d) the county superintendent of schools;
(e) the sheriff;
(f) the chief of any police force;
(g) any board of trustees of a public school district operating within the boundaries of the county; and
(h) the department of corrections.

(2) Officials under subsection (1) from one county may also cooperate with officials under subsection (1) from any other county to form regional interdisciplinary child information and school safety teams, in which case access to information under **41-5-215**(2) is authorized for all members of the regional team for each county participating in a regional team. The formation of regional teams must be formalized by written agreement between participating counties.

(3) The persons and agencies listed in subsection (1) or (2) may by majority vote allow the following persons to join the team:
(a) physicians, psychologists, psychiatrists, nurses, and other providers of medical and mental health care;
(b) entities operating private elementary and secondary schools;
(c) attorneys; and
(d) a person or entity that has or may have a legitimate interest in one or more children that the team will serve.

(4) (a) The members of the team or their designees may form one or more auxiliary teams for the purpose of providing service to a single child, a group of children, or children with a particular type of problem or for any other purpose.
(b) A member of an auxiliary team must be a person who has personal knowledge of or experience with the child or children in the member's respective field.

(5) The purpose of the team is to ensure the timely exchange and sharing of information that one or more team members may be able to use in serving a child in the course of their professions and occupations, including but not limited to abused or neglected children, delinquent youth, and youth in need of intervention, and of information relating to issues of school safety. Information regarding a child that a team member supplies to other team members or that is disseminated to a team member under **41-3-205** or **41-5-215**(2) may not be disseminated beyond the organizations or departments that have an authorized member on the team under this section.

(6) A written agreement may be created to provide for the rules under which the team will operate, the method by which information will be shared, distributed, and managed, and any other matters necessary to the purpose and functions of the team. Any agreement created may not limit access of any team member to information under **41-5-215**(2).

(7) An interdisciplinary child information and school safety team shall coordinate its efforts with interdisciplinary child protective teams as provided in **41-3-108** and youth placement committees as provided for in **41-5-121**.

(8) To the extent that the county or regional interdisciplinary child information and school safety team is involved in a proceeding that is held prior to adjudication of a youth in youth court, the team satisfies the requirements of 20 U.S.C. 1232g(b)(1)(E)(ii)(I) of the Family Educational Rights and Privacy Act of 1974. Montana school districts may release education records to the team. The officials and authorities to whom the information is disclosed may not disclose any information to any other party without the prior written consent of the parent or guardian of the student.

(9) The county superintendent of schools shall provide to the office of public instruction a current copy of any written agreement under this section no later than September 1. The office of public instruction shall report to the education interim committee no later than September 15 any county that has not provided a written agreement under this section.

County officials have a legal obligation to share information relating to a COVID-19 infection in their schools in accordance with the section of law above.

II. SCHOOL BOARD MEETINGS

TOPIC: FUNDAMENTAL BOARD ACTIONS FOR THE 2020-2021 SCHOOL YEAR

Q8: What important actions should a Board take heading into the 2020-2021 school year to maintain funding and comply with aggregate hours of instruction?

A8: Every Board should take the following actions:

1. Declare a continuing emergency through June 30, 2021. This ensures that a district that is unable to meet aggregate hours is not punished 2x the hourly rate of any shortfall in instruction that would otherwise occur under section 20-1-301(3), MCA. Instead, worst case scenario is a proportional reduction in funding for each hour short pursuant to section 20-9-805, MCA.
2. Have the Board authorized offsite instruction by motion. This is to ensure compliance with the generation of ANB from offsite instruction pursuant to section 20-9-311(11)(g), which provides that offsite instruction can be provided "with the approval of the trustees of the district."
    a. Offsite instruction is an authorized means of meeting the aggregate hours of instruction. Section 20-1-101(17), MCA, defines pupil instruction as "the conduct of organized instruction of pupils enrolled in public schools while under the supervision of a teacher."
    b. We are advising that this definition is flexible enough to allow for onsite or offsite instruction and that both are equally valid means of meeting the aggregate hours of instruction. See Section 20-9-311(10)(a), which allows inclusion of a student in ANB who is enrolled in a basic education program "through any combination of onsite or offsite instruction."
3. Have the Board authorize its staff to determine and declare proficiency of its students when appropriate. This is intended as a failsafe to 1, overcome any regulatory overreach claiming that aggregate hours cannot be met through offsite methods (which we have heard staff from both the Governor's office and from OPI voice over the years) and to ensure that positive results will generate ANB even in the case that aggregate hours are found to be short by regulators. Section 20-9-311(4)(d) provides that a school district can include a proficient student in its ANB count regardless of the aggregate hours provided, with ANB converted to an hourly equivalent based on the hours of instruction ordinarily provided for the content over which the student has demonstrated proficiency.

TOPIC: CONDUCTING VIRTUAL BOARD MEETINGS

Q9: If our Board meetings are held in person, can or should we allow everyone else to participate virtually?

A9: We do not recommend the Board meeting in person and requiring everyone else to participate virtually. If the Board meets in person and prevents members of the public (who comply with the District or County health directives) from observing and participating in the meeting (during public comment and before the Board takes final action on any items) in person, you could have a member of the public or press challenge the District on an open meeting violation. If the Board is only going to allow the public to participate virtually, the Board should also participate in the same manner to avoid the potential for an open meeting violation. On a related note, you can require that anyone wishing to attend your board meetings comply with District and/or County health directives. If the Board has adopted the 1900 Policy Series, in particular 1903, that policy envisions people complying with all health directives if

attending a meeting. It also provides that the district will accommodate vulnerable individuals and others who may not want to attend by providing for a means of electronic participation. The board can meet in person with the appropriate protocols and provide a method for remote participation for those who need or want it.

TOPIC: VIRTUAL EXECUTIVE SESSIONS

Q10: How does a District conduct executive sessions virtually?

A10: If the Board is conducting virtual meetings, precautions should be taken to ensure executive sessions are confidential. Under Montana law, Boards can only convene in a closed session under two limited circumstances: (1) When the Board Chair determines that an individual's privacy rights clearly outweigh the public's right to know; or (2) if the Board convenes in a closed session for litigation strategy to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

Boards will need to have one link that is available to the general public for commencing a board meeting, to take public comment on non-agenda items and to conduct all other business that does not trigger a closed session. The Board will need to have a separate link for the closed session that is provided only to those who will be part of a closed session. If you need guidance for conducting virtual executive sessions, the attorneys at MTSBA have developed a form for individual compliance with the confidential nature of executive sessions and can assist you.

