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September 11, 2020

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Ann M. Schwieman
Director of Administrative Services & Personnel
Lapeer County ISD

Via email to aschwieman@lapeerisd.org

Re: Follow-Up Questions from August Webinar

Dear Ms. Schwieman:

We write in response to the follow-up questions posed by attendees at the August School Law Update webinar. The posed question and our response follows.

(1) In regards to the written authorization to participate in athletics, does a signed physical/MHSAA questionnaire and/or signed emergency contact form fulfill that?

Normally, MHSAA conditions student participation in athletics upon obtaining a signed physical: "After undergoing a physical examination, the student must submit a form signed by a health care examiner (M.D., D.O., physician's assistant, or nurse practitioner) stating that the student is physically able to play." Reg. I, Section 3(A). But, due to concerns regarding a lack of access to primary care providers during the late spring and early summer, [MHSAA](#) allows students—who submitted a physical exam on or after April 15, 2019—to submit an [MHSAA Sports Health Questionnaire](#) in lieu of a physical; provided that the student has not answered "yes" to any Questionnaire questions.

If the student answered "yes" on the Questionnaire, the student must obtain a signed physical. Or, if the student did not obtain a physical on or after April 15, 2019, the student must obtain a signed physical now.

If the student obtained a physical on or after April 15, 2020, the student does not even need to complete the Questionnaire.

While a signed emergency contact form by itself does not satisfy MHSAA's condition to participate in athletics, we recommend that such a form also be completed.



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(2) Does the outdoor max apply to staff/students at recess/on the playground and are staff/students required to wear face masks at recess/on the playground?

Executive Order 2020-176 established an outdoor maximum gathering of 100 people, which applies to staff and students alike at recess/on the playground. Although EO-142 exempts students from indoor gathering limits in a classroom setting, that order does not have a corresponding exemption for outdoor gathering limits. The order states: “The limitation on the size of *indoor* social gatherings and events in section 5 of Executive Order 2020-110 or any executive order that may follow from it does not apply to students *in a classroom setting*.” (emphasis added).

The Return to School Roadmap (p. 42) states that: “All gatherings, including those that occur outdoors (e.g., graduations) should comply with current and future executive orders that set caps on congregations of people.” While this language is described as a “strongly recommended” measure under Phase 5 of the MI Safe Start Plan, we recommend adhering to the outdoor maximum absent any language to the contrary.

Staff must wear facial coverings at recess/on the playground in accordance with the following provisions in the Return to School Roadmap (pp. 22, 38), which schools in either Phase 4 or 5 of the MI Safe Start Plan: “Facial coverings must always be worn by staff except for meals [or if] [a]ny staff member ... cannot medically tolerate a facial covering [or if] [a]ny staff member ... is incapacitated or unable to remove the facial covering without assistance.” Without any other exception, we recommend that staff wear facial coverings at recess/on the playground.

The Return to School Roadmap advises that students “should” wear facial coverings at recess/on the playground if there is more than one class outside. The Return to School Roadmap (p. 26) provides the following recommendation for schools in Phase 4 of the MI Safe Start Plan: “Recess should be conducted outside whenever possible with appropriate social distancing and cohorting of students. If more than one class is outside, students should wear facial coverings.”

We note some tension here with EO-153, which provides that “[a]ny individual who leaves their home or place of residence must wear a face covering over their nose and mouth ... [w]hen outdoors and unable to consistently maintain a distance of six feet or more from individuals who are not members of their household.” Despite this inconsistency, we rely on the more school-specific guidance to govern students in a school setting.

(3a) If a staff member wants to take a leave because they are required to work onsite during Phase 3 and their child care center is closed/child care provider is unavailable/school is closed, but we are making onsite child care available, can they “ELECT” to not use our child care and still be eligible for the benefits afforded under EFMLEA leave and EPSLA?

Yes, a staff member can elect not to use the District’s offered child care and still be eligible for FFCRA benefits. Although the District offers child care, the staff member’s child care



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center/child care provider is still closed or unavailable, which is a qualifying reason under EPSLA and EFMLEA.

The regulations implementing the EPSLA, in part, state: “An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to ... [t]he Employee is caring for his or her Son or Daughter whose School or Place of Care has been closed for a period of time, whether by order of a State or local official or authority or at the decision of the individual School or Place of Care, *or* the Child Care Provider of such Son or Daughter is unavailable, for reasons related to COVID-19.” 29 CFR § 826.20(a)(1)(v). If (a) the child care center is closed due to COVID-19 or (b) the child’s child care provider is unavailable, either is a qualifying reason. Nothing requires the staff member to use the District’s child care.

An FAQ published by the [U.S. Department of Labor](#) echoes this regulation and states:

A “place of care” is a physical location in which care is provided for your child. The physical location does not have to be solely dedicated to such care. Examples include day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs.

A “child care provider” is someone who cares for your child. This includes individuals paid to provide child care, like nannies, au pairs, and babysitters. It also includes individuals who provide child care at no cost and without a license on a regular basis, for example, grandparents, aunts, uncles, or neighbors.

The [U.S. Department of Labor](#), however, has clarified that the staff member must provide the District-employer with the following information:

- The name of the child;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for the child.

(3b) What if their child care is not available, but other child care is available?

See 3a, above. Unavailable child care is sufficient for leave.



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(4a) Can students be asked to assist with the cleaning/disinfecting of their desks/areas?

Yes, as age-appropriate and with proper safety instruction and supervision. Additionally, a discussion should take place with representatives of any custodial bargaining unit about this situation to avoid any claims of “subcontracting”.

For schools in Phase 4 of the MI Safe Start Plan, the Return to School Roadmap (p. 27) requires that: “Student desks must be wiped down with either an EPA-approved disinfectant or diluted bleach solution after every class period.” The Roadmap is silent about students performing this cleaning.

The Roadmap (p. 27) requires schools to “Ensure safe and correct use and storage of cleaning and disinfection products, including *storing products securely away from children*, and with adequate ventilation *when staff use products*.” Further, the Roadmap states: “*Staff* must wear gloves, surgical mask, and face shield when performing all cleaning activities.” While this phrasing also does not contemplate student cleaning, there is no prohibition from asking students to assist with light cleaning of desks between class periods.

(4b) If yes to 4a...since they would be cleaning, would they be subject to the same requirements that custodians are subject to?

Not clear. The Roadmap requires “staff” to wear gloves, surgical mask, and face shield when performing a cleaning activity. Of course, as a practical matter, one might ask if staff are required to wear these items “when performing all cleaning activities,” then why wouldn’t the same measure extend to students. In determining whether students will be asked to perform desk wipe-downs between classes, school officials should carefully weigh the risks/benefits of the decision and always favor student safety.

Should you have any questions or concerns about this matter, please contact us.

Very truly yours,

THRUN LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read 'Lisa L. Swem', written over a horizontal line.

Lisa L. Swem

A handwritten signature in black ink, appearing to read 'Philip G. Clark', written over a horizontal line.

Philip G. Clark

LLS/PGC

This document constitutes privileged attorney-client communication to remain confidential among the members of the Board of Education and administrative staff for the School District. As such, this document is exempt from disclosure under the Michigan Freedom of Information Act, MCL 15.243(1)(g), and the Board of Education may meet in a closed session to consider its contents pursuant to the Michigan Open Meetings Act, MCL 15.268(h).