



Legal Update for School Professionals; Addressing Student Needs During the COVID-19 Shutdown

APRIL 27, 2020

MICHAEL J. JOYCE, ESQ. &

CRAIG F. KOWALSKI, ESQ.

NUTTALL, MACAVOY & JOYCE, P.C.



Governor's Order

- All Public and Private Schools to suspend “normal, in-school instruction” until May 4, 2020 (extended on March 25th).
- “All public and private elementary and secondary schools in the Commonwealth, excepting residential schools for special needs students, shall not reopen for normal operations prior to June 29, 2020.”
- “As provided in the March 15 and March 25 Orders....public schools are directed to continue collaborative efforts to provide student access to alternative learning opportunities.”
- Directed the Commissioner of DESE to issue guidance to implement the terms of the Order, available at: <https://www.mass.gov/doc/april-21-2020-school-closure-extension-order/download>

US DOE, Supplemental Fact Sheet, March 21, 2020

- “School districts must provide a free and appropriate public education (FAPE) **consistent with the need to protect the health and safety** of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.”

“We remind schools that they should not opt to close or decline to provide distance instruction, at the expense of students, to address matters pertaining to services for students with disabilities.... To be clear, ensuring compliance with the [IDEA, Section 504 and the ADA] should not prevent any school from offering educational programs through distance learning.” *Supplemental Fact Sheet, U.S. Dept. of Education, Office for Civil Rights and OSERS, March 21, 2020.*

SHOULD SHOULD SHOULD
SHOULD SHOULD SHOULD
SHOULD SHOULD
SHOULD SHOULD SHOULD

US DOE, Question and Answers, March 2020

- ❑ “If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.”
- ❑ “SEAs, LEAs and schools must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under the IDEA, or a plan developed under Section 504.”
- ❑ *Questions and Answers of Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020), A-1.*



What is FAPE?

March 21st US DOE Guidance

- ❑ Offers no official or explicit relaxation to the FAPE standard.
- ❑ “OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer **flexibility** where possible. However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance learning.” *Id.*
- ❑ Acknowledges that schools “may not” be able to provide all services in the same manner that they are typically provided.
- ❑ Schools will be required to convene teams, once school resumes, to determine “whether and to what extent” compensatory services are needed.

What is FAPE?

Massachusetts DESE Frequently Asked Questions (FAQ)



- ❑ Mirrors US DOE March 21st Guidance.
- ❑ Districts “must” provide FAPE during this national emergency.
- ❑ “Schools may not be able to provide all services in the manner they are typically provided pursuant to students’ IEP. The provision of FAPE may include, as appropriate, special education and related services provided remotely through resources and supports, such as strategies, projects and packets provided to students matched with regular and ongoing communication from special education team members and services and instruction, such as virtual, online, or telephonic instruction.”
- ❑ “Every effort to use creative strategies”... to provide special education and services “to the extent feasible.”

DESE Frequently Asked Questions, March 17, 2020 as updated on March 26, 2020.

Do NOT Need to Convene the Team to Provide Distance Learning

- “Do I need to make changes to the student’s IEP to provide these services?”
- It is not necessary for a district to convene an IEP Team to provide learning opportunities and services to students with disabilities during this period of extended school closures because of the COVID-19 pandemic.”
 - *DESE Frequently Asked Questions, March 17, 2020 as updated on March 26, 2020.*



Distance Learning Opportunities

- ❑ IEP Teams, even if meeting for other purposes (e.g., annual review), do not need to make Team determinations about the amount or frequency of services a student needs during the period of school closure.
- ❑ “Teams may, but are not required to, include a distance learning plan in a child’s IEP that could be triggered and implemented during a selective closure due to a COVID-19 outbreak. Such contingency provisions may include the provision of special education.” *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 12, 2020), A-5.*



Remote Learning Plans

- Not required.
- We need to provide parents/student notice of the special education services we will provide during the period of school closure.
- Email is sufficient.
- The template provided by DESE is sufficient.
- If your district has created its own template, then that should be sufficient.
- Whether by email or by Remote Learning Plan, the written notice should include the special education supports, resources, and direct services that the student will receive during the period of school closure. To be effective, these should align with specific goals and benchmarks.
- It is not required to use a Notice of Proposed School District Action (N1) for these learning plans.