III. DISTRICT OPERATIONS

TOPIC: RELEASES OF LIABILITY V. NOTICE OF RISKS

Q11: Can we require students, staff, parents, or visitors to sign a waiver releasing the District of liability if it is determined that they contracted COVID as a result of being present in a school building, attending a school function, participation in activities, etc.?

A11: No. The Montana Supreme Court has previously held in a series of cases that liability releases are invalid. The Court's holdings were issued on the grounds that a release of liability for a violation of law is against public policy and negligence is a violation of law. The statute in question is Section 28-2-702, MCA, which provides:

> *"All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law."*

See, e.g., *Miller v. Fallon County*, 222 Mont 214, 221, 721 P2d 342 (1986) (under statute, prospective release from liability for negligence is against the policy of the law and illegal, despite being a private contract between two persons without significant public implications).

Districts can, however, inform students, parents, staff and visitors of the risks associated with being present on school property and/or participating in school activities during the Pandemic. We have developed Form 1903F to assist districts in this regard. MTSBA has also adapted Form 1903F for parents and students to sign for participation in extra-curricular activities.

TOPIC: PLEXIGLASS DESK SHIELDS

Q12: Do plexiglass desk shields meet the Governor's Face Covering requirement?

A12: No. Information from the Governor's Office confirms that plexiglass shields between desks do not meet the requirement of the Governor's Mask Directive.

TOPIC: FACE COVERINGS ON BUSES

Q13: Does the Governor's mask mandate apply to school buses?

A13: Yes. The Governor's Directive states that it is applicable to indoor spaces open to the public and includes all modes of public transportation. So, masks are required on buses. For the general exceptions to the Governor's Face Covering Mandate, refer to Q&A#3.

TOPIC: TRANSPORTATION FUND

Q14: Is the maximum amount that we can increase the Transportation Fund budget restricted to the estimated increase to that fund shown on the District's SB 307 notice the Board approved and published in March of 2020?

A14: No. The notice last March was an estimate. If circumstances have changed since March necessitating a larger budget, districts can make that adjustment. You should be careful to document the changed conditions that require a higher amount than your estimate last March.

TOPIC: SCHOOL CALENDARS

Q15: What is the process for amending a school calendar that was previously approved by the Board of Trustees?

A15: Section 20-1-302, MCA, provides as follows: School term, day, and week. (1) Subject to 20-1-301, 20-1-308, and any applicable collective bargaining agreement covering the employment of affected employees, the trustees of a school district shall set the number of days in a school term, the length of the school day, and the number of school days in a school week and report them to the superintendent of public instruction.

1. When proposing to adopt changes to a previously adopted school term, school week, or school day, the trustees shall:
   a) negotiate the changes with the recognized collective bargaining unit representing the employees affected by the changes;
   b) solicit input from the employees affected by the changes but not represented by a collective bargaining agreement; and
   c) solicit input from the people who live within the boundaries of the school district.

TOPIC: SCHOOL CALENDAR/AGGREGATE HOURS OF INSTRUCTION

Q16: Should the District's calendar be constructed to meet the required aggregate hours of instruction?

A16: Yes. Every school district should be constructing its calendar and instructional program with the intent of meeting the aggregate hours of instruction in law. Some keys to help you do so and to prepare for any audit of your hours include:

1. Make sure that your board has adopted an emergency for the 2020-21 school year pursuant to section 20-9-805. This will ensure that, worst case scenario, your funding will be reduced proportionally if you fail to meet the aggregate hours of instruction. Without declaration of an emergency, your funding will be cut 2x the hourly equivalent for any hours you come up short.
2. Make sure to take full advantage of the flexibility in the definition of pupil instruction in section 20-1-101(17), MCA. For purposes of calculating aggregate hours of instruction, any organized instruction supervised by a teacher qualifies. This includes onsite traditional instruction, but it also includes offsite instruction. Section 20-9-311(10) provides that "enrollment in a basic education program provided by the district through any combination of onsite or offsite instruction may be included for ANB purposes." If you are providing any offsite instruction, you should make sure that the board authorizes it, as section 20-9-311 provides that offsite instruction can be included in aggregate

hours when approved by the board. Finally, you must offer the full range of educational offerings through offsite instruction to be eligible for inclusion.

3. Make sure that the board approves a process for its staff to determine and declare proficiency for students who have mastered content. If a student is proficient, you need not account for offering the aggregate hours of instruction at all. You are eligible to include proficient students in your ANB count based on a full-time equivalent conversion of the courses in which they are proficient, based on the time ordinarily required to complete. The law provides that the determination of proficiency is in the discretion of the Board, using district assessments. This could be as simple, for example, as using the teachers' grades in the same manner that you do so when providing traditional instruction. See section 20-9-311(4)(d) and 20-1-301, MCA, for documentation.

If your Board has previously adopted the MTSBA Model 1900 Policy Series, you will have covered your bases above.

TOPIC: SCHOOL DISTRICT LIABILITY

Q17: Are Montana's public schools potentially liable if there is a COVID-19 outbreak that was proven to originate from the District that results in personal injury or death to an individual or individuals?

A17: This will clearly depend on the circumstances and will likely be determined on a case-by-case basis.

Article II, Section 18 of the Montana Constitution provides as follows:

> **Section 18. State subject to suit.** The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

As it stands right now, school districts are not immune and could incur liability related to COVID-19 under some circumstances. The burden of proof in such cases is on the plaintiff. If they cannot prove they contracted COVID in school and/or through participation as a student in the school (e.g., such as on the bus, during an extracurricular activity), they won't prevail. However, if there is a cluster and those infected all have in common that they were in the same class or building, it will not be difficult for a plaintiff to establish that the infection was more likely than not acquired in the school. If you had a cluster of 3-5 cases paired with facts where the district ignored the recommendations from the CDC, local Health Department, and/or legal advice, we think it would be highly likely that a jury would find negligence.

