



## MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS

### DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (DESE) REOPENING GUIDANCE/REGULATIONS AND LOCAL BOARDS OF HEALTH

4.7.21

This information is provided for informational purposes only and is not to be construed as legal advice. It has not been approved or reviewed by any state agency.

**MAHB's comments are indicated in *bold italic font*. These comments are the opinion of MAHB and are provided for informational purposes only. They are not to be construed as legal advice.**

- **Goal of DESE Guidance/Regulations:** Safe return to a full time, in-person instruction learning model<sup>1</sup>:
  - Elementary School (K-5): Full-time, in-person instruction 5 days per week beginning April 5, 2021.
  - Middle School (6-8): Full-time, in-person instruction 5 days per week beginning Wednesday, April 28, 2021.
  - High School (9-12): DESE has issued no formal mandatory return date as of the above date.
- **Rationale:**
  - Improvement in COVID-19 health metrics; implementation of rigorous mitigation strategies; weekly pooled testing.
  - DESE regulations are legally binding.
- **Rigorous Mitigation Program:**
  - Mitigation is a comprehensive program with a combination of interdependent strategies. Every strategy is dependent upon the proper deployment of all other strategies.
    - ***If any of these strategies are not implemented, or implemented poorly, then the entire mitigation program is non-compliant, and LBOH should take corrective steps.***
    - 3-foot distancing is considered ample *so long as masks are in use at all grade levels*, provided that the area is properly sanitized, personal hygiene measures are taken, and that respiratory etiquette is maintained. The lack of any one of these strategies completely negates the mitigation program.
    - ***LBOHs should recognize that, while there is “an ever-growing body of evidence locally, nationally, and from across the globe that in-person school is safe when proper health and safety protocols are followed,” this must be balanced against the growing concern that the long-term effects of COVID on school-age children are completely unknown, and certain variants are as – or more – virulent in children.***
  - Physical distancing in school buildings:

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<sup>1</sup> There are two exceptions to the full time return: 1) parents/guardians may choose to have their students remain in the remote model through the end of the school year; and 2) students who are symptomatic, diagnosed with COVID-19, or who are close contacts with a positively diagnosed person, may follow DESE quarantine protocols and learn remotely.

- On March 19, 2021, the CDC Standard was amended to provide for a minimum of 3 feet so long as the community transmission rate is determined to be low, moderate, or substantial for students.<sup>2</sup>
  - In areas of high community transmission, middle and high school students should be 6 feet apart if cohorting is not possible, according to CDC.
    - ***The LBOH in a municipality which is classified as “High Transmission,” should enforce 6-foot minimum social distancing in middle and high school settings.***
  - Cohorts/assigned seating.<sup>3</sup>
    - Cohorts must be separated by at least 6 feet.
  - There must always be a 6-foot distance between adults and between adults and students.\
- Masks required:
    - The new standard issued March 9, 2021<sup>4</sup>, updated the prior face mask guidance “to require masks **at all grade levels**, unless students receive a medical or behavioral exemption” effective immediately.
  - Handwashing required periodically throughout the day:
    - DESE states that increasing installations of hand sanitizer may be considered by schools while monitoring its use by younger students.
    - CDC standards state that schools should teach and reinforce handwashing with soap and water for at least 20 seconds and increase monitoring to ensure adherence among students, teachers, and staff. If handwashing is not possible, hand sanitizer containing at least 60% alcohol should be used.
      - ***The use of hand sanitizers (which contain 60% + ethanol) in elementary schools may present risks to the children. According to the National Poison Data System, there has been an increase in child poisoning cases since COVID began. Prior to COVID, there were over 85,000 calls to poison control from 2011 to 2015 involving children who ingested hand sanitizer.***
  - Physical distancing on school busses:
    - DESE has amended its regulation for school bus distancing<sup>5</sup> As of 2.11.21,
    - “capacity limitations and physical distancing requirements for students on buses are lifted, except for middle and high schools in districts with high community prevalence.”
    - For middle and high schools in districts with high community prevalence, capacity limitations and physical distancing requirements on buses are amended to allow 2 students per bus bench.
    - The CDC Standard is different, requiring distance between children on school buses (for example, seat children one child per row, skip rows), when possible.

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<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html#:~:text=In%20middle%20schools%20and%20high.if%20cohorting%20is%20not%20possible>

<sup>3</sup> A cohort or pod is a distinct group that stays together throughout the entire school day during in-person learning, or over the course of any pre-determined period of time, so that there is minimal or no interaction between groups. This practice limits cross-over of students and teachers to the extent possible to decrease opportunities for exposure or transmission; reduce the number of people touching shared surfaces; facilitate more efficient contact tracing if a person has COVID-19; and allow for targeted testing, quarantine, and/or isolation of a single cohort instead of school-wide measures in the event of a positive case or cluster of cases.