Responsibility for Compensatory Services

- Once school resumes, the school district “would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.” *U.S. DOE, Question and Answers, March 12, 2020.*
- “Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services – IEP teams (as noted in the March 12, 2020 guidance) must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.” *U.S. DOE, Supplemental Fact Sheet, March 21, 2020.*



Will all Students be Eligible for Compensatory Services?

- “[I]ndividualized determination made by the IEP Team”
- “Doing everything possible *now* to provide special education and related services will be the most effective way for school districts to mitigate the need to provide compensatory services in the future.”
- “DESE anticipates further guidance” from US DOE “before schools re-open.”
 - *DESE Frequently Asked Questions, March 17, 2020 as updated on March 26, 2020.*
- **Of note:** April 8, 2020 - class action lawsuit filed in federal district court against Hawaii Board of Education seeking Declaratory Judgment that the DOE has denied eligible students a free appropriate public education or FAPE during the Covid-19 crisis.
- Lawsuit seeks an Order to the Hawaii Department of Education to follow “a definitive and fair process” for establishing compensatory education for affected students.

Potential IEP Meeting Considerations When School Resumes

- ❑ Once school resumes, according to current guidance, we are required to consider “whether and to what extent” compensatory services may be needed. We will be awaiting more guidance from state and federal agencies, however, here is what such considerations may look like:
 - ❑ How long was the school closed?
 - ❑ What instruction, including specially designed instruction and/or related services, was provided via an alternative method during the closure?
 - ❑ What other services/accommodations did we provide to offset any loss of service to the student during this period of time?
 - ❑ Were the alternative methods, in light of the student’s IEP goals/benchmarks, as beneficial to the student as the methods normally used to serve the student?
 - ❑ Was the student engaged and able to access the instruction?



Potential IEP Meeting Considerations When School Resumes

- ❑ Is there clear documentation of the amount of instruction and services the student was provided during the closure (dates, time, duration)? If so, what percentage of the student's IEP services, did the student receive?
- ❑ Any evidence of regression or loss of skills?
- ❑ Ultimately, in light of the answers to the above questions and the student's unique circumstances, does the student need any additional services to compensate him or her relative to delivery of special education services during the period of school closure?
- ❑ If so, what amount of services are owed and how will they be delivered?
- ❑ Document these determinations in the meeting notes and N1.





Timelines

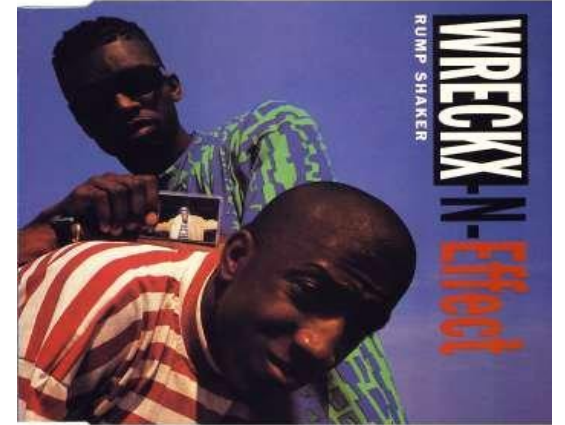
- ❑ To date, neither state nor federal department of education have waived any timelines.
- ❑ Federal timelines under the IDEA cannot be waived without an act of Congress.
- ❑ Massachusetts DESE has not clarified whether the remote learning days count as “school working days” for the purpose of state timelines.
- ❑ Where face-to-face observation and/or evaluation is required those evaluations will likely need to be delayed until school reopens for in-person instruction.
- ❑ Virtual IEP Meetings are permissible and encouraged, when possible.

Practical Tips for Addressing Timeline Issues

- Do the best you can!
- Attempt to make agreements with parents to extend timelines on evaluations.
- DOCUMENT any agreements reached.
- If unable to complete an evaluation due to health and safety concerns and parents will not agree to extension, notify parents that the evaluation will be completed when school re-opens.
- Do not issue incomplete evaluations – once a school issues an evaluation, parents have the right under the IDEA to challenge the school’s evaluation and seek an Independent Educational Evaluation (“IEE”) at public expense.
 - Letter to Zirkel (OSEP, December 2008): “We note that when a parent requests reimbursement for an IEE prior to the completion of the district’s evaluation, the school district may deny the request for reimbursement without filing for a due process hearing.”