Additional factors include:

1. With pandemic coverage exclusions in every insurance policy out there right now, that could mean significant damages that would come right back on local property taxpayers through imposition of a non-voted judgment levy, which is how local governments are required to satisfy liability when there are gaps in insurance coverage.
2. The fact that there is a heightened standard of care vis-à-vis a student in a public school (particularly with regard to disabled students under IDEA or 504 at risk for more serious complications);
3. A cluster of cases within the school could create a rebuttable presumption of negligence by the district, which changes the burden of proof from the plaintiff to the school district;

4. This is a politically and emotionally charged issue and litigation could involve allegations of lifelong consequences or even a wrongful death claim.
5. No matter what you do, there will be no shortage of people ready to second guess your decisions.

The best thing you can do to decrease the likelihood of successful litigation against the district is to adopt policy documenting your plans for preventing/reducing the likelihood of infection, using CDC guidance and complying with any statewide or countywide directives. Then, if an infection does occur, you have a fighting chance of successfully defending the case, even if the plaintiffs can prove that the infection came from within the school.

There is also a possible defense under Title 10, Chapter 3, Part 1 (Disaster and Emergency Services), specifically Section 10-3-111, Personnel Immune from Liability given that school districts have been determined by our courts to be political subdivisions of the state.

Section 10-3-111, MCA, provides as follows:

> *10-3-111. Personnel immune from liability. (1) The state, a political subdivision of the state, or the agents or representatives of the state or a political subdivision of the state are not liable for personal injury or property damage sustained by a person appointed or acting as a volunteer civilian defense or other response and recovery activity worker, a volunteer professional, or a member of an agency engaged in civilian defense or other response and recovery activity during an incident, disaster, or emergency. This section does not affect the right of a person to receive benefits or compensation to which the person might otherwise be entitled under the workers' compensation law or a pension law or an act of congress.*
> *(2) The following individuals or entities are not liable for the death or injury of individuals or for damage to property as a result of an act or omission specifically arising out of activities undertaken in response to an incident, disaster, or emergency and while complying with or reasonably attempting to comply with parts 1 through 4 and 12 of this chapter or an order or rule promulgated under the provisions of parts 1 through 4 and 12 of this chapter:*
> *(a) the state or a political subdivision of the state;*
> *(b) except in cases of willful misconduct, gross negligence, or bad faith:*
> *(i) the employees, agents, or representatives of the state or a political subdivision of the state; or*
> *(ii) a volunteer or auxiliary civilian defense or other response and recovery activity worker, a member of an agency engaged in civilian defense or other response and recovery activity, a volunteer professional, or the owners of facilities used for civil defense or other response and recovery shelters pursuant to a fallout shelter license or privilege agreement or pursuant to an ordinance relating to blackout or other precautionary measures enacted by a political subdivision of the state.*

TOPIC: INTERNET EXPENSES

Q18: What is the district's position or obligation when it comes to a parent asking for the district to cover the internet expense as they do not have internet currently but choose to do online learning rather than face-to-face instruction?

A18: Provided you are giving them the option of onsite vs. offsite and further provided that the offsite option is not required to provide a reasonable accommodation to a student under section

504 (in which case, support for internet access could be implicated based on need), there is nothing in the law requiring you to pay for internet access. If you offer offsite instruction as the only option, however, there is a possibility that the family's requirement to pay for internet access not already existing in the home could be construed as an unlawful fee under section 20-9-214, MCA:

> **20-9-214. Fees.** (1) The trustees of a district may:
>
> (a) require pupils in the commercial, industrial arts, music, domestic science, scientific, or agricultural courses to pay reasonable fees to cover the actual cost of breakage and of excessive supplies used; and
>
> (b) charge pupils a reasonable fee for a course or activity not reasonably related to a recognized academic and educational goal of the district or a course or activity held outside normal school functions. The trustees may waive the fee in cases of financial hardship.
>
> (2) The fees collected pursuant to subsection (1)(a) must be deposited in the general fund, and the fees collected pursuant to subsection (1)(b) must be deposited in a nonbudgeted fund as provided in 20-9-210.

Paying for internet access for students who do not have or cannot afford access to the internet to complete coursework is authorized for both ESSER and CRF funds. There is also an option, dependent on meeting deadlines for individual transportation contracts, to use transportation funds for internet access as part of providing supervised home or correspondence study as provided in the definition of individual transportation in section 20-10-101(5)(b), MCA.

TOPIC: INDIVIDUAL TRANSPORTATION CONTRACTS

Q19: What are the deadlines that a district needs to meet in order to be able to use individual transportation contracts?

A19: Montana law provides a general rule that individual transportation contracts must be completed by the fourth Monday of June. In ordinary times that would be the end of the inquiry. However, in the midst of COVID-19, that is not the case. There is an exception to the June deadline when "an emergency transportation budget is adopted." Given the immediate circumstances of COVID-19 and most boards' adoption of an emergency for FY21, you can alter this June deadline. Make sure to reference in either your budget or your budget amendment that it is an emergency transportation budget. Here are the applicable laws:

> **20-9-161. Definition of budget amendment for budgeting purposes.** As used in this title, unless the context clearly indicates otherwise, the term "budget amendment" for the purpose of school budgeting means an amendment to an adopted budget of the district for the following reasons:
>
> . . . . . .
>
> (6) any other ***unforeseen need of the district that cannot be postponed*** until the next school year without dire consequences affecting:
>
> (a) the ***safety of the students and district employees***; or
>
> (b) the ***educational functions of the district***. Any budget amendment adopted pursuant to this subsection (6)(b) that in combination with other budget amendments within the same school fiscal year exceeds 10% of the district's adopted general fund budget must be reported by the school district to the education interim committee and the board of public education with an explanation of why the budget amendment is necessary.

20-10-124(2) Private party contract for transportation -- individual transportation contract. (2) Any school bus transportation by a private party or individual transportation that is furnished by a district must be under contract, and district, county, or state money may not be paid for transportation services to any person or firm who does not hold a legal contract with the district. Transportation contracts for the ensuing year must be completed by the fourth Monday of June, except when an eligible transportee establishes residence in the district after the fourth Monday of June and a contingency amount is included in the regular transportation budget ***or an emergency transportation budget is adopted*.**

20-9-165(4) Whenever the trustees adopt a budget amendment for the transportation fund, the trustees shall ***attach to the budget amendment a copy of each transportation contract that is connected with the budget amendment*** and that has been prepared and executed in accordance with the school transportation contract laws.