<sup>4</sup> <https://www.doe.mass.edu/covid19/on-desktop/in-person-learning-guide.docx#:~:text=The%20requirement%20for%20%E2%80%9Cfull%2Dtime,per%2C%20five%20days%20per%20week>

<sup>5</sup> <https://www.doe.mass.edu/covid19/on-desktop/in-person-learning-guide.docx>

- In addition, **masks are required** by federal order on school buses and other forms of public transportation in the United States. Open windows to improve ventilation when it does not create a safety hazard. Maintain social distancing in the bus, including at entry doors.<sup>6</sup>
- CDC also states, “drivers and aides should create distance between children on school buses, including **seating children one student per row facing forward and skipping rows between students.** Children from the same household can sit together, if needed.”
  - *Local boards of health are advised to decide for themselves whether there is any public health benefit to mandating a minimum 3-foot distancing in an indoor school facility but allowing the same students to sit shoulder to shoulder on a school bus, frequently for a half hour or more. Children may legally spend up to one hour on a school bus unless a child’s IEP team decides differently.*<sup>7</sup>
- Classroom capacity:
  - Set up classrooms with desks at least three feet apart, with students facing the same direction. The three feet distance is measured “seat edge to seat edge” front to back and side to side.
  - Having students face the same direction should be the default desk set-up in the classroom.
  - According to DESE, students may face each other for a “turn and talk” or other group activity for short periods of time (e.g., 15-20 minutes several times per day). During these short periods, students should refrain from singing or engaging in activities that involve increased respiration. Appropriate mask use should be verified before these short periods occur.
    - *This appears to conflict with the CDC/DPH standard wherein a “close contact” is deemed contact within 6 feet for 15 or more minutes in a 24-hour period. LBOHs are urged to consider whether this is an acceptable standard in their community.*
    - *Even though the DESE & CDC standard allow children to distance at 3’, the close contact definition by CDC in such events is still 6’, so all children sitting within 6’ of a positive contact are close contacts of that positive person.*<sup>8</sup>
- Comprehensive communication strategy:
  - There should be an ability to communicate with the “COVID lead” and LBOH “24/7” in emergency situations.
    - *The LBOH or its agent should have a reliable line of communication with any and all “COVID leads” in the municipality. This should include the exchange of cell phone numbers.*
- Be prepared to provide remote learning immediately:
  - *If a situation is creating an imminent threat to public health, the LBOH has the authority to declare a public health emergency under the nuisance statutes (G.L. c. 111, §§ 122, 123), and take steps to abate the nuisance.*
    - *LBOH can order a school to be closed pursuant to public nuisance statutes.*

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<sup>6</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html>

<sup>7</sup> 603 CMR 28.05 (8)(a).

<sup>8</sup> The definition of a close contact is someone who was within 6 feet of a person diagnosed with COVID-19 for a total of 15 minutes or more over a 24-hour period. The definition of a close contact applies regardless of whether either person was wearing a mask. For schools that use less than 6 feet between students in classrooms, the definition of close contacts should not change. Students sitting less than 6 feet next to another student or person diagnosed with COVID-19 for a total of 15 minutes or more should quarantine at home and be referred for testing. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html>

- ***Before doing this, please check with your city or town attorney.***
    - Testing, tracing, and isolation:
      - According to DESE, when a case tests positive, the LBOH or the CTC will notify the positive case/case’s guardian.
        - Provide support for isolation.
        - Begin contact tracing.
          - “to further assist with contract tracing” positive cases “are asked” to reach out to personal contacts and notify the school.
      - Close contact:
        - Anyone who was within 6 feet of an infected person for a total of 15 minutes or more over a 24-hour period (for example, *three individual 5-minute exposures for a total of 15 minutes*).
          - ***The DESE guidance states this as this as “a total of 15 minutes during the [school] day,”<sup>9</sup> which implies that the measure is a school day, rather than a 24-hour period as stated by CDC. “An infected person can spread COVID-19 starting from 2 days before they have any symptoms (or, if they are asymptomatic, 2 days before their specimen that tested positive was collected), until they meet the criteria for discontinuing home isolation.” (CDC)<sup>10</sup>***
- ***In the event of an in-school positive case, the case should be referred to the LBOH in all instances. Contact tracing and isolation or quarantine are statutorily the legal obligation of the LBOH, and not the school department. It is recommended that the LBOH notify the local school district that it is not the place of schools to substitute their procedures for those of the board of health.***
- ***While DESE requires that all in-school positive cases be reported to them with no personal identifiable information, they will not “play a formal role in tracking or monitoring cases at a local or state-wide level” but they will be able to provide support “in consultation” with local public health authorities (i.e., LBOH).<sup>11</sup>***
- Protocol when there is case:
  - Positive case must stay home and isolate.
  - Notify designated “COVID-19 lead,” who notifies other school personnel previously identified.
  - Assure that designated school COVID lead maintain contact with LBOH throughout the process.
    - ***In all instances the LBOH takes charge of contact tracing.***
  - If the positive case was on premises two days prior to symptom onset or positive test:
    - Close areas visited by positive case until areas can be cleaned and disinfected.
    - Clean and disinfect classroom and other facilities, including buses visited by positive case.
    - School should help identify close contacts through:
      - Assigned seating charts;
      - Proximity related to class activities;

<sup>9</sup> <https://www.doe.mass.edu/covid19/faq/fall-reopening-faq.docx> see Pg. 4

<sup>10</sup> <https://search.cdc.gov/search/index.html?query=%22Close+Contact%22&sitelimit=coronavirus%2F2019-nCoV&utf8=%E2%9C%93&affiliate=cdc-main>

<sup>11</sup> DESE protocol dated 9.18.2020

- Specials (art, gym, music) may have merged cohorts, so be aware of inter-cohort contacts.
    - “Identifying all who were within 6 feet of positive case for at least 15 minutes (cumulative over school day)”
      - ***Note the DESE standard conflicts with the CDC guidance. It uses the measure of a “school day” for the span of exposure, versus “CDC’s 24 hours.” The LBOH should mandate and enforce the safest alternative which is the CDC standard.***
      - Look back to 2 days before symptom onset or 2 days before positive test for an asymptomatic but positive person.
      - Consider students in “specials” (i.e., art, music, gym, etc.)
  - While DESE guidance instructs the school to have written communication to staff/teachers/families of close contacts that there has been a positive case, DESE has strict limitations on the information that can be provided.
    - ***See MAHB guidance document on privacy, which is a predecessor document to this guidance.***<sup>12</sup>
  - Do not share name of case.
    - LBOH will be notified of positive tests by DPH/MAVEN.
      - ***Assure that the school confirms that the LBOH in each municipality the school serves has that information, as students may be from different cities and towns, and the particular LBOH may not have the relevant information for a given contact, especially in regional school districts.***
      - ***HIPAA is not a bar to sharing information with a board of health, as it is critical that the LBOH have all data necessary to protect others from the spread.***
      - ***The need for constant exchanges of information between the school district and the LBOH cannot be stated strongly enough. The more information that is exchanged, the less likely there will be a surprise that will put too much strain on the system.***
- Protocol when there are multiple cases in the school or district:
  - Work with LBOH to determine whether transmission is happening in school.
    - ***The schools will follow the lead of the LBOH.***
      - Review public health metrics.
      - Must have regular and open line of communication between LBOH and the schools’ “COVID-19 lead.”
    - Before making a final decision to close or shut down all or parts of school, “the superintendent must consult with DESE for further guidance.”
      - ***Superintendent and/or COVID-19 lead must keep the LBOH apprised of all evolving situations.***
      - ***If there remains a public health emergency in the opinion of the LBOH, and the Superintendent has not closed the school, the LBOH may exercise its statutory powers and close a school.***
      - ***Contact the city or town attorney first.***

## SPECIAL GUIDANCE NOTE ON COVID-19 EXPOSURE-RELATED PRIVACY ISSUES

<sup>12</sup> <https://www.mahb.org/wp-content/uploads/2020/10/Final-Privacy-Issues-in-Schools-10.6.2020.pdf>

The outline above is an attempt to simplify DESE guidelines relative to COVID-19 issues in the school setting. The outline identifies two main issues that need some clarification. The first is the need to assure that LBOHs are the lead partner in any and all COVID-19 surveillance in schools and school districts. The second surrounds privacy and confidentiality issues that will arise in collecting and receiving protected health information without individual authorization.

The Health Insurance Portability and Accountability Act's (HIPAA) Privacy Rule permits a covered entity to disclose without authorization, the "protected health information" (PHI) of a person who has been infected with or exposed to COVID-19 to a local public health authority that "is authorized by law to collect or receive such information for *the purpose of preventing or controlling disease, injury or disability, including for public health surveillance, public health investigations, and public health interventions*"<sup>13</sup> "Covered entities" include hospitals, public and private health insurance, and health care providers.

While schools and local boards of health are not covered entities, HIPAA's Privacy Rule provides a helpful analogy in addressing the sharing of the name and/or other identifying information of a person who has been infected with or exposed to COVID-19. If the sharing of PHI is necessary for the purpose of preventing or controlling disease, injury, or disability, including for public health surveillance, public health investigations, and public health interventions, then school personnel and LBOHs should be able to share PHI to prevent a serious and imminent threat to public health and safety. The disclosure can be to persons at risk of contracting or spreading a disease. It can also be to a patient's family members, friends, or other persons responsible for the patient's care. The means of disclosure should be consistent with the above-described DESE protocols and should be limited to information which is the "minimum necessary" to accomplish the purpose.<sup>14</sup>

In light of the above, the disclosure of protected health information should happen only when necessary, to protect a serious threat to public health and should be limited to information which is the minimum necessary. The decision to disclose such information should be made by exercising the judgment of a public health professional based upon the specific circumstances of the case at hand.

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<sup>13</sup> 45 CFR §154.512(b)(1)(i).

<sup>14</sup> HHS HIPAA Bulletin.