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FREQUENTLY ASKED QUESTIONS ON COVID-19-RELATED SCHOOL LAW ISSUES

REMOTE LEARNING PLANS

Do we have to use the Remote Learning Plan template provided by DESE?

No. Use of the DESE Remote Learning Plan template is optional. The template is available [here](#).

Districts should, however, provide families with written notice of the services that will be provided for their student during the school closures. This notice does not have to be drafted in the form of the DESE template or in the form of an N1. Whatever format is used, the notice should include a description of the services that will be provided, when they will be provided, and who will provide the service. Be sure to note if services will be evolving as districts continue to roll out remote services, and subsequently notify families of any additional or changing services as they are implemented.

REMOTE LEARNING: RECORDING AND OBSERVING

May a teacher record a live lesson for the purpose of sharing it with students who are absent?

Yes, districts may allow teachers to record remote lessons, provided that proper notice is given to parents and students ahead of time to comply with Massachusetts law, which prohibits surreptitious audio recording. M.G.L. c. 272, § 99. This should be done initially, in the form of a general notice sent to parents regarding remote learning, and additionally, at the beginning of any recorded session, the teacher should remind students that the lesson is being recorded.

When a lesson is being recorded, and to the extent possible, we are recommending recording only the portion of the lesson in which a teacher is providing direction or lecture, and turning off the recording for group discussion. This is not always possible or practicable when students answer or ask questions during a lesson, which is why it is critically important to provide notice to parents and students prior to recording. Ideally, the recording will include video and audio coverage of only the teacher and not the students, as this is the best way to ensure privacy for your students.

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FERPA does not prohibit teachers from recording their remote instruction, even if students' voices or images are captured within the recording. "FERPA does not protect the confidentiality of information in general; rather FERPA applies to the *disclosure* of tangible records and of information derived from tangible records." See [Letter to Mamas, U.S. Department of Education Family Policy Compliance Office \(December 8, 2003\) \(emphasis added\)](#). In other words, to avoid a FERPA violation, the teacher's lesson, including questions and answers from students, should not involve a disclosure of personally identifiable information derived from a student's education record. (Note that there are unique circumstances when a recorded lesson may become part of an individual student's tangible education record subject to FERPA; please see Q&A below for when this might occur).

If a district chooses to record remote lessons, the lessons should be maintained on the district's network and not on the teacher's private computer. Coordinate with your Technology Specialist/IT Department to ensure the district's network has the capacity to maintain the recorded lessons. Ensure that the class recordings are distributed only as intended and as authorized.

Finally, in regard to class recordings, teachers should ensure that they disable the recording feature for participants in the settings of their live instruction platform (Google Meet, Zoom, etc.) to mitigate against surreptitious recording by students or parents.

Does a recorded lesson automatically become a student record?

Recorded lessons that contain photos or videos of students are generally not educational/student records as contemplated under FERPA or the Massachusetts student record statutes and regulations unless they are, both: (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. If a district stores the recordings on the district's network as is recommended, then they are "maintained by" the district, but most class recordings will not be "directly related to a student."

A recording (audio, video, or photo) will be considered "directly related to a student" if:

- the recording is used by the school district for disciplinary actions involving a student (or if it would reasonably result in use of the audio/video for disciplinary action);
- the recording shows a student acting in violation of local, state, or federal law;
- the recording shows a student getting injured, attacked, becoming ill, or having a health emergency; or
- the recording contains personally identifiable information contained in a student's education record.

So, by way of example, if a student were to engage in discriminatory harassment of a peer during a recorded remote class, that recording could become a student record for that individual student since it would be used for subsequent disciplinary action. In contrast, a student's incidental participation in class would not cause the recording to become a student record. See *Owasso v. Falvo*, 534 U.S. 426 (2002).

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How should we address concerns raised about parents observing instruction or service delivery in the 1:1 or small group video format?

“FERPA neither requires nor prohibits individuals from observing a classroom.” See [FERPA and Virtual Learning Related Resources](#), U.S. Department of Education Student Privacy and Policy Office (March 2020). Instead, school districts, in accordance with applicable state laws, have the authority to make determinations about classroom observations.