20-10-145(5) ***After adopting a budget amendment*** for the transportation fund in accordance with **20-9-161** through **20-9-166**, ***the district shall send to the superintendent of public instruction a copy of each new or amended individual transportation contract*** and each new or amended bus route form to which the budget amendment applies. State reimbursement for the additional obligations must be paid as provided in subsection (1).

TOPIC: PROTECTING PRIVACY OF STAFF, STUDENTS AND OTHERS WITH COVID-19

Q20: If district officials learn of a positive COVID-19 case that impacts some aspect of school operations, individuals or the community, do they have an obligation to protect the privacy rights of individuals while also confirming the existence of a COVID-19 case if asked to confirm the same?

A20: Yes. If district officials learn of a positive COVID-19 case that impacts some aspect of school operations, individuals or the community, they have both an obligation to: (1) protect the privacy rights of the individual who has COVID-19 by not disclosing personally identifiable information about the individual but also (2) to confirm the existence of a COVID-19 case in the district if asked. The Montana Supreme Court in the case of *Cut Bank Public Schools v. Cut Bank Pioneer Press* (2007) held that the District was required to provide information about student discipline so long as any identifying information was redacted from the records requested.

TOPIC: COMMUNICATING POSITIVE COVID-19 CASE

Q21: How does a district handle communication with parents, students and our community if we learn that someone in our school has tested positive for COVID?

A21: Here is a sample communication for anyone associated with the District who tests positive for COVID subject to modification depending on the circumstances. It is important in any communication to protect the privacy rights of individuals, including students, staff, parents and others.

On _____, 2020, the _____ School District was notified that an individual associated with the District had tested positive for COVID-19. The positive test was confirmed on _____. According to the _____ County Health Department, the District's staff and students were/were not in contact with the individual during the period of possible exposure. The individual last had

contact with others in our school district at _____ on _____, ___ days prior to the _____'s diagnosis. Since _____, the individual has not been at the school. If any associated with the District is at risk of exposure, the _____ County Health Department will be in contact with that person to determine a safe and appropriate course of action. It is still recommended that any person who feels sick or ill, seek out their medical provider for specific instructions. The School District is in contact with the Health Department and reviewing the Centers for Disease Control guidance to complete cleaning the school and other related facilities. The other steps taken by the School District include _____. Contact the Superintendent for details about these measures. School officials will continue to monitor the situation and will provide further information if and when it becomes available.

IV. STUDENT INSTRUCTION

TOPIC: OFF-SITE LEARNING/DISTANCE LEARNING PROVIDERS

Q22: Can a district use distance learning providers that are not on OPI's approved list of distance learning providers in the provision of off-site instruction?

A22: First and foremost, whatever you do, you will want to ensure that you are meeting the definition of pupil instruction in section 20-1-101(17):

> 20-1-101(17) "Pupil instruction" means the conduct of organized instruction of pupils enrolled in public schools while under the supervision of a teacher.

It is best to use those distance learning providers approved by OPI. If you utilize the services of a distance learning provider not approved by OPI, you must have a Montana licensed teacher of record supervising the instruction, determining grades, promotion, etc. The Administrative Rules provide, in pertinent part, as follows:

> *"10.55.907(2)(a) School districts receiving distance, online, and technology-delivered learning programs **to supplement instruction** may utilize distance, online, and technology-delivered learning as they would other supplementary resources **without restriction.***

Other issues for consideration:

- Your local union may consider the use of a third-party vendor to be an outsourcing of collective bargaining unit work and could demand to bargain. You have a duty to bargain this as a change in working conditions, so be sure to get the union to agree before proceeding (If agreement cannot be reached and negotiations have reached an impasse, districts may implement the change unilaterally. Refer to Q27 below).
- Claiming ANB for some third-party vendors vs. others can be complicated. If the provider were the Montana Digital Academy, for example, it would work fine, as there is an established precedence and recognition that school districts enroll students in a digital academy course and continue to generate ANB. The MTDA also complies with the Board of Public Education's rules regarding licensure of instructors.
- With a properly licensed and endorsed teacher employed by the district and serving as the teacher of record, you can treat the third-party service as supplementary instruction, which can be used without limitation under ARM section 10.55.907.
- Another option could be to provide remote instruction concurrent with in class instruction, using Zoom or comparable technology to livestream lectures.

Here is a list of OPI approved providers: http://opi.mt.gov/Portals/182/Page%20Files/School%20Accreditation/Standards%20of%20Accreditation/MT%20Distance%20Learning%20Providers.pdf?ver=2019-01-15-104241-033.

TOPIC: OFF-SITE LEARNING/OUT-OF-DISTRICT STUDENTS

Q23: Can school districts provide remote learning to out-of-district students?

A23: Yes, the Governor's July 31, 2020, directive waives current residency requirements to allow school districts to provide educational services in an offsite instructional setting, including the provision of services through electronic means, to any pupil who (a) meets the residency requirements for that district as provided in section 1-1-215, MCA; (b) resides in the same county as the district; or (c) resides in a school district immediately adjacent to the district.

TOPIC: OFF-SITE LEARNING/AGGREGATE HOURS OF INSTRUCTION

Q24: How does the District track aggregate hours of instruction for those students utilizing off-site learning?

A24: First and foremost, "Pupil Instruction" is defined as "*the conduct of organized instruction of pupils enrolled in public schools while under the supervision of a teacher."* Section 20-1-101(17), MCA.

There is no requirement that such instruction take place in person, or by any specific methodology or in the immediate physical presence of a teacher. Technically, even time spent on homework can count, to the extent that the object of such homework is to assess and ensure the student's mastery of the content of the course, and assuming of course that the teacher supervises such homework by, for example, formulating the assignment, requiring adherence to deadlines and grading.

Instruction is not exclusively synonymous with a teacher in front of a physical classroom of students delivering a lecture. It encompasses all the time that is spent in ensuring a student's mastery of content both in and out of a traditional classroom setting.