Virtual Team Meetings

- ❑ The sooner, the better. Reduce backlog; increase transparency; and continue communication with students and parents.
- ❑ Make sure criteria for prioritizing meetings is non-discriminatory. (e.g., alphabetical, or by level, high school and middle school).
- ❑ Plan for translation, as needed.
- ❑ Can be by phone or videoconference.
- ❑ Consider having parents acknowledge that they are agreeing to participate in the “virtual” meeting and that they agree that all documents will be sent electronically.
- ❑ Review confidentiality and privacy concerns before selecting the platform for the meetings.
- ❑ At the onset of the meeting, review the rules and understanding regarding recording of the meeting so each participant is aware whether or not the meeting is being recorded.



Virtual Team Meetings



- ❑ The Team should consider and propose services for the “brick and mortar” building, as if schools were open.
- ❑ Team meeting attendance rules apply.
- ❑ Maintain attendance sheet.
- ❑ Get parent agreement to excusal of Team members and document that agreement (email confirmation is sufficient).

Virtual Team Meetings

- ❑ Plan for the distribution of all required paperwork after the meeting (meeting notes, attendance, etc.).
- ❑ Use the Notice of Proposed School District Action (N1) to document the circumstances of the meeting and to note that some of the proposed services will not be implemented until schools open.
- ❑ Meetings to discuss services for distance learning do not, and should not, be proposed by the IEP Team.
- ❑ Compensatory services, “additional services” that may be needed as a result of the shut-down, should not occur until after schools are back in session.



Monitoring Attendance



It is unlawful for a parent/guardian to allow a child between the ages of 6 and 16 to be absent for more than seven (7) days or fourteen (14) half days in a six-month period. *See M.G.L., c. 76, §1, 2.*

When, due to unexcused absences, a student has missed five (5) or more school days in the school year, parents will be notified and provided an opportunity to meet with the Principal, or designee, to develop an action plan to address the student's school attendance. *See M.G.L. c. 76, §1B.*

If a parent/guardian does not comply with the state's mandatory attendance requirements, school staff may need to file a Failure to Send Complaint with the district court, a Child Requiring Assistance (CRA) petition with the juvenile court, or a 51A for neglect with the Department of Children and Families.

Monitoring Attendance for Remote Learning

There has been zero guidance from DESE on how attendance should be monitored.

- Commissioner Riley's March 30, 2020 letter: provided loose guideline that the length of a remote school day be half the length of a regular school day but was silent on attendance.

Districts likely to use combination of online classroom attendance, work completion, check-ins from school to home, etc. to monitor student attendance.

- Equity issue of requiring participation in Zoom classes depending on WiFi access of families.

Consider taking attendance based on participation in lessons, live lessons, and other school related activities (e.g., weekly participation totals).

Question remains: Should Districts actually retain students in a grade, file CRAs, etc. for families who do not engage in remote learning?

Circuit Breaker/Vendor Contracts



- ❑ Letter from the Commissioner, Jeffrey C. Riley, March 27, 2020
- ❑ Expectation is that the District continue to pay day and residential education programs...
 - ❑ “The tuition payments will be eligible for reimbursement under the circuit breaker program if they exceed the statutory threshold and are otherwise eligible.”
- ❑ But see 603 CMR 10.07(7) – “**Tuition Costs.** If a student is tuitioned to a program outside of the district, [p]rogram tuition rates shall exclude all transportation costs, and shall not exceed the rates approved by the Operational Services Division if such approval is required.”
- ❑ In-district services – DESE has taken the position that it will only reimburse for the services actually delivered to students (not for what is in the IEP).
- ❑ Vendors that provide special education and related services:
 - ❑ “Given the need to continue to provide some services, I recommend that districts work with providers to review and potentially amend the providers’ scopes of service to ensure vendor contracts reflect the necessary requirements to get these services up and running.”

Online Learning and Confidentiality

CONFIDENTIAL

“Under FERPA, the determination of who can observe a virtual classroom, similar to an in-person classroom, is a local school decision as teachers generally do not disclose personally identifiable information from a student’s education record during classroom instruction.” *FERPA and Virtual Learning Related Resources, US DOE, Student Privacy and Policy Office, March 2020.*

Letter to Mamas (December 8, 2003) - “...FERPA does not specifically prohibit a parent or professional working with the parent from observing the parent’s child in the classroom. This is because FERPA would generally prohibit a teacher from disclosing information from a child’s education records to other students in the classroom, as well as prohibit a teacher from disclosing information from a child’s education records to the parents of another child who might be observing in the classroom.”

“Further, FERPA does not protect the confidentiality of information in general; rather FERPA applies to the disclosure of tangible records and of information derived from tangible records.”

