

Privacy and Employment Issues for New York Schools: Are You Prepared for a Switch to More Remote Learning?

October 2, 2020

Earlier this year, when COVID-19 caused schools to rush to virtual and remote learning, the rapid and unexpected transition presented a variety of operational, technological and accessibility issues for administrators and instructors. As the public health crisis continued, many schools faced the reality that a complete return to the classroom this fall, at least initially, may not be practical. As schools adopted varying learning approaches, from full-time on-campus, to hybrid and remote, they have been doing their best to operate in this new environment. For those with on-campus learning, the focus has been on safe return to the classroom, with re-opening proposals detailing plans for face coverings, food service, sanitation and social distancing. But as data begins to roll in about the spread of COVID-19 in schools, and as your faculty face the possibility of needing leave time if their own children's schools move to a hybrid or remote model, is your school fully prepared to head into "round two" of online learning?

The New York State COVID-19 School Report Card

In September, the New York Department of Health launched [The COVID-19 Report Card \(the Report Card\)](#), an online dashboard tracking COVID-19 infections of every school and district in the state. The tool, which went live with data on September 14, provides daily updates on:

- Positive infections by date (of students and staff by school/school district)
- The school's/district's learning model (remote, in-person or hybrid)
- Number of students and staff on-site
- Percentage of on-site students and staff with positive test results
- Number of tests administered by the school, test type, lab used and lag time
- Date of last submission

As of Monday, September 21, the [Report Card showed 229 cases statewide](#). This data will presumably be used to inform whether schools can safely open (or remain open) for on-campus learning, or whether they need to transition to hybrid or remote models as the school year progresses.

Technology Guidance From the Authorities

In "take two" of remote learning, there is an established playbook of action items that schools should take to ensure educational technology is being utilized safely and securely. On top of these best practices, the New York State Department of Education (DOE) [presented guidelines](#) to the Board of Regents for public schools across the state

to re-open amidst the ongoing COVID-19 pandemic. The guidelines reiterated critical procedures with respect to students' health and safety, created requirements for teaching and learning and addressed technology and connectivity issues.

Technology due diligence

The mandatory requirements from the DOE include, but are not limited to, clear opportunities for maintaining continuity of learning when using in-person, hybrid and remote instructional models, which encompass substantive daily interaction between teachers and students and clear communication plans between parents and schools.

Transitioning from in-person to remote learning, and in many instances, back and forth, heightens the importance for schools to perform critical due diligence on software, applications and technology platforms with regards to how they protect students' privacy. This requires schools to pay close attention to how these platforms collect data on students; whether they provide sufficient disclosures to students, parents and guardians, and teachers; and/or whether or not they employ adequate information and cybersecurity protocols. Schools that re-opened this fall with an on-campus model may have been more focused on safety protocols in the building than online and may need to reassess their focus in the event of a transition away from an in-person learning model in the coming weeks and months.

Education policies and procedures

Pursuant to the DOE guidance, districts and schools must 1) have knowledge of the level of access (to a computing device and high-speed broadband) that all students and teachers have in their places of residence; 2) to the extent practicable, address the need to provide devices and internet access to students and teachers who currently do not have sufficient access; and 3) provide multiple ways for students to participate in learning and demonstrate mastery of learning standards in remote/blended models. In addition, schools and districts should provide instruction on using technology and IT support for students, teachers and families, as well as professional development for teachers and leaders on designing effective online/remote learning experiences.

Once new technology is thoroughly assessed, schools should draft and/or revise their privacy, data and cybersecurity policies, procedures and notices, including, but not limited to, parent/student handbooks, media release forms, consent and disclosure agreements and information security policies to ensure they address the necessary requirements. Where schools provide students with school-owned technology devices, they should consider updating their student and staff Acceptable Use Policies (if in fact they had one in the first place, which in many cases they did not).

When reviewing and updating policies and procedures, schools should take into account the requirements under the New York Stop Hacks and Improve Electronic Data Security (SHIELD) Act, which applies to any business that owns or licenses computerized data that includes private information of New York residents. Schools covered under the SHIELD Act should examine their existing security and privacy policies to ensure they meet these new requirements for safeguarding private information in their possession.

The DOE guidance also discussed considerations for students' social and emotional well-being. To the extent schools have employed licensed counselors and psychologists to assist with students' mental health needs, they must consider compliance with state and federal laws regarding the collection, maintenance and use of mental health records in a remote environment. Additionally, there are several state and federal regulatory changes that have been made to accommodate the provision of telehealth, making it a viable solution for students in the virtual environment. Appropriate consent and disclosure forms should be adopted for mental health care as well.