Given the nature of remote learning, parents may inadvertently observe a session, or may do so without the instructor’s knowledge. To account for this, parents should be put on notice that they may not re-disclose any personally identifiable information about other students that they may access while their child receives remote instruction, and they may not interfere with instruction. The school district’s general disclaimer/consent to participate in remote learning should also make clear that neither the parent nor child will grant any third-party access to the remote learning services. Your school or district policy, regarding class observations, and the Massachusetts observation law, M.G.L. c. 71B, § 3, may be used as a guide for establishing protocols, if necessary, to ensure that the integrity of a class and the safety of the students is not compromised by parents observing remote classes. The Massachusetts observation law allows districts to impose conditions or restrictions on classroom observations if they are necessary to ensure the safety of children in a program, or the integrity of the program, and as needed to protect children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation. M.G.L. c. 71B, § 3.

As a reminder, teachers should not disclose personally identifiable information from a student’s education record during virtual classroom instruction, just as they should not disclose that information during live classroom instruction, whether it is whole class instruction or a small group.

RELATED SERVICE PROVIDERS

Have there been any developments regarding state licensure requirements for teletherapy for Speech & Language Pathologists and Audiologists?

Yes. On March 31, 2020, the Commonwealth of Massachusetts Division of Professional Licensure, Board of Registration for Speech-Language Pathology and Audiology (“Board”) issued an information sheet regarding license renewal, continuing education, and telepractice during the state of emergency for COVID-19. The Board extended the timeline for renewal of licenses and completing continuing education to ninety (90) days following the termination of the state of emergency. The Board also has temporarily waived the requirement of the Telepractice Policy that before providing telepractice services, an SLP or Audiologist must obtain ten (10) hours of training in telepractice. Within four (4) months of beginning to provide telepractice services, however, the SLP or Audiologist must obtain the required ten (10) hours of training in telepractice, via in-classroom courses or via distance learning. See [License Renewal, Continuing Education, and Telepractice During the State of Emergency for Coronavirus \(COVID-19\), Commonwealth of Massachusetts, Division of Professional Licensure Board of Registration for Speech-Language Pathology and Audiology \(March 31, 2020\)](#).

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Is written notice required prior to providing teletherapy for Speech and Language Pathology and Audiology Services?

Yes. According to Policy No. 2019-001 issued by the Board of Registration for Speech-Language Pathology and Audiology, prior to initiating telepractice services, a telepractitioner must, among other requirements, provide a client “written notification of telepractice services,” which includes:

- the limitations of using technology in providing telepractice;
- the potential risks to the confidentiality of information due to technology used in telepractice;
- how communications can be directed to a specific licensee;
- options for service delivery by telepractice and in person;
- the client’s right to refuse or discontinue telepractice services; and
- instructions on filing and resolving complaints.

Additionally, the telepractitioner must “obtain the signature of the client, or the parent or guardian of a minor client, on this written document and maintain this document in the clinical record.” See [Providing Speech-Language Pathology and Audiology Services by Electronic Means, Policy No. 2019-001, Division of Professional Licensure Board of Registration for Speech-Language Pathology and Audiology.](#)

May districts provide remote Social Pragmatic/Social Skills groups (e.g., a “lunch bunch”)?

Yes. Districts may offer small group video conferencing for social skills groups similar to a virtual classroom. Before providing any services remotely, the district should give parents of the students who would be participating written notice regarding the limitations on confidentiality of these remote services, comparable to notice that should be provided for any remote classroom instruction.

May paraprofessionals provide support services or 1:1 service if a student’s IEP provides for such service delivery?

Yes, as appropriate, and with supervision. Paraprofessionals may continue to support students when the support can be provided in a format that is workable for the paraprofessional and the student. Some families may be able to engage in telephone or video conferencing between the paraprofessional and student, while others may prefer academic support via email. The form of service delivery will depend on the particular needs of the student. Any agreements reached with families regarding the provision of services by paraprofessionals during the period of school closures should be documented by the district; email exchanges with parents will suffice.

Districts should ensure that paraprofessionals are working under the direct supervision of a teacher, as required by the Individuals with Disabilities Education Act. Paraprofessionals may not design instruction but may support the delivery of instruction designed by the teacher who is supervising them. Districts should maintain documentation noting how supervision of paraprofessionals occurs during the school closure. For example, a schedule of teacher-paraprofessional consultation sessions could be maintained.

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MEETING THE NEEDS OF ENGLISH LEARNERS

As we shift to remote learning, what are the district’s responsibilities to students currently identified as English Learners (EL)?

Districts need to ensure that general education instruction is accessible to students currently identified as ELs. See [Guidance to Plan and Provide Remote Learning for English Learners, Massachusetts Department of Elementary and Secondary Education \(April 2020\)](#). State and federal laws require that districts continue to facilitate ELs’ progress toward English Language proficiency, and that districts ensure that ELs continue to have access to all content area instruction. It is critical that administrators and teachers continue to collaborate with English Learner Education (ELE) staff on ways to provide English Language instruction remotely to EL students, and also to ensure that EL students are engaging in the remote learning opportunities provided to all students.

Is there a requirement to provide ESL instruction as part of our ELE program during the school closure?

Yes. DESE has clearly stated that districts need to be providing ESL instruction. School districts and Charter schools have a legal obligation to ensure that ESL services are provided to students even during this time of remote learning. DESE has provided recommendations with different approaches to providing ESL instruction to promote English Language proficiency in listening, reading, speaking and writing. See [Supporting the Needs of English Learners through Remote Learning: Educational Resources, Massachusetts Department of Elementary and Secondary Education \(April 2020\)](#). Districts should document the manner in which these services are provided, as well as their outreach efforts to parents and students. Districts are also reminded to ensure that EL students with disabilities are provided with remote learning that is in line with DESE’s guidance on supporting students with disabilities during this school closure. See [Coronavirus/COVID-19 Frequently Asked Questions for Schools and Districts Regarding Special Education, Massachusetts Department of Elementary and Secondary Education \(March 26, 2020\)](#).

During the school closure, are districts required to identify and recommend placement for EL students?

DESE issued guidance on the provisional identification and placement of students who enroll in the district during this school closure. See [Guidance on the Provisional Identification and Placement of English Learners, Massachusetts Department of Elementary and Secondary Education \(April 2020\)](#).¹

² Due to the current public health emergency, the district may not complete in-person face to face screenings, but there is an expectation that when school re-opens, in-person face to face screenings will be completed. For the current time, the district is expected to work with newly enrolling families to

¹ Districts that are subject to settlement agreements or consent decrees relating to English Learners must seek guidance from the district’s legal counsel as to whether the provisional procedures would be consistent with the terms of the applicable agreement/decrees.

² Enrollment of students should not be delayed due to any delays in screening for EL services, to the extent consistent with health and welfare directives from the relevant governmental entities.

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complete the Home Language Survey. This survey can be sent to the parent or a district staff person can complete the survey with the parent over the phone.

DESE advises that district staff conduct an interview with the student and/or parent and make a provisional placement decision. The interview should involve questions that would allow the staff member to consider the Student's English Language skills in listening, speaking and interacting. Parents must be notified of the provisional determination for placement related to ESL instruction based on the information gathered through the interview and Home Language Survey. A sample letter to be used by districts for provisional identification is available [here](#).

The district should not code the student as an EL student until a language proficiency screening test can be completed. When school re-opens, the district should have a plan to appropriately complete a language proficiency screening test for all students who have been provisionally identified for ESL services during this time of school closure. Only after school re-opens and the district completes the formal English Learner initial identification process, should coding occur. See [Massachusetts English Language Learner Identification and Placement Document 2019 – 2020](#).

If a district provisionally identifies a student as EL, are ELE services required to be provided during this time of school closure?

Yes. If a district or Charter school makes a provisional determination during this time of closure that a student is an EL student, then remote ELE services must be offered. Please see the above Q&A regarding remote provision of ELE services.

STAY SAFE AND HEALTHY AND LET US KNOW HOW WE MAY ASSIST YOU.

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