



As we quickly move through July, most of the state has continued to loosen public health restrictions as part of Phase III of the state's reopening plans. Phase III allows museums, gyms, theaters, and libraries to reopen with safety measures and precautions in place. Massachusetts has continued its deliberate approach to reopening the economy even as much of the country experiences a dramatic rise in COVID-19 infections. Currently, the question of whether schools can open safely in the Fall is on most people's minds. The state's guidance and lack of a clear plan is a concern to many people. This week's Advisor looks at the latest communication and guidance from DESE around regular and special education, provides an update on workplace safety standards and testing considerations from the CDC, and touches on new legislation, including major proposals around police reform.

***In This Issue:***

<b>Subject</b>	<b>Page</b>
<b>A. Revised Workplace Specific Safety Standards for Office Spaces in Phase III</b>	1
<b>B. CDC Clarifies COVID-19 Testing Considerations for Workplaces</b>	2
<b>C. Reopening Schools for the 2020-2021 School Year</b>	3
1. DESE Announces Two-Step Process For District Reopening Plans	3
2. DESE Issues Additional Guidance Regarding Fall Reopening and an FAQs	4
3. DESE Issues Guidance on Special Education Services for Fall 2020	5
<b>D. LEGISLATIVE ALERT</b>	8
1. Police Reform in Massachusetts	8
<b>E. COVID-19 Postings on NMP Website</b>	11

**A. Revised Workplace Specific Safety Standards for Office Spaces in Phase III**

On July 6, the state's Department of Labor Standards issued revised Workplace Specific Safety Standards for Office Spaces as Phase III of the Commonwealth's reopening plan began. Many of the protocols from Phases I and II remain in place, however, the updated Workplace Specific Safety Standards now require employers to screen employees prior to the start of each shift.

**What must be done to screen employees at workplaces?**

Under the revised Safety Standards, employers are now required to screen workers "at each shift" to ensure that each worker is not experiencing COVID-19 symptoms, has not been exposed to COVID-19, and has not been asked to self-isolate or quarantine by the worker's doctor or a local public health official. As part of the screening employees must confirm:

- That the employee has no COVID-19 symptoms such as fever (100°F or above), chills, cough, shortness of breath, sore throat, fatigue, headache, muscle/body aches, runny nose, new loss of smell and/or taste, nausea, vomiting, or diarrhea;

- That the employee has not had “close contact” with an individual who tested positive for COVID-19. Close contact is defined as: living in the same household; caring for a person; being within 6 feet of a person for 15 minutes or more; or coming in direct contact with secretions (e.g. sharing utensils, being coughed on) while that person was symptomatic; and,
- That the employee has not been asked to self-isolate or quarantine by their doctor or a local public health official.

### **What if an employee fails to meet the above criteria?**

Any employee who fails to meet the above criteria must be sent home.

### **Were any changes made to the occupancy levels for office spaces in Phase III?**

Yes. Office spaces are now permitted to allow up to 50% of the maximum permitted occupancy compared with the 25% minimum capacity restriction set forth in the earlier phases. At no time may an enclosed space within a building exceed occupancy of 10 persons per 1,000 square feet. The occupancy calculations include customers, staff, and other workers. According to the updated guidance, office spaces must monitor customers and workers entering and exiting to ensure compliance with occupancy limits.

### **B. CDC Clarifies COVID-19 Testing Considerations for Workplaces**

On July 3, the Centers for Disease Control and Prevention (CDC) issued new guidance concerning different categories of COVID-19 testing “as part of a comprehensive approach to reducing transmission in non-healthcare workplaces.” The guidance outlines five different applications for testing which are summarized below.

#### Testing of Symptomatic Individuals

According to the CDC, the most relevant scenario for most employers is testing employees who exhibit COVID-19 symptoms as identified during screening procedures before entering the workplace. The guidance recommends that such employees should be immediately separated from others and sent home or to a health care facility. If the employee subsequently tests positive, the employee should self-isolate until meeting the criteria for discontinuing home isolation is met. Additionally, the CDC reiterated that employers should not use antibody testing to determine whether an employee is currently infected (which is not permitted under the ADA).

#### Testing Individuals Exposed to COVID-19

Employers may use viral testing for employees who come in close contact with someone who has COVID-19 (within 6 ft of an infected person for more than 15 minutes or longer). The CDC cautions that it is possible that there could be a delay between when a person is exposed to the virus and when the virus can be detected by testing. As a result, testing immediately after suspected exposure may not detect some employees who have been infected.

#### Testing Individuals Who Have Not Been Exposed to COVID-19

The CDC guidance provides for COVID-19 testing to help identify COVID-19 positive employees who are asymptomatic without any known or suspected exposure as a means of controlling transmission in the workplace. This application for testing may be used in workplaces where social distancing is difficult or where employees live on-site. The CDC recommends that employers use different testing approaches for this category such as initial testing of employees entering the worksite, periodic testing of employees at regular intervals, and/or testing of workers returning from a prolonged absence.

### Testing Individuals with Positive COVID-19 Tests to Discontinue Isolation

Testing in this context can be used to determine when an employee who has previously tested positive may discontinue self-isolation. The CDC recommends that testing under this approach should be used in collaboration with state and local health officials. The CDC also stated, consistent with its earlier guidance, that under the ADA employers may require a doctor's note from an employee prior to allowing the employee to return to work.

### Testing for Public Health Surveillance Purposes

The CDC stated that COVID-19 testing may be used for this reason to detect “transmission hot spots” or to evaluate the effectiveness of workplace infection control measures. However, employers should note that, pursuant to the current EEOC guidance, COVID-19 testing is permitted only in the context of determining whether employees are safe to enter the workplace.

Finally, the CDC notes that these testing considerations should be used as a supplement to rather than a replacement for federal, state, and local health and safety workplace safety laws. Any testing strategy should be conducted consistent with the EEOC guidance regarding permissible testing policies and procedures for employers.

## **C. Reopening Schools for the 2020-2021 School Year**

### 1. DESE Announces Two-Step Process for District Reopening Plans

On July 15, the Department of Elementary and Secondary Education (DESE) released an overview of a two-step process along with a template for school districts to submit their fall reopening plans. In its Initial Fall Reopening Guidance, DESE required school districts to create a plan that includes three learning models: 1) in-person learning with safety requirements, 2) hybrid learning, and 3) remote learning. Districts are instructed to submit their reopening plans to DESE in a two-step process summarized below:

**Step 1:** Districts must complete and submit a preliminary reopening plan summary to DESE **no later than July 31<sup>st</sup>**. In step 1, districts must complete an online form which requires the district to provide the following information:

- District's contact information, findings from the feasibility study on in-person learning, and a tentative election for which of the three reopening models the district may use to reopen the school year; and
- A brief description of each of the three reopening models.

**Step 2:** Districts must finalize their comprehensive reopening plan, submit the documents to DESE, and publicly release the plan to their community **by August 10<sup>th</sup>**. This will allow districts to incorporate any changes to their reopening plan based on additional guidance issued by DESE later in the summer. Each district must include the following information in its final reopening plans:

- Executive summary;
- Letter from the Superintendent to the community, including the district's selected reopening plan;
- Detailed descriptions for each of the three learning models;
- Out-of-school time plan;
- Information on student support and professional learning (e.g., safety, wellness, and social emotional supports; planning and instruction; school calendar with start date);
- Certification of health and safety requirements.

The complete DESE guidance and template may be found at our [website](#).

## 2. DESE Issues Additional Guidance regarding Fall Reopening and an FAQs

On Friday, July 10, the Department of Elementary and Secondary Education (DESE) released additional guidance and a set of Frequently Asked Questions regarding fall reopening plans which it announced would be due to DESE by **Friday, July 31** (see two-step process above).

Copies of both are available on our [website](#).

The Department is continuing to require school districts to submit one reopening plan that addresses health and safety requirements across three different student learning models — in-person, hybrid, and remote learning.

The plan must also describe how special populations will be effectively served within each of the models.

In this update and its more recent communications, DESE is asking districts and schools to focus on assessing the feasibility of bringing back students for in-person instruction.

No announcements have been made about exactly what school will look like in the Fall and Commissioner Riley has asked that districts refrain from making any public announcements about what reopening will look like in their district until early August. The Department and districts are still waiting for key information that will directly impact the best reopening model for each community.

The Department has indicated that it will continue to release FAQs with updates and covering additional topics as more details become available.

### 3. DESE Issues Guidance on Special Education Services for Fall 2020

Following the release of its Initial Fall Reopening Guidance, DESE issued its Guidance on Special Education Services for Fall 2020 early this month. The guidance, which is summarized below, outlines the manner in which districts and schools should deliver special education services within each of the three learning models (in-person, hybrid and remote) and provides additional direction to ease the transition for students with disabilities back into the learning environment.

#### Delivery of IEP Services

Consistent with its initial guidance, DESE urges districts and schools to prioritize in-person learning for students with significant and complex needs, which include the following:

- Students already identified as “high needs” through the IEP process on the IEP form titled “Primary Disability/Level of Need-PL 3,” who meet two of the following criteria:
  - Services provided outside of the general education classroom;
  - Service providers are special education teachers and related service providers;
  - Special education services constitute more than 75% of the student’s school day;
- Students who cannot engage in remote learning due to their disability;
- Students who primarily use aided and augmentative communication;
- Students who are homeless;
- Students in foster care or congregate care; and/or
- Students identified as English Learners.

Schools and districts must ensure that students receive all services documented in their IEPs through either in-person instruction, remote learning, or a combination of both. Additionally, schools and districts must make every effort to maintain in-person instruction for students with significant and complex needs, even if schools plan to offer a hybrid or remote learning model. For example, schools may provide full-time in-person instruction for such students in self-contained special education classes while operating a hybrid model. Alternatively, schools and districts are encouraged to provide as many in-person services as possible on a part-time basis or provide in-person services in a home or other community setting.

#### Special Education Services within the Three Learning Models

Districts and schools are expected to provide special education services through each of the learning models below, although the guidance stresses the importance of finding ways to provide in-person learning for students with disabilities. “Even if schools or districts are operating in a hybrid or remote model, educators and administrators must make every effort to continue to provide up to full-time in-person instruction to such students.”

##### A. Full-Time In-Person Learning

- All districts and schools should consider priority for in-person learning for students with disabilities when developing schedules.
- Ensure that considerations for inclusive learning are made for students with disabilities when using alternative school or external spaces and such students are placed in groupings or cohorts that support learning goals in the least restrictive environment.

- Identify staff trained in various areas of special education to be part of the COVID-19 response team.
- Provide additional training for educators who will provide direct physical support to students with disabilities (e.g. use of PPE).

#### B. Remote Learning

- All districts and schools are required to have a comprehensive plan for delivering special education instruction and services remotely.
- Districts and schools must be prepared to provide services through “Instruction and Services” model (e.g. structured learning time, teletherapy, and video conferencing) as opposed to the “Resources and Supports” model (e.g. sending packets and assignments home combined with frequent communication with parents). The “Resources and Supports” model, which districts and schools were permitted to employ in Spring 2020, may only be used on a temporary basis (no more than two weeks) once school reopens.
- For the 2020-2021 school year, Instruction and Services must include the following components:
  - A regular and consistent schedule of classes, interventions, services, and therapies as required by a student’s IEP, offered synchronously or asynchronously;
  - Structured learning time designed so that students can access state standards; and
  - Frequent interactions with teachers and other staff members to ensure participation.
- Districts and schools must support the infrastructure needed to put in place the required Instruction and Services, including availability of computer devices and internet connectivity in student’s homes.

#### C. Hybrid Learning

- Districts and schools should, as described above, prioritize in-person learning for students with disabilities to the greatest extent possible.
- Districts and schools may, in the alternative, choose to employ in-person services at a student’s home or in another community-based setting to ensure as many services as possible are provided in-person instead of remotely.

### Promoting Inclusive Services and the Least Restrictive Environment

Districts and schools should carefully develop classroom assignments and service delivery schedules for students with disabilities so that they receive services consistent with their IEPs in the least restrictive environment, while maintaining current health and safety protocols. For example, special education teachers and related service providers (speech language pathologists, occupational therapists) may provide services in the general education setting remotely from within the school building via video conference instead of physically entering the classroom.

Special education teachers and other service providers that are unable to provide services in the general education setting remotely via video conference should schedule services in a manner that adheres to physical distancing requirements and minimizes the number of staff members and teachers in a classroom at a given time. To accomplish this some classrooms may need to have a

smaller number of students to accommodate the presence of additional educators and staff members.

### Parent Engagement and Communication

DESE encourages districts and schools to ensure that teachers, special education teachers, and service providers communicate regularly with parents. Frequent and ongoing communication will allow educators, service providers, and parents to develop a comprehensive plan for students to receive individualized instruction and related services. All communication with parents must be provided in the parents' primary language.

IEP team members must consider information provided by parents regarding their children's experiences during the state of emergency and must take into account that the school closure was a traumatic event causing some students to regress and develop new disability-related areas of need such as anxiety. Districts and schools should use all available data and information to anticipate a student's areas of need and levels of need once school reopens.

Parent engagement will be extremely important in determining if and how special education services will be provided differently. As such, districts and schools should contact parents as soon as possible to discuss how a student's IEP services will be delivered if different from that described in a student's IEP. With this information, educators must provide parents with specific information describing how IEP services will be provided at the start of the 2020-2021 school year.

If special education services are provided differently than as described in a student's IEP, parents must be notified in writing with specific information about how those services will be provided after they have discussed such changes with a teacher or IEP liaison. Parental notification about changes in special education services should include information such as how, where, and when specialized services will be provided and should reflect when the different services will begin.

### Developing Positive Behavior and Safe Learning Environments

Proactive instruction regarding school- and class-wide routines, social skills instruction, and other support will be necessary to prevent unwanted behaviors. Recognizing that students will reacclimate to learning and school life at different rates, districts and schools should communicate with parents about how their child is doing emotionally and behaviorally and assist parents with the transition to in-person learning.

Districts and schools should utilize disciplinary action as a last resort for students with disabilities who exhibit behavioral challenges as wearing masks, adapting to new routines and protocols, and other changes in the learning environment may be challenging or frightening for students with disabilities.

### Initial Evaluations, Reevaluations, and IEP Team Meetings

Districts and schools will need to develop a plan to address the back log of assessments and meetings, while also addressing the need to maintain timelines for annual review team meetings and evaluation of students who are newly referred or due for an evaluation. Districts and schools

are advised to continue following the timelines in the *DESE Implementation of Special Education Timelines During the COVID-19 State of Emergency*.

IEP teams must continue to conduct annual review team meetings as they are due, in compliance with 603 CMR 28.04(3). Districts should update IEPs as though the student will be attending school full-time in-person; however, they should remain flexible in their approach to the delivery of IEP services because of the unpredictable nature of the COVID-19. Changes in the delivery of services due to a school's change in learning model as a result of COVID-19 does not result in a change in placement.

The complete version of this guidance, along with the Initial Fall Reopening Guidance, may be found at our website. As always, should you have specific questions regarding special education issues as you begin planning to reopen, please do not hesitate to contact one of our attorneys.

## **D. LEGISLATIVE ALERT**

### **1. Police Reform in Massachusetts**

Last week the Massachusetts Senate passed a comprehensive bill to bring about police reform and racial equality through additional training and oversight. On Sunday night, July 19, the House unveiled its own version of the police reform and racial equality legislation. Unless lawmakers decide to extend their legislative session, they have until July 31 to reach agreement on these and any other substantive proposals. The Legislature has also yet to pass a budget for the fiscal year that started July 1, 2020.

The highlights of both versions of the proposed legislation are summarized below:

#### **Senate Bill, S. 2800**

The Senate bill was passed in the early morning hours of July 14, after an overnight session that spanned more than 17 hours. The highlights of the proposed legislation include the following:

- Creates an independent police officer standards and accreditation committee within the Executive Officer of Public Safety and Security consisting of 13 members appointed by the governor. This committee will have the power to certify, renew, or revoke or otherwise modify the certification of any law enforcement officer.
- Provides authority to the committee on standards and accreditation to receive complaints of officer misconduct from any person, request an officer's appointing authority initiate an investigation into a complaint of officer misconduct, and conduct independent investigations into and adjudicate complaints of officer misconduct.
- Outlines procedures for hearings before the committee for officers accused of misconduct. The committee may revoke or suspend an officer's certification or issue a reprimand for certain enumerated grounds based upon a finding by a preponderance of the evidence and a majority vote of the panel.



- Requires the committee to create and maintain a database containing information with details relating to an officer's certification, training, separation from an appointing authority, complaints of misconduct, etc.
- Provides that adverse employment actions taken by an appointing authority as a result of a revocation decision from the committee may not be appealed to the Civil Service Commission.
- Mandates additional basic and in-service training programs on de-escalation tactics and use-of-force
- Regulates the use of physical force by law enforcement officers. Officers may not use physical force unless de-escalation tactics have been attempted or such tactics are not feasible in the situation, with certain exceptions (e.g. effect an arrest, prevent escape, and prevent imminent harm).
- Requires law enforcement officers to intervene if they witness another officer using physical force, including deadly force, beyond what is necessary or objectively reasonable in the situation. The officer must report the use of excessive force to their direct supervisor as soon as reasonably possible, but no later than the end of the officer's shift. Any officer who has a duty to intervene and fails to do so may be held liable for any injuries or death caused by the other officer's use of unreasonable force.
- Prohibits law enforcement entities from engaging in racial or other profiling tactics, and temporarily restricts the use of facial recognition technology
- Creates a task force on the uniform use of body-worn cameras by law enforcement across the Commonwealth.
- Eliminates the requirement that cities, towns, and school districts employ a school resource officer (SRO). Police chiefs may continue to be able to assign an SRO at the request of a superintendent.

### **House Bill, H. 4680**

The House is expected to vote on the following on Thursday. The House proposed bill includes the following:

- Establishes a seven-member police standards and training commission with power to certify, renew, or revoke or otherwise modify the certification of any law enforcement officer. The racial and gender makeup of this committee should reflect the Commonwealth's population.
- Creates a division of police standards, within the standards and training commission, to investigate officer misconduct and make disciplinary recommendations to the full commission.
- Requires that the division of police standards create a database containing information regarding complaints of officer misconduct and to actively monitor such database to identify patterns of unprofessional police conduct.

- Creates of a division of police training and certification, which will establish and promulgate uniform policies for training and certification of all law enforcement officers within the Commonwealth.
- Establishes a right for all persons to bias-free professional policing and any action taken by a law enforcement officer while acting under color of law that results in his or her decertification shall constitute a prima facie case of a violation of such right to bias-free professional policing.
- Also provides that adverse employment actions taken by an appointing authority as a result of a revocation decision from the committee may not be appealed to the Civil Service Commission.
- Provides that no law enforcement officer shall be immune from civil liability for any conduct under color of law that violates a person's right to bias-free professional policing if that conduct also results in the officer's decertification.
- Also requires law enforcement officers to intervene if they witness another officer using physical force, including deadly force, beyond what is necessary or objectively reasonable in the situation. The officer must report the use of excessive force to their direct supervisor as soon as reasonably possible, but no later than the end of the officer's shift. Any officer who has a duty to intervene and fails to do so may be held liable for any injuries or death caused by the other officer's use of unreasonable force.
- Establishes a separate division of police standards and professional conduct enforcement within the Office of the Attorney General to investigate allegations of criminal offenses committed by law enforcement officers, investigating all instances where the action of an officer results in the death or serious bodily injury.
- Also regulates the use of physical force by law enforcement officers. Officers may not use physical force unless de-escalation tactics have been attempted or such tactics are not feasible in the situation, with certain exceptions (e.g. effect an arrest, prevent escape, and prevent imminent harm). Bans use of chokeholds and discharge of a firearm at or into a fleeing motor vehicle.
- Keeps in place the requirement that cities, towns, and school districts employ a school resource officer.
- Creates a commission to review the model memorandum of understanding for school resource officers and make recommendations for changes for the model memorandum of understanding.
- Mandates additional in-service training for school resource officers, including child and adolescent cognitive development; engagement and de-escalation techniques for youths, and strategies for resolving conflicts and diverting youths in lieu of arrest.

## **E. COVID-19 Postings on NMP Website**

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website ([www.nmplabor.com](http://www.nmplabor.com)). The following is a list of the new materials added since our last Advisor:

- DESE Two-Step Process and Template for Fall Reopening Plans
- Additional Guidance on Reopening and FAQs
- Comprehensive Special Education Guidance for the 2020-21 School Year

If you have any questions or would like to discuss the above in more detail, please contact:

**Leo Peloquin**

lpeloquin@nmplabor.com

**Melissa Murray**

mmurray@nmplabor.com

**Brett Sabbag**

bsabbag@nmplabor.com



<https://nmplabor.com/covid-19-resources/>

**Tim Norris**

tnorris@nmplabor.com

**Philip Collins**

pcollins@nmplabor.com

**Antoine Fares**

afores@nmplabor.com