The purpose of output of instruction is to generate the outcome of learning. MTSBA Model Policy 1906 draws this connection directly as follows:

From MTSBA Model Policy 1906:
For the purposes of this policy and the School District's calculation of ANB and "aggregate hours of instruction" within the meaning of that term in Montana law, the term "instruction" shall be construed as being synonymous with and in support of the broader goals of "learning" and full development of educational potential as set forth in Article X, section 1 of the Montana Constitution. Instruction includes innovative teaching strategies that focus on student engagement for the purposes of developing a students' interests, passions, and strengths. ***The term instruction shall include any directed, distributive, collaborative and/or experiential learning activity provided, supervised, guided, facilitated or coordinated by the teacher of record in a given course that is done purposely to achieve content proficiency and facilitate the learning of, acquisition of knowledge, skills and abilities by, and to otherwise fulfill the full educational potential of each child.***

Staff shall calculate the number of hours students have received instruction as defined in this policy through a combined calculation of services received onsite at the school or services provided or accessed at offsite or online instructional settings including, but not limited to, any combination of physical instructional packets, virtual or electronic based course meetings and

assignments, self-directed or parent-assisted learning opportunities, and other educational efforts undertaken by the staff and students that can be given for grade or credit. Staff shall report completed hours of instruction as defined in this policy to the supervising teacher, building principal, or district administrator for final calculation.

Other provisions in law strongly support the legitimacy of offsite instruction and the authority of school districts to incorporate instruction through such methods for ANB:

1. Section 20-1-101(5) provides that "ANB means the average number of regularly enrolled, full-time pupils physically attending ***or receiving educational services at an offsite instructional setting*** from the public schools of a district."
2. Section 20-9-311(10), provides that "enrollment in a basic education program provided by the district ***through any combination of onsite or offsite instruction may be included for ANB purposes.***

In short, the law clearly supports a school district's right to provide the aggregate hours of instruction through offsite means. If a school district adopts policy 1906 and follows it, there should be no difficulty in satisfying the requirements necessary to preserve your funding.

TOPIC: PROFICIENCY-BASED LEARNING/AGGREGATE HOURS OF INSTRUCTION

Q25: Can we apply proficiency-based learning across the board and forget about calculating hours of instruction?

A25: If your Board has adopted MTSBA Model Policy 1906, you have your bases covered. In addition to using a proficiency-based model of instruction, districts should continue to calculate the aggregate hours of instruction as not all students will thrive under a proficiency-based model. Also, recall that MTSBA's Model Policy 1906 and the provision of proficiency-based instruction is intended to enhance the learning opportunity for students not lessen the opportunities available to students through a reduction in time devoted to the mastery of each subject matter. As referenced in MTSBA Model Policy 1906, "using proficiency-based learning in combination with onsite and offsite instruction protects funding if an audit determines that aggregate hours have not been provided. Proficiency determinations should not be used to cease instruction, only to backup and enhance instruction."

TOPIC: FERPA AND VIRTUAL INSTRUCTION

Q26: How do we comply with FERPA when providing virtual instruction?

A26: The US Department of Education has a PowerPoint on FERPA issues related to virtual learning in the midst of COVID-19. Here is a link to that PowerPoint, which gives some pointers on how to address student privacy in virtual learning environments.

https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPAandVirtualLearning.pdf

V. SCHOOL STAFF

TOPIC: BARGAINING CHANGES TO EMPLOYMENT

Q27: Is the District obligated to bargain over changes to terms and conditions of employment, including any change in duties, hours, etc.?

A27: Yes. The obligation to bargain collectively with public employees derives primarily from Section 39-31-305, MCA:

39-31-305. Duty to bargain collectively -- good faith. (1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

> (2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> (3) [Irrelevant Portion Omitted]
> As can be seen, this statutory provision is extremely broad, requiring the parties to meet at reasonable times and places and negotiate over what is commonly referred to as the mandatory subjects of bargaining: "wages, hours, fringe benefits, and other conditions of employment." Also falling within the scope of required negotiations is "any question arising under an agreement." Thus, the obligation to bargain includes virtually any condition of employment and covers disputes regarding interpretation of a collective bargaining agreement. Interpretation disputes are primarily resolved via a grievance procedure culminating in final and binding arbitration, as required by Sec. 39-31-306, MCA.

Unless the discussion actually pertains to wages, working hours, or fringe benefits, the discussion inevitably revolves around a mostly misconstrued idea of "management rights," e.g., that there are simply some subjects over which a school board has no obligation to bargain. While it is technically correct that there is a category of subjects not included in the "mandatory subjects of bargaining," this category is very narrow, and asserted at some risk to the school district.

The Montana Supreme Court had the opportunity to define the parameters of mandatory subjects of bargaining in 2008, in *Bonner School District No. 14 v. Bonner Education Association, et al.* The Court set very broad parameters as to what is a mandatory subject of bargaining. Specifically, the Court effectively defined the term "conditions of employment" as including any "matters plainly germane to the working environment," as opposed to managerial decisions that "lie at the core of entrepreneurial control" and are "related to the basic scope of the enterprise."

Thus, the Court's conclusion was that any matter "plainly germane to the working environment" that does not "lie at the core of entrepreneurial control" or "concern the basic scope of the enterprise" is a mandatory subject of bargaining. The Court identified as the "scope" of the Bonner School District's "enterprise" the education of students in grades kindergarten through eight. The Court also provided examples of subjects that lie at the core of entrepreneurial control, such as which subjects will be taught by a school district, or which grades will be taught by a school district. The decision of whether to include the German language in the curriculum, or to run a K – 6 school as opposed to a K – 8 school are ultimately the Board's to make, and the decision itself is not a mandatory subject of bargaining.

While there may be other extremely limited matters that "lie at the core of entrepreneurial control," the point is that virtually anything that changes the conditions under which employees are expected to work constitutes a "condition of employment" and therefore a mandatory subject of bargaining. Unless the plan for reopening school this fall is to do everything the same way as things were done pre-COVID pandemic, there is going to be an obligation to bargain over changes to conditions of employment. These changes cannot be accomplished by adopting new policies and telling employees that policy takes precedence over the bargaining agreement. We assure you that it does not.