Confidentiality and Related Services

- ❑ Generally, related services are also covered by FERPA.
- ❑ HIPAA does not apply to related services (unless your school is running a medical clinic).
- ❑ Generally, no specific confidentiality issues are presented through virtual delivery of related services through phone or video.
- ❑ If your license to practice is limited to Massachusetts, then most related service providers are not authorized to deliver remote services to a student who is physically located out-of-state.

Confidentiality and SLPs

On March 31st, Mass. Board of Registration temporarily waived a requirement that SLPs and Audiologists obtain ten hours of training in telepractice before providing telepractice services.

BUT ... Policy No. 2019-001 still in effect, requires “written notice of telepractice services” to clients with the following information:

- The limitations of using technology in providing telepractice;
- The potential risks to the confidentiality of information due to technology used in telepractice;
- How communications can be directed to a specific licensee;
- Options for service delivery by telepractice and in person;
- The client’s right to refuse or discontinue telepractice services; and
- Instructions on filing and resolving complaints.

Further, the telepractitioner must “obtain the signature of the client, or parent or guardian of a minor client, on this written document and maintain this document in the clinical record.”

To Record or Not to Record

Districts may allow teachers to record remote lessons, provided that proper notice is given to parents and students ahead of time to comply with MA law, which prohibits surreptitious audio recording. *M.G.L. c. 272, §99*.

FERPA does not prohibit teachers from recording their remote instruction, even if students' voices or images are captured:

- “FERPA does not protect the confidentiality of information in general; rather FERPA applies to the disclosure of tangible records and of information derived from tangible records.” *US DOE Letter to Mamas (December 2003)*.

To avoid a FERPA violation, the teacher's lesson, including Q&A from students, should not involve a disclosure of personally identifiable information derived from a student's education record.

Recording Dos and Don'ts

- ❑ To the extent possible, record only the portion of the lesson in which a teacher is providing instruction and turn off during group discussion.
- ❑ Ideally, the recording will only include video and audio coverage of the teacher and not the students to ensure privacy for your students.
- ❑ Lessons should be maintained on the district's network and not on the teacher's private computer.
- ❑ Teachers should ensure that they disable the recording feature for participants in the settings of their live instruction platform (Google Meet, Zoom, etc.) to mitigate against surreptitious recording by students or parents.

“Alice, turn your video on. No, it's the button on the button. Not that one, over to your left. Jan, you're on mute. UNMUTE YOURSELF!”



Don't Lose Sight of Bullying and Harassment



Districts are still obligated to investigate complaints of bullying and/or harassment.

M.G.L. c. 71, § 37O, Bullying is defined as:

the repeated use by one or more students or by a member of a school staff ... of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that:

- causes physical or emotional harm to the victim or damage to the victim's property;
- places the victim in reasonable fear of harm to himself or of damage to his property;
- **creates a hostile environment at school for the victim;**
- **infringes on the rights of the victim at school; or**
- **materially and substantially disrupts the education process or the orderly operation of a school**

Legal definition has not changed, but certain language within definitions may become more relevant in complaints arising during remote learning ...

Language Matters

“School-sponsored or school-related activity”

The statute and regulations state that bullying “shall be prohibited ... at a *school-sponsored or school-related activity*, function or program whether on or off school grounds ...” M.G.L. c. 71, s. 37O; 603 CMR 49.04(2). A virtual classroom with instruction from or facilitated by district educators or service providers would be considered a school-sponsored or school-related activity.

“At school”

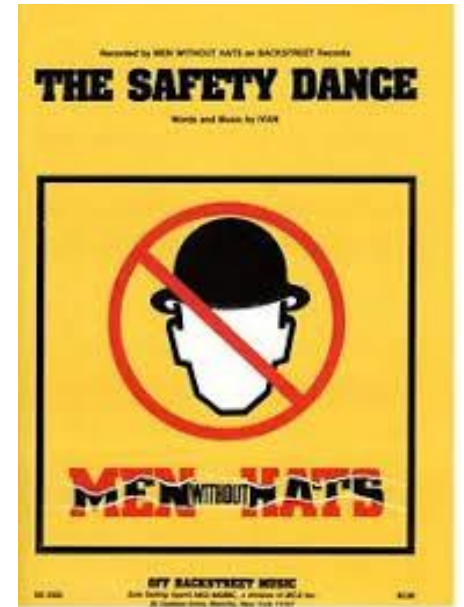
Bullying conduct “at a location, activity, function or program that is not school-related, or through the use of technology or an electronic device that is not owned, leased or used by a school district or school, shall be prohibited if the bullying: (a) creates a hostile environment *at school* for the target; (b) infringes on the rights of the target *at school*; or (c) materially and substantially disrupts the education process or the orderly operation of a school.” 603 CMR 49.04(2).

During the period of school closures due to COVID-19, districts should consider students to be “at school,” for the purposes of the bullying statute, whenever they are participating in virtual classrooms.

Tips for the Times

Tip 1: Prioritize Health and Safety

- ❑ Health and safety of staff and students remains the number 1 priority during this crisis.
- ❑ While we are obligated to provide FAPE, that obligation can only be delivered “consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students.” *Supplemental Fact Sheet, U.S. Dept. of Education, Office for Civil Rights and OSERS, March 21, 2020.*
- ❑ Do **not** take any steps that would compromise the safety of children or our staff.



Tip 2 : Preparation Checklist

- ✓ Ensure all students (including English Language Learners and students with disabilities) will have equal access to the learning and required materials, including technology.
- ✓ Ensure the online materials can effectively support different learning styles.
 - ✓ **Good faith efforts** should be made to implement the IEP/504 accommodations.
 - ✓ If that is not possible, then we should consider supplemental services (group chats, teleconferences, etc.) to mitigate any losses due to inability to deliver the accommodations in this context.
- ✓ Provide training to staff, students, parents and guardians on the available technology and provide resources to troubleshoot.
- ✓ Ensure the systems are secure (to the degree possible).



Tip 3: Collaboration and Cooperation

- ❑ Work with parents/guardians to extend timelines for meetings/deadlines when appropriate.
- ❑ The BSEA will likely be very forgiving in circumstances in which we have a documented agreement (email should suffice) with the parent/legal guardian to delay meetings/evaluations.
- ❑ Work with other districts to share teaching tools/resources, particularly in serving small group classes with comparable profiles.
- ❑ Make sure all agreements are memorialized in writing and become part of the student's record.



Tip 4: Respond to Parents Nicely!



- Parents have no current rights to appeal or be part of the decision-making process regarding the services their children receive during the period of closure.
- So what happens when you receive the email from parents demanding 1:1 services consistent with his or her IEP?
- Be nice!

Tip 4: Always Respond to Parents Nicely!



“Thank you for your email. We share your concerns regarding the services for your daughter. Please know that despite our best efforts, during this period of remote learning, we will not be able to replicate the services in your daughter’s IEP. Just as the services for all students are different during this crisis, the delivery of special education services is also different. At this time, due to the constraints presented by the global pandemic, including the inability to access our schools and more limited availability of staff, we will not be able to provide your child with the services you have requested, namely 1:1, at this time. We are certainly willing to work with you around how we can adapt other instructional supports and services during the period of closure; however, unfortunately, given the current crisis, we will not be able to deliver the service you have requested. Thank you again. I look forward to continuing to work with you.”

Tip 5: Progress Monitoring

- ❑ Keep in mind that we are required to issue IEP Progress Reports at least as often as report cards are issued.
- ❑ If your school district is going to issue 4th quarter/3rd Trimester report cards, IEP Progress Reports must be issued.
- ❑ Consider how you are gathering data on goals and benchmarks now so that you/your staff can effectively and accurately write these reports in June.
- ❑ These reports should be data driven.
- ❑ ~~Billy made great progress! He benefited from the resources provided during distance learning!~~



Tip 6: Document! Document! Document!

- ❑ Remember: If a communication, service or agreement is not documented, then we will not be able to prove that it happened.
- ❑ Create one system for documentation of all service delivery (date, time, duration, goal/benchmarks worked on).
- ❑ Create a point person for consolidating this information for each student.
- ❑ Make sure there is a system in place for these documents to become part of the official student record.
- ❑ Email is your friend. Use it to document consent, extension of timelines, and other communications. Blind copy yourself on each correspondence and save to an individual student folder.

Resources

- ❑ Covid-19 Frequently Asked Questions and Power Point slides from Nuttall, MacAvoy & Joyce available at: www.nmjedlaw.com
 - ❑ March 27, 2020 – Covid-19 Newsletter
 - ❑ March 30, 2020 – Covid-19 Power Point
 - ❑ April 3, 2020 – Frequently Asked Questