

Frequently Asked Questions

ENROLLMENT AGREEMENTS



Frequently Asked Questions Relating to Enrollment Agreements between Massachusetts Early Education and Care Providers and Parents

These Frequently Asked Questions (FAQ) are provided for informational purposes only and are not legal advice. These FAQ do not address state subsidies for early education and care. They are focused on contracts between parents and a school relating to so-called “private pay” arrangements⁽¹⁾. These FAQ are not legal advice related to any particular facts or any particular situation and should not be relied upon. Notably, the answers to the questions posed below may vary depending on which state’s laws apply to the question.⁽²⁾

Question: Is my enrollment agreement a contract? What does that mean?

Generally speaking, yes, an enrollment agreement between a school (or a center) and a parent or guardian is a contract. When we talk about the parties to an enrollment agreement, the school, on the one hand, and the parents or guardians, on the other hand, are parties to that contract. This means that courts will generally enforce the promises the parents make to the school and the promises that the school makes to the parents. To do so, the courts will look to the words of the contract and the facts and circumstances of the situation to decide a dispute between the parties. If the words are unclear or the contract does not address an issue that the parents and school dispute, the court may also look to common law and “precedent” for guidance.

Question: I don’t have parents/guardian sign an enrollment agreement, but I do have a handbook. Do I still have a contract with parents/guardians?

You may still have a contract, but you also may not. Whether you have a contract in these circumstances will depend on the communications between you and the parents or guardians, including what forms parents or guardians have signed and what the written and verbal communications have been between you and the parents or guardians. It is possible to create a contract without having a document called “contract” or “agreement” that is signed by both parties. If you have an enrollment form that says something like, “parents/guardians agree to the terms and conditions of the Family Handbook” or phrasing like that, your enrollment agreement may well include your Family Handbook.

Question: I have an enrollment agreement with parents/guardians. I have sent out emails periodically updating parents on the remote learning that our school (or center) will provide to their children. Does this change my contract with parents/guardians?

It might. It is possible to change the terms of contract through later communications and conduct. It is also possible to change your or the parents' obligations under the contract by later communication and conduct.

Email correspondence may or may not change the meaning of your agreement. It will depend on what your enrollment agreement says and what your correspondence says. For example, if you state in your communication that you intend to change the terms of the enrollment agreement, you may or may not change it – your enrollment agreement may state that both parties have to agree to changes (or it may be silent, which generally means that both parties need to agree to a change). However, if one party has a right under an existing contract (for example a right to keep a deposit), that party can waive the right by its words or conduct without the other party's consent (including without meaning to do so).

Similarly, how a party performs under a contract in the absence of a formal amendment might alter how the contract is interpreted. For example, a school providing online learning services as soon as it's closed and a family's use of those services (or its continued tuition payments) could lead a court to conclude that online learning services satisfies a school's obligations under its contract.

Question: What is “boilerplate” in a contract?

“Boilerplate” refers to parts of a contract that may not seem to affect the parties' rights – they seem standard and are often overlooked. Sometimes these provisions are referred to as the “fine print.” However, all words in a contract matter, so “boilerplate” provisions will affect the rights of parties to a contract. They may be especially important to understand if there is a controversy or disagreement between the parties. A *force majeure* clause is an example of a contract provision that may be included in so-called boilerplate provisions of a contract.

Question: What is a *force majeure* clause? What does it mean if my contract doesn't have one?

A *force majeure* clause is a provision in a contract that excuses a party (the school or the parents/guardians, for example) from performance of the contract (doing what's promised in the contract) when circumstances beyond the parties' control occur. Not all emergencies will trigger a *force majeure* clause and not all *force majeure* clauses are equal. The circumstances that will trigger a *force majeure* clause will depend on what the clause itself says. For example, if a *force majeure* clause uses the words “pandemic”, “epidemic”, “disease”, “government ordered closure”, it probably is triggered by the current COVID-19 pandemic. But, if it does not include those words, it may still be triggered. The words matter – and their meaning (or their interpretation) matters.

Question: If my contract doesn't have a *force majeure* clause, then what?

If a contract does not include a *force majeure* clause that excuses performance of a party's obligations under a contract, and a party cannot perform its obligations (e.g., a school cannot be open or a parent cannot pay tuition), then that party probably will be in breach of its contract unless there is another excuse (that is recognized by the law on enforcing contracts) for that party's failure to perform its obligations.

Question: What is "frustration of purpose" and what does it mean for my contract?

"Frustration of purpose" is a doctrine that has developed under common law (the body of law built out of court decisions over time). This doctrine focuses on how the inability of a party to perform the contract impacts the overall purpose of the contract. Courts generally try to avoid forgiving a party that does not do what it contractually promises to do, but have recognized that there are narrow circumstances where it makes sense to release both parties from their obligations. The "frustration of purpose" doctrine is one example, allowing parties to walk away from a contract where their mutual reason for signing it in the first place parties has been "frustrated." The frustration of purpose must go to the core of the contract and permanently make one party's performance of no value to the other party. The purpose must also have been recognized or at least obvious to both parties at the time the contract was signed. If a party successfully argues frustration of purpose, then the contract may be nullified – that is neither party will have an obligation to perform (e.g., no obligation to provide school or care by school and no obligation to pay by parents/guardians).

Question: What if it is impossible for me to be open because of the governmental orders?

There are doctrines of "impossibility" and "impracticability" that focus on whether it is impossible or impracticable for a party to perform its obligation. Both of these doctrines look at whether extraordinary, unforeseen circumstances make performing an obligation (e.g., providing in-person care or providing developmentally appropriate education) impossible ("impossibility") or extremely difficult or highly unreasonable ("impracticability"). Notably, economic hardship and additional costs generally will not make performing an obligation an impossibility or an impracticability. In addition, the impossibility or impracticability generally must be permanent (or at least last until the contract would have expired).

Question: Do parents/guardians have to continue paying tuition if my school (or center) is closed? What if I am providing online, remote learning opportunities?

Whether or not parents/guardians are required to continue paying tuition after your school closes will depend on the terms of your enrollment agreement and other facts and circumstances. On the one hand, for example, if the school is offering virtual education then it may be able to argue that it is performing its obligations, and therefore defeats a frustration of purpose argument that parents/guardians are asserting to avoid paying tuition. On the other hand, for example, if the school emails all parents/guardians a message that due to COVID-19, no family will be required to pay more than the family can afford, depending on how that message is worded, parents/guardians looking to avoid tuition may take a position that the school has waived tuition (when all the school meant was to send a supportive "we-will-work-with-you" message).

Facts and circumstances that help determine whether parents/guardians need to continue paying tuition include (but are not limited to): whether notice of withdrawal is required under the enrollment agreement and whether the family has provided that notice; whether online learning was offered and whether the family (the child(ren)) participated in online learning; what is contained in communications about online learning; whether the school's board has adopted a policy on tuition relief; how the school is addressing other families' requests; and what the school has communicated regarding its tuition expectations and how families have responded.

Question: We had to close in the middle of March. Do I have to pay parents/guardians back for one-half of March and all of April?

This is a version of the prior Q&A with the twist that tuition for March and April were paid prior to any governmental order and before the length of closure was known. This question reflects how facts and circumstances matter – and how they change over time. For example, is there a *force majeure* clause (see above) that might apply? If not, could you compare a 2-week closure (in March) to snow days? Does the school have a snow day policy that would help answer the question? And, of course, does the school being closed through June change the answer?

Question: Do I have to provide online learning opportunities?

Whether or not you are required to provide curriculum online will depend on the terms of your enrollment agreement. If you do not promise to provide remote learning opportunities in your enrollment agreement, you probably do not. If you prepare an amendment (or addendum) to your enrollment agreement to address COVID-19, consider very carefully what you say about online learning – are you stating that it is an option? An aspiration? Or, are you promising to provide it? These are the sort of new promises that can change a school's obligations (and so parents'/guardians' obligations) in significant ways. Please note that if you do not provide remote learning opportunities, it will make it more difficult to collect tuition, both practically and legally.

Question: All families at my school make a deposit at the beginning of the year. If a family leaves the school, do I have to return their deposit?

Whether or not you have to return a deposit will depend on what your contract says. For example, if your contract states something like "If you withdraw from the school before the end of the year, your deposit is not refundable." or "All deposits are non-refundable." You probably have a strong position that you are entitled to keep the deposit.

Question: Can I modify an enrollment agreement without the family agreeing to it?

Generally, you can waive your rights (you can give up your right to payment) or exceed your own obligations (promise to teach online if your school stays closed), but you cannot increase parents' obligations (increase tuition) or decrease parents' rights (a 5-day, full time schedule), without the parents agreeing to the change. However, as noted above, that agreement does not always have to be explicit—it may be determined by facts and circumstances.

Question: I do not have room for all of the families who want to return to the school. How do I reschedule families or decide who can and cannot return to school?

There are several things to consider when thinking about families returning to school. The first step would be to communicate with parents/guardians to determine which families are ready, willing and able to attend. As another initial matter, if your school receives government-funded subsidies, you will need to consider and take into account the rules applicable to those government-funded subsidies. (And, the same may be true if you are a not-for-profit that relies on grants, which may have restrictions.) You will need to consider the regulatory requirements for reopening schools and their consequences and staffing availability, e.g., that a school cannot mix 5-day per week kids with 2-day and 3-day per week kids). This means that your school may end up renegotiating schedules and tuition, with returning families.

If you must exclude families, you may do so (subject to any penalties under your enrollment agreement), except that you should not exclude (i.e., discriminate) on an illegal basis. Your school may consider a lottery, for example. Note that, as mentioned, if your school receives government-funded subsidies, you will need to consider and comply with the rules applicable to those subsidies (and the same may be true if you rely on grant money). The Massachusetts Department of Early Education and Care provides guidance on this question, which takes into account subsidies, in its [Reopening Information Package](#). Whichever process you elect to use to exclude certain families, you should not discriminate on the basis of race, ethnic background, gender, sexual orientation or another illegal basis.

Question: With class sizes cut in half, can I increase my tuition so that I don't have to operate at a loss?

Unfortunately, if you are in the middle of a school year, you probably cannot increase tuition because health and safety rules related to COVID-19 require smaller class sizes and make operations more expensive. This may be true, too, if you have already signed up re-enrollment agreements for the next school year. As noted in prior Q&A, you may need to renegotiate your enrollment agreements.

Question: A family is threatening to sue me if I do not refund part of their tuition and refund their deposit? What does that mean practically?

As noted in Q&A above, the interpretation of an enrollment agreement will depend on the words in the agreement and the relevant facts and circumstances. The answer may or may not be clear. The dollars involved in a dispute on an enrollment agreement may mean that the dispute qualifies for small claims court or may be required to be addressed in an alternative dispute procedure (like arbitration or mediation). There is a good chance that going to court, arbitration and mediation is expensive (in terms of money and time). Accordingly, practically speaking, it may be very difficult to “force” parents/guardians to pay tuition or to “force” a school to refund tuition or deposits. However, if a parent is threatening to sue, you should speak with a lawyer.

Question: Should I update our school's enrollment agreement for this new COVID-19-driven reality?

This is a great question to consider. Some schools are adding addendums to their enrollment agreements to include (1) *force majeure* provisions (frequently mutual), (2) updates of their policies on tuition and closing and (3) new policies around on-line learning (which may be aspirational and make no promises). Negotiating and putting in place an amendment that is the same for your enrollment agreement with each family (or at least for most families) may have advantages for clarifying expectations between families and the school and treating all families in the same manner.

Question: Should our school have parents/guardians sign a COVID-19 waiver?

You should certainly consider it. A liability waiver has two primary functions: first, to have the person who signs the waiver (the signatory) acknowledge the risks he or she is assuming by entering the school, and second, waiving the right to hold the school liable (and to sue the school) if harm comes to the signatory (e.g., contracting COVID-19) from being in the school. It's useful to think about these two functions separately. In the first case, listing out the risks that the signatory is acknowledging by entering the school may have value if it blocks someone from later complaining that they didn't know about the risk. (This may also be accomplished by posting clear signage at any entrance to the school detailing the risks, which you should also consider).

On the liability waiver front, it is an open question whether such agreements will be enforceable. While Massachusetts is not among the states that bar liability waivers, a liability waiver may still be difficult to enforce in this context. The words in the liability waiver will matter (and may increase the chance of enforcement), but keep in mind that the COVID-19 pandemic is new. There is no law on COVID-19 pandemic waivers, and the legislature could pass one at any time. If the legislature does not act, courts may decide that enforcing COVID-19 waivers is against public policy and strike them down wholesale. And even if courts do allow such waivers generally (and the legislature does not intervene), courts will have to consider common law based on other facts and circumstances to interpret the specific words in new COVID-19 liability waivers. The outcome might not be obvious even if the school's liability waiver seems to be an effective shield on the day it is first signed. Consider for just a moment how difficult it may be for a court to decide who "should" be responsible for someone contracting the virus when everyone involved was doing everything "right."

That leaves one area, potentially, in the school's control: facts and circumstances. Updating practices to comply with the requirements of new health & safety and reopening and other COVID-19 related rules is at least as important as implementing a liability waiver with families. Equally important may be documenting those practices, implementing policies to monitor compliance with those new practices and documenting who enters the school. In Massachusetts, the Massachusetts Department of Early Education and Care provides information on reopening on its [reopening website](#) and in the [Massachusetts Department of Early Education and Care's Reopening Information Package](#).

Question: I want to compromise with two families who disagree with their obligations under the enrollment agreement. Is there anything that I should think about?

If you want to resolve a disagreement with one or two families, you may want to consider these questions:

- What does our school's enrollment agreement say about the point we have a disagreement on?
- What relationship do we want to have with these two families? How does it impact the school's relationship with other families?
- Will these two families agree to keep confidential any agreement you reach with them? Will they agree not to disparage (not to speak negatively in social media or other public forum about) the school?
- Do we have to solve this problem now (when we don't know how things will go in three months), or could we defer timing (for example, until the end of the school year)?
- Does the school want to offer all parents/guardians the same terms offered to two families in a disagreement with the school (or at least different terms arrived at on the same basis)? Can the school even afford to make that compromise?
- What are our school's values and how do we act consistently with those values in this situation?
- Does the school receive government-funded subsidies and, if so, what do the rules related to receiving those subsidies require?

Question: Where can I look for technical assistance, a pro bono attorney or other pro bono technical assistance?

Many of these questions are good questions to discuss with a lawyer or other advisor. In particular, it is a good idea to speak with a lawyer before you resolve any dispute (or potential dispute). Your school may consult its existing lawyers, accountants and other advisors for guidance or simply to be a sounding board for management and the board of directors as they think through options and alternatives. Your school may seek pro bono legal assistance through the Neighborhood Business Initiative, a pro bono project of Goodwin, by clicking [here](#).

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(1) Early education and care providers in Massachusetts, including those centers and schools receiving subsidies, may find useful guidance from the Massachusetts Department of Early Education and Care on its website and in its [Reopening Information Package](#).

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