As for the rest, anything related to following CDC guidelines, the cleaning of the school, the wearing of masks and other protective gear, and/or anything else that constitutes a change from the way things have been done in the past, is going to trigger an obligation to bargain. Because these will hopefully be temporary changes in working conditions, however, it is not required, and it makes no sense, to change the actual bargaining agreement. Rather, it is highly advisable that school districts instead negotiate memorandums of agreement with employee bargaining units that temporarily supersede specific portions of the CBA. In this way, once things get back to normal, there will be no requirement to renegotiate in order to return to the pre-COVID conditions of employment.

This is the very reason MTSBA collaborated with MFPE on a model MOA for both teachers and classified employee who are collectively bargained to provide a starting place for mandatory discussions regarding changes to conditions of employment. The intent of both organizations was clearly stated on the introductory page of the model MOA, indicating an expectation that school boards and union representatives sit down and discuss and develop a plan for reopening school at the local level, and then reduce that plan to writing in the form of an MOA.

If there are provisions in the MOA that are not acceptable to the Board of Trustees, then don't include those provisions in a proposal to the union or rewrite the language so that it reflects local control and addresses specific circumstances on the ground in your district. Do not simply discard the document because you don't like what it currently says. Negotiate with your employees and create a document that works for the Board, works for the employees, and most importantly, works for the children of your school district.

TOPIC: MASKS AND POLITICAL SPEECH

Q28: Can employees wear masks expressing political speech in the performance of their respective duties with a District?

A28: No. First, Section 13-35-226(4) provides that “A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However,

subject to **2-2-121**, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

Second, Section 2-2-121(3) provides in relevant part as follows:

> 2-2-121(3)(a) Except as provided in subsection (3)(b), a public officer or ***public employee may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office*****,** or the passage of a ballot issue unless the use is:
>
> (i) authorized by law; or
>
> (ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.
>
> (b) As used in this subsection (3), ***"properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office*****.** With respect to ballot issues, properly incidental activities are restricted to:
>
> . . . . .
>
> (c) This subsection (3) is ***not intended to restrict the right of a public officer or public employee to express personal political views*****.**

Additionally, in 51 A.G. Opinion 1 (2005), then-Attorney General Mike McGrath (now Chief Justice on the Montana Supreme Court) issued an opinion addressing the prohibition on use of public time for campaign activities and held that “public time” consists of those hours for which an employee receives payment from a public employer. The opinion includes an important caveat noting that a public employee retains the right to express personal political views, if there is no use of public resources in doing so.

TOPIC: REQUESTS FOR REMOTE WORKING

Q29: What are a district’s options if an employee requests to telework rather than work onsite at the school?

A29: The correct answer is dictated by the specific conditions and circumstances of each individual request. There are various categories of factors that must be taken into consideration, as follows:

1. Is the employee eligible for Families First Coronavirus Relief Act (FFCRA) leave?

An employee is eligible for up to two weeks (up to 80 hours) of Emergency Paid Sick Leave under the FFCRA leave if the employee is unable to work or telework because of the employee:

- is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- has been advised by a healthcare provider to self-quarantine related to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

An employee is eligible for up to 2 weeks (up to 80 hours) of Emergency Paid Sick Leave (at two thirds pay) if the employee is:

- caring for an individual subject to a federal, state, or local quarantine order or who has been advised to a healthcare provider to self-quarantine;
- is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons; or
- is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

An employee is also eligible for up to 10 weeks (at two-thirds pay) if the employee is:

- caring for his or her child whose school, childcare provider or place of care is closed or unavailable because of COVID-19.

Thus, if an employee falls into one or more of the above categories, and that employee requests to telework, the choice is really between allowing the employee to telework or placing the employee on paid FFCRA leave and hiring a substitute to perform the employee's duties. Under those circumstances, and assuming the employee's job duties can be performed remotely, it makes much more sense from an economic point of view to simply grant the request to telework.

2. Is the employee eligible for other types of leave over and above FFCRA Leave?

If the same employee is not eligible for FFCRA leave, or has already exhausted all FFCRA leave, the employee might be eligible to take other types of paid leave available to them. For example, if the employee cannot come to work because they are caring for a child or other immediate family member who has been advised by a healthcare provider to self-quarantine or who is suffering from COVID symptoms and awaiting a medical diagnosis, the employee is almost certainly entitled to take regular sick leave. As a result, if the employee's duties can be performed remotely, and the employee is willing to telework rather than take sick leave, it makes much more sense to permit teleworking than to force the employee to take sick leave.

3. Is the employee requesting a reasonable accommodation for a disability?

An employee who is suffering from an underlying health condition that places them in a high-risk category in the event of a COVID infection, or who is otherwise immunocompromised thereby increasing the likelihood of becoming infected, and decreasing the likelihood of surviving a COVID infection, is most likely suffering from a disability within the meaning of the Americans with Disabilities Act (ADA). The existence of a known disability triggers an obligation on the part of the employer to provide reasonable accommodations to the disability in order to permit the employee to perform the essential functions of their job position. Stated differently, if an employee requests to telework because they are suffering from an underlying high-risk health condition or are otherwise immunocompromised, granting the request could constitute a reasonable accommodation to the employee's disability, and denial of the request could easily be construed as illegal disability discrimination.

4. Are there other risks involved in denying the request to telework?

If an employee falls into none of the above categories, there is always still a general risk of liability from a negligence standpoint. This is not a risk that is probably great enough to dictate that all requests to telework be automatically granted, but prudence would indicate some flexibility. In other words, if an employee's job duties can be performed remotely with no

disruption of district operations and no adverse effect on the provision of educations services, granting the request costs the district nothing, and buys a certain amount of risk management.

5. None of the above applies, and the employee's job duties cannot be performed remotely.

There are probably going to be employees that do not qualify for any sort of leave, and that do not suffer from any sort of underlying health conditions, and that do not live with anyone suffering from an underlying health condition, but simply do not wish to take the risk of working at the school during a pandemic. If this is also an employee whose job duties are not conducive to teleworking, in that the duties must be performed onsite at the school, or performance of the duties remotely will have a negative outcome in relation to providing education services, the district can require the employee to perform their job duties at the school.

TOPIC: PAYROLL DEDUCTION

Q30: Are school districts required to defer employee social security tax withholding under IRS Notice 2020-65 which was released on August 28, 2020?

A30: No. The executive order and the guidance allow, but do not require, the deferral of payroll taxes. This Payroll Tax Holiday is a deferral of the employee's portion of social security tax on applicable wages paid from September 1, 2020 through December 31, 2020. It is important to point out that this is a deferral of the payroll tax and NOT an exemption from the payroll tax. The only mandatory language in the guidance is about the employer being eventually responsible for withholding and deferring the taxes deferred:

> *"An Affected Taxpayer must withhold and pay the total Applicable Taxes that the Affected Taxpayer deferred under this notice ratably from wages and compensation paid between January 1, 2021 and April 30, 2021 or interest, penalties, and additions to tax will begin to accrue on May 1, 2021, with respect to any unpaid Applicable Taxes. If necessary, the Affected Taxpayer may make arrangements to otherwise collect the total Applicable Taxes from the employee."*

We strongly discourage school districts from participating in the payroll tax holiday and here's why:

- School districts retain the eventual responsibility to withhold and pay the tax that should have been withheld and paid during the tax holiday.
- The deferral period is relatively short and the time period to pay the deferred payroll taxes is relatively short as well. If an employer suspends collection of an employee's Social Security tax during the last four months of this year, it will be repaid by doubling the employee's tax during the first four months of 2021.
- If an employee leaves the District before repaying the deferred tax, you as the employer are still liable for payment of the tax not withheld.
- Deferred payroll taxes not paid by April 30, 2021, will be subject to interest and penalties.

President Trump's Executive Order: https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/

IRS Guidelines: https://www.irs.gov/pub/irs-drop/n-20-65.pdf

Other authoritative sources interpreting the payroll tax holiday as voluntary:

1. Forbes: https://www.forbes.com/sites/shaharziv/2020/08/28/treasury-finally-issues-guidance-on-trumps-payroll-tax-deferral-holiday-effect-social-security-defund-unclearmemo/#386f38f65c8f
2. The Tax Advisor: https://www.thetaxadviser.com/news/2020/aug/irs-payroll-tax-deferral-guidance.html
3. Journal of Accountancy: https://www.journalofaccountancy.com/news/2020/aug/irs-payroll-tax-deferral-guidance.html

VI. ACCOMMODATING INDIVIDUALS AND PROTECTING INDIVIDUAL PRIVACY RIGHTS

TOPIC: MEDICAL CONDITIONS/MASKS

Q31: What does the District do if someone claims to have a medical condition that prevents them from wearing a mask on school property?

A31: Both under Section 504 of the 1973 Rehabilitation Act (which governs students with disabilities) and the Americans with Disabilities Act (which governs others), a school district has a right to request medical documentation of a request for reasonable accommodation. The underlying basis for the clear authority in federal law and administrative rule is to ensure that those requesting reasonable accommodation due to a disability: (1) actually have a disability qualifying for reasonable accommodation; and (2) to identify, based on medical diagnosis and judgement, whether the reasonable accommodation requested is necessary and sufficient.

EEOC guidelines addressing reasonable accommodation specifically confirm that you can ask relevant questions regarding the nature of a claimed disability and a request for reasonable accommodation. You cannot ask for a person's complete medical record, as the scope of that request will yield information that is irrelevant to the request for reasonable accommodation. You can require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional.

For further details on this issue, see the link below and look specifically at question 6 in the FAQ: https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada

In the case of a student, the district is required by federal law to pay for that medical assessment. See 34 C.F.R. § 104.35(c)(2).

TOPIC: RELIGIOUS ACCOMMODATIONS

Q32: How does the District handle situations where individuals claim they cannot wear a mask for religious reasons?

A32: In essence, if someone is requesting a religious accommodation, school districts will need to address those requests on a case-by-case basis just like a request for medical accommodation and could offer, for example, an accommodation of a face shield as opposed to a mask, if that is the issue, or possible off-site learning or working options.

The Montana Human Rights Act provides, in pertinent part, as follows:

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:
(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

The EEOC provides guidance on this issue: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

TOPIC: AT-RISK FAMILY MEMBERS

Q33: Is the District required to accommodate an employee or student who is requesting an accommodation because of a family member's underlying health condition and risk of COVID-19?

A33: There are also multiple provisions in law that create potential for liability in cases where the existence of a disability is disregarded, including the 14th amendment of the U.S. Constitution (guaranteeing equal protection under the law), Article X of the Montana Constitution (guaranteeing equality of educational opportunity), the ADA, Section 504 of the 1973 Rehabilitation Act, and the provisions of Title 49 relating to human rights.

In this specific instance, formal guidance from the EEOC states that you are not required to reasonably accommodate under the ADA:

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? (6/11/20)

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

With the above in mind, the EEOC's interpretation of the ADA is not binding on the courts or plaintiffs who may be interested in seeking a court's interpretation of the law that would extend protections beyond those incorporated in the EEOC's interpretation.

There is some additional concern for potential exposure on refusal to consider the disability status of an immediate family member under one or both of the following provisions:

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:
(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

49-2-304. Discrimination in public accommodations. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, *advantages, or privileges* because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin.

The definition of a public accommodation is broad and could be interpreted to include schools: **49-2-101(20) (a)** "Public accommodation" means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbering, barbering nonchemical, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, rest house, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

The broader interpretation of the concept of "because of" by the U.S. Supreme Court in the case on transgender discrimination (*Bostock v. Clayton County, Georgia (2020*) lends credence to the concern regarding risk here. Asking all your employees to come to work, including those who, by virtue of a disabled family member, could bring something home from work that could kill a loved one, impacts employees with disabled family members differently than those without disabled family members. Whether that would be found actionable in litigation against the district is uncertain but possible.

VII. SCHOOL ACTIVITIES/TITLE IX

TOPIC: OFF-SITE INSTRUCTION/PARTICIPATION IN SCHOOL ATHLETICS/ACTIVITIES

Q34: Can a school district require students participating in clubs or activities to be present for onsite learning and prohibit students who are learning offsite from participating in clubs or activities?

A34: MHSA has waived the 10 hours of physical presence in school in order to be able to participate in athletic events for the 20-21 school year. With that said, a school district's conditioning participation in athletics on in-person instruction, is different if you are dealing with a student claiming a disability vs. a student claiming a preference. If a student is asking to remain home out of a personal preference and not for a disability of his/herself and/or a member of his/her family in the immediate household, you may have a greater chance of prevailing on restricting participation in athletics if challenged. Even restricting participation in athletic activities in this circumstance, however, may or may not meet the "substantially related" test adopted by the Montana Supreme Court on these types of circumstances in the *Bartmess v. Sch. Dist. 1* case (weighing the 2.0 rule of Helena Public Schools for athletic participation). For those schools that are giving students and families the option to receive on-site or off-site instruction, you would likely have substantial challenges in meeting the "substantially related" test in *Bartmess*.

Under that middle tier analysis, a reviewing court will first determine if the district's eligibility rule is reasonable and will then determine whether the school district's interest in making this classification is more important than the student's interest in participating in the extracurricular activity. With no case directly on point and with the highly unusual circumstances of COVID increasing use of virtual education, whether you could prevail if challenged on this point is uncertain.

TOPIC: TITLE IX AND DIFFERENT PROTOCOLS/RULES FOR ACTIVITIES

Q35: Is there a Title IX issue if a district creates different fan/spectator guidelines for different sports to address COVID-19 concerns?

A35: There is always a risk of facing an allegation of a Title IX violation when it comes to determining the effect of your actions in providing extracurricular activities to male and female athletes. Although there is not a specific case on point, and though Title IX focuses on the impact on the student athlete, proportionality in opportunities for athletes to play in front of crowds that are comparable for male and female sports could be an area of potential concern. The key in any Title IX matter is to ensure that you are providing equal athletic opportunities, benefits, and treatment for members of both sexes. In determining whether equal opportunities are available, OCR considers the following factors:

1. whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. the provision of equipment and supplies;
3. scheduling of games and practice times;
4. travel and per diem allowance;
5. opportunity to receive coaching and academic tutoring;
6. assignment and compensation of coaches and tutors;
7. provision of locker rooms, practice and competitive facilities;

8. provision of medical and training facilities and services;
9. provision of housing and dining facilities and services; and
10. publicity.

Schools will generally be found in compliance if the compared program benefits, opportunities, or treatment are equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible. See 34 C.F.R. § 106.41(c)(1-10); OCR Policy Interpretation, 44 Fed. Reg. 71418.

When there are health-related restrictions on gathering sizes that differ as to outdoor vs. indoor sports, you should compare outdoor to outdoor, indoor to indoor and you should also take an overall look to confirm that the cumulative opportunities to play before spectators are not differentiated on the basis of gender.

APPENDIX OF CITATIONS/MATERIALS REFERENCED IN THIS FAQ

MT-PEC's Back to School Roadmap and Emergency School District Policies: https://www.mt-pec.org/home

Governor's March 13, 2020 Executive Order declaring a State of Emergency: https://covid19.mt.gov/Portals/223/Documents/EO-02-2020_COVID-19%20Emergency%20Declaration.pdf?ver=2020-03-13-072730-880

Governor's May 19, 2020 Directive on Implementing and Establishing Phase 2 of Reopening: https://covid19.mt.gov/Portals/223/Documents/Phase%20Two%20Directive%20with%20Appendices.pdf?ver=2020-05-19-145442-350

Governor's May 20, 2020 Reopening Montana Phase 2: https://covid19.mt.gov/Portals/223/Documents/Reopening%20Montana%20Phase%202.pdf?ver=2020-05-20-142015-167

Governor's July 15, 2020 Directive -- mandatory use of face coverings in certain indoor and outdoor settings: https://covid19.mt.gov/Portals/223/Documents/Mask%20Directive%20FINAL.pdf?ver=2020-07-15-140109-633

Governor's August 12, 2020 Directive -- Mandatory use of face coverings to all public and private school settings in counties with four or more active COVID-19 cases: https://covid19.mt.gov/Portals/223/Documents/2020-8-12%20-%20Masks%20in%20Schools%20FINAL.pdf?ver=2020-08-12-152544-863

Governor's FAQ: https://covid19.mt.gov/Frequently-Asked-Questions

Bartmess v. Helena Public Schools https://www.courtlistener.com/opinion/879084/state-ex-rel-bartmess-v-board-of-trustees/

Miller v. Fallon County, 222 Mont 214, 221, 721 P2d 342 (1986) https://casetext.com/case/miller-v-fallon-county

Cut Bank Public Schools v. Cut Bank Pioneer Press (2007): https://caselaw.findlaw.com/mt-supreme-court/1214449.html

Bonner School District No. 14 v. Bonner Education Association, et al.: https://www.courtlistener.com/opinion/888649/bonner-school-dist-no-14-v-bonner-educ-assn/

Bostock v. Clayton County, Georgia (2020): https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

McCall Flynn Email Communications to all or one of the MT-PEC partners providing greater clarity on the Governor's Directives:

- August 20, 2020 email communication re: teachers instructing in the front of a class as an exception to the mask requirement
- August 20, 2020 email communication re: students giving a presentation in the front of a class as an exception to the mask requirement

- August 21, 2020 email communication re: teachers in their individual classrooms where students and others are not present as an exception to the mask requirement
- August 25, 2020 email communication re: students practicing or playing wind band instruments as an exception to the mask requirement
- August 28, 2020 email communication re: recess and gatherings of less than 50 individuals

Section 1-1-215, MCA

Section 2-3-203, MCA

Section 2-9-316, MCA

Section 2-9-305, MCA

Section 2-16-603, MCA

Section 13-35-226, MCA

Section 45-7-401, MCA

Section 20-1-301, MCA

Section 20-9-805, MCA

Section 20-9-311, MCA

Section 20-1-101, MCA

Section 20-10-101, MCA

ARM 10.55.907: http://mtrules.org/gateway/ruleno.asp?RN=10%2E55%2E907

51 A.G. Opinion 1 (2005): https://dojmt.gov/wp-content/uploads/2005/01/51-001.pdf

U.S. Department of Labor Guide on FFCRA: https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave