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April 1, 2020

**MEMORANDUM**

FROM: RYAN STEWART, SECRETARY OF EDUCATION

TO: DISTRICT SUPERINTENDENTS AND CHARTER SCHOOL LEADERS

RE: FREQUENTLY ASKED QUESTIONS (FAQs) ABOUT WORK AND  
PAYMENT FOR WORK DURING THE PHYSICAL CLOSURE OF SCHOOLS  
THROUGH THE END OF 2019-2020 SCHOOL YEAR

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The following FAQs are intended to update guidance, and to address multiple questions received about, the use and payment of staff and contractors now that schools will be physically closed for the remainder of the 2019-2020 school year. This April 1, 2020 Memorandum supersedes the March 31, 2020 draft that was emailed yesterday evening.

The continued use of staff and contractors is crucial for implementing each district's and charter school's Continuous Learning Plan, delivering meals, and performing other essential operations for the remainder of the 2019-2020 school year. The ways in which staff and contractors may be used during school closures have been described in the following guidance previously shared with districts and schools:

- PED [FAQ regarding Extended School Closure, dated March 27, 2020](#).
- PED Implementation Guide for Your Continuous Learning, dated March 26, 2020.
- HSD Memorandum to Medicaid School-Based Services (MSBS) Participating LEAs/RECs/SFEAs, dated March 23, 2020.
- PED Business Operations Memorandum, dated March 17, 2020.

- WSD Email, dated March 16, 2020 – see also, <https://www.dws.state.nm.us/COVID-19-Info>.
- PED Alternate Work Expectations, dated March 13, 2020.



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## **FAQ**

**Q:** *Are the alternate work suggestions for staff and contractors in prior guidance still applicable, even though they were written to address the initial 3-week closure?*

**A:** All of the examples of off-site work are suggestions that remain applicable for the 2019-2020 school year. Please be creative in determining how to utilize staff and contractors to provide continuous learning and other educational supports in the manner that best serves your students. This is a great opportunity to use staff and contractors to implement ways to individualize students' education; to increase outreach to families and increase parent and family engagement; to focus attention on equity and at-risk student needs across your district or charter school; to build the capacity of school staff; and to identify ways to be cognizant of your students' social-emotional needs during these uncertain times.

**Q:** *May a district or charter school require staff and contractors to perform duties that aren't listed in the job description?*

**A:** This period of school closure requires a comprehensive approach to providing continuous learning and to supporting district and charter school operations that enable student learning. The expectation is that staff and contractors be productively engaged. Ultimately, the terms of the contract or contractor agreement and any applicable collective bargaining agreement should be read together with relevant federal and state guidance. For example, the U.S. Department of Labor has posted the following [FAQ regarding the Fair Labor Standards Act](#):

*Can an employee be required to perform work outside of the employee's job description?*

Yes. The FLSA does not limit the types of work employees age 18 and older may be required to perform. However, there are restrictions on what work employees under the age of 18 can do. This is true whether or not the work asked of the employee is listed in the employee's job description. As part of your pre-influenza, pandemic, or other public health emergency planning, you may want to consult your human resource specialists if you expect to assign employees work outside of their job description during a pandemic or other public health

emergency. You may also wish to consult bargaining unit representatives if you have a union contract.

*Q: May districts or charter schools pay less to contractors who work fewer hours than before the school closure?*

A: The expectation is that contractors be productively engaged. For contractors who find they have less work to do than before the school closure, taking on other duties, such as food service work, is a productive way to increase hours of work. While the contract may allow districts or charter schools to pay less to contractors who work fewer hours, there is much work to do with the continuous learning requirements and the continued provision of services to students with special needs. Importantly, educational services under the Continuous Learning Plan must comply with FAPE to meet the educational needs of students with disabilities under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. See [March 21, 2020 OSERS Supplemental Fact Sheet](#). Contracted employees can play a major role to ensure that essential special education and 504 services can continue to be met.

In addition, it is recommended that districts and charter schools creatively utilize their contracted employees to assure preparation and delivery of meals and to help support students and staff during the time that schools are physically closed. The more that we can keep contractors engaged in meaningful support of our schools, the greater the possibility that they will be available when students physically return to school.

*Q: Must districts or charter schools use and pay contractors who refuse to perform work assigned by the district or charter school?*

A: Generally speaking no - please refer to the terms of the contract.

*Q: May ancillary service providers, such as occupational therapists, physical therapists, and school counselors provide telehealth services?*

A: Yes.

*Q: May staff refuse to participate in continuous learning and refuse to perform other duties?*

A: Generally speaking, unless the employee is on an authorized form of leave such as Family Medical Leave Act (FMLA) or federal paid sick leave, staff may not refuse to participate in continuous learning and may not refuse to perform other duties. The appropriate response may depend on the terms of the contract, any applicable collective bargaining agreement, and district or charter school policies. Please consult with your human resources professionals, counsel, and union representatives for specific questions about the interpretation of contracts, laws, and any applicable collective bargaining

agreements that are relevant to your situation. PED continues to urge unions, staff, and administrators to work together to set expectations for staff responsibilities and to ensure the successful implementation of the Continuous Learning Plan. If the district or charter school has clearly established expectations for work while schools are physically closed, then school staff who are physically able to work on school premises or through telework are required to do so. As long as the district or charter school has taken necessary steps to comply with social distancing, stay-at-home orders, and other protective health measures, then a refusal to work may be treated as insubordination and documented as such. Then staff could be subject to a reduction in personal leave or wages if allowed under the contract and any applicable collective bargaining agreement. During these unprecedented times, schools and staff need to work together to optimize educational services in accordance with the Continuous Learning Plan. Districts and charter schools should make all reasonable efforts to ensure that staff receive the technology or resources needed to successfully implement the Continuous Learning Plan. Once the start date for the district or charter school's Continuous Learning Plan commences, staff should begin implementing it according to the stated expectations.

*Q: May school staff refuse to implement parts of their district's or charter school's Continuous Learning Plan -- for example, if they are uncomfortable with delivering online learning?*

A: Generally speaking, no. Each district's and charter school's Continuous Learning Plan will describe the expected ways for providing education services, and it may include online learning. In order to optimize learning opportunities for students, it will be critical for school staff to implement the Continuous Learning Plan. If staff need additional support to deliver online learning, then districts and charter schools should consider providing coaching and professional development to increase digital skills among school staff.

*Q: May districts and charter schools require staff and contractors to work from home when they have expressed a wish to work on school premises?*

A: Yes, and this would be consistent with current public health orders by the Governor and the Department of Health (DOH).

*Q: May districts and charter schools require staff and contractors to come onto school premises to pick up materials so staff and contractors may work from home?*

A: Generally speaking, if coming to the school is necessary to implement the continuous learning plan or maintain key services like food distribution or site maintenance, then yes. If materials are most suitably distributed by having staff members pick up the materials from the school, then districts and charter schools may allow pick

up in a non-congregate fashion while practicing proper health safety protocols. Staff and contractors should be notified of the protective health practices that are being implemented to protect their health, i.e., current limitations on the number of people in a space at one time, social distancing, and sanitization of certain materials. Districts and charter schools are encouraged to take all reasonable alternative measures to attend to the needs of those with legitimate concerns about picking up materials. For example, districts and charter schools can allow a fellow staff member to pick up their colleague's materials and deliver them to that individual's house. Similarly, a school bus driver possibly could deliver the necessary materials. If staff and contractors have specific health or safety concerns, then these should be addressed with a supervisor, and additional concerns should be addressed with the chain of command and the Human Resources Department at the district or charter school. However, if coming on-site is simply a matter of preference and the work to be performed is not an "essential service", is not time-sensitive, or it can be performed remotely, then districts and charter schools should allow staff to perform the work remotely or wait until the public health order deems it safe to resume normal work routines.

Q: *During the school closure period, what are "essential services"?*

A: For the purposes of this April 1, 2020 Memorandum, "essential services" pertain to work in support of health and hygiene which cannot be performed through telework and includes work in the line of food service preparation and delivery and work done to clean, maintain, supervise, and sanitize district and charter school property, materials, and supplies. The term "essential" comes from the [March 23, 2020 DOH Public Health Order](#) defining "essential business". While executing the Continuous Learning Plan is also an absolutely necessary service for your students, PED envisions that the vast majority of the instructional work inherent in implementing a district or charter school's Continuous Learning Plan can and will be performed remotely. Any instructional work requiring the on-site presence of staff (such as photocopying instructional materials) should be limited to the greatest extent possible and should be conducted with proper social distancing, with strict adherence to DOH protocols for hygiene, and in a non-congregate fashion, combined with telework when practicable. Because telework appears to be available to staff implementing the Continuous Learning Plan, the necessary service of educating your students is not described as an "essential service" for the purpose of this April 1, 2020 Memorandum.

Q: *May districts and charter schools require staff and contractors who perform "essential services" to work on school premises?*

A: Yes - if essential services are required at a school or administrative site, then that is where the work must be performed. If the employee has specific concerns about health

and safety, then these should be addressed with the supervisor, and remaining concerns should be addressed with the chain of command and Human Resources Department at the district or charter school. If the district or charter school has clearly established expectations for essential services staff at school premises, then staff who are physically able to work on school premises are required to do so. As long as the district or charter school has taken necessary steps to comply with social distancing and other protective health measures, then a refusal to work may be treated as insubordination and documented as such. Staff also may be subject to a reduction in personal leave or wages if allowed under the contract and any applicable collective bargaining agreement.

*Q: May districts and charter schools provide additional compensation to food service staff who must prepare meals on school premises during the school closure?*

*A:* While PED is not requiring or recommending additional compensation, a local school board or governing body may choose to adopt a resolution to provide additional compensation for food service staff whose preparation of meals on school premises during the school closure requires additional work or duties. A local school board or governing body choosing to do this should consult with their legal counsel about how to take such action within the parameters of law. In collective bargaining environments, these actions may require agreement with the union, depending on the language in the collective bargaining agreement. The additional work and duties provided by food service staff preparing meals on school premises would constitute consideration for additional compensation; would not be a donation; and would be permissible under N.M. Const. Art. 9, § 14 and N.M. Const. Art. 4, § 27.

*Q: May a district, charter school, or school bus company terminate a bus driver's contract?*

*A:* That depends on the terms of the contract. If there is not enough work for every bus driver, and the terms of the contract allow it, then a reduction in bus driver positions may be possible. (See the attached DWS email and link). However, the preservation of school bus companies and school bus driver positions is important for when students physically return to school. Districts and charter schools are urged to use the services of contractors to the fullest extent possible, including for the preparation and delivery of meals and the delivery and pick up of instructional materials and supplies. Given the extraordinary circumstances, bus drivers and administrators can collaborate to identify other critical needs to which bus drivers can meaningfully contribute. For additional suggestions, please refer to prior guidance on alternate work suggestions.

*Q: May long-term substitute teachers continue to receive compensation during the school closure?*

A: Only if long-term substitutes are performing services for districts or charter schools. Districts and charter schools are encouraged to use long-term substitutes to provide continuous learning to students or other educational or operational support. It is recommended that districts and charter schools identify opportunities to use long-term substitutes when crafting and implementing the Continuous Learning Plan. Long-term substitutes should work with their supervisor and the district or charter school to determine what services they may continue to provide in order to receive compensation.

Q: *May short-term substitute teachers continue to receive compensation during the school closure?*

A: If there is a way for districts and charter schools to use short-term substitutes to provide continuous learning to students, then they may be able to provide services and receive compensation. Otherwise, options such as unemployment compensation benefits may be available to short-term substitutes through the Department of Workforce Solutions.

Q: *Has the U.S. Department of Labor issued guidance about COVID-19 and the Family Medical Leave Act?*

A: Yes – see the U.S. Department of Labor’s:

1. [Notice regarding the Families First Coronavirus Response Act](#), which must be posted from April 1 through December 31, 2020. The posting requirement may be met by posting it on your website and/or emailing it to all of your employees.
2. [FAQ regarding the Notice regarding the Families First Coronavirus Response Act](#). To take advantage of paid leave under this Act, generally speaking, employees need to demonstrate the inability to work onsite and the inability to telework. Districts and charter schools must document and account for all leave taken under this Act in order to receive the 100% federal tax deduction for providing paid leave under this Act. Your employment and tax attorneys should be consulted for more information about the tax deduction requirements.
3. [COVID-19 and the Family and Medical Leave Act Questions and Answers](#).

Q: *Has the applicability of the Fair Labor Standards Act changed due to COVID-19 and the various federal relief measures?*

A: No.