Employment Law Considerations if More Schools Switch to Hybrid and Remote Models

At the federal level, the [Equal Employment Opportunity Commission](#) and the [Centers for Disease Control](#) have encouraged employers to take a flexible stance in affording employees leave time. In addition, the [Families First Coronavirus Response Act](#) (FFCRA) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19, including if a child's school or daycare is closed due to COVID-19.

FFCRA leave requirements and updates

The FFCRA provides employees of certain public employers and private employers with fewer than 500 employees with certain paid leave entitlements, if the employee is unable to work (or unable to telework), because the employee:

1. is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially similar condition specified by the US Secretary of Health and Human Services, in consultation with the US Secretaries of Labor and Treasury.

As the school year began, the US [Department of Labor updated its resources](#) to address questions raised by the combination of in-person and remote learning options that schools and school districts across the country are implementing. Whereas in the spring, the US Department of Labor confirmed that schools were considered "closed" for purposes of the FFCRA's paid leave mandates when they transitioned to online or distance learning, the requirements are more nuanced this fall.

- **Hybrid Schedules.** The US Department of Labor states that employees may use FFCRA leave where the school assigns students to alternate days between in-person and remote learning because the school is effectively "closed" to students when they are scheduled to engage in remote learning. Leave under the FFCRA is permitted, as long as the parent or guardian actually needs to care for their child during that time, and only if no other suitable person is available to do so.
- **Optional Remote Learning.** Where schools are starting the academic year with in-person classes but offering students the option to participate remotely, employee caregivers are not eligible to take paid leave under the FFCRA because the school is not "closed" due to COVID-19-related reasons. However, if a child is required to quarantine for COVID-19-related reasons, paid sick leave may be available to care for him or her under a different framework.
- **Initial Remote Learning Subject to Change.** For schools that are starting the academic year with a remote learning model, with the option to transition to in-person at a later date, FFCRA leave is available while the school is closed to in-person attendance.

Based on the above, schools should be prepared to respond to an increase in requests from teachers and faculty for FFCRA leave and/or modified schedules based on the decisions made by their own children's schools and school districts to switch to more remote models as the year progresses. School administrators should consider whether their existing policies are equipped to address such requests consistently and in accordance with recent COVID-related regulations, and revise them if necessary.

New York leave requirements

New York State also added two paid leave laws to its books this year that necessitate employer handbook updates.

First, New York's Emergency Paid Sick Leave for COVID-19 (NYEPSL) provides paid leave to employees if they, or their minor dependent child(ren), are subject to a mandatory or precautionary order of quarantine or isolation.

Second, [New York State Paid Sick Leave](#) (NYPSL), which is largely modeled on the New York City Earned Safe and Sick Time Act (ESSTA), will become available to all employees in New York State on January 1, 2021 (with leave accruals beginning on September 30). ESSTA, which applies to employers with five or more employees, who work more than 80 hours per calendar year in NYC, generally requires employers to provide up to 40 hours a year of paid safe and sick leave to employees for specified reasons, including: (1) the employee's or a family member's illness; (2) if the employer's business closes due to a public health emergency; (3) if the employee is needed to care for a child whose school or daycare closed due to a public health emergency; or (4) if the employee is a victim of domestic violence, sexual assault, stalking or human trafficking. NYPSL requires leave for most of the same reasons, with the exception of business or school closures. NYPSL leave entitlements range from 40 hours of unpaid leave to 56 hours of paid leave annually, depending on the employer's size and net income.

Handbook policies may require multiple rounds of modifications, as the US Department of Labor or other regulatory agencies at the federal, state and local levels provide further guidance and clarification.

Katten is Ready to Help

Katten's Employee Benefits and Executive Compensation group and Privacy, Data and Cybersecurity group continue to monitor state and federal guidelines concerning the re-opening of schools and are standing by to advise schools on implementing technological solutions to enable and enhance student learning in a virtual environment and navigate their leave management responsibilities related to COVID-19.

For more information, please contact Katten's [Privacy, Data and Cybersecurity](#) group or any of the following attorneys:



Trisha Sircar
Privacy, Data and Cybersecurity
+1.212.940.8532
trisha.sircar@katten.com



Kate Ulrich Saracene
Employment Litigation and Counseling
+1.212.940.6345
+1.312.902.5436
kate.saracene@katten.com



Jeremy Merkel
Privacy, Data and Cybersecurity
+1.212.940.6339
jeremy.merkel@katten.com

Katten

katten.com

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2020 Katten Muchin Rosenman LLP. All rights reserved.

Katten refers to Katten Muchin Rosenman LLP and the affiliated partnership as explained at kattenlaw.com/disclaimer.

10/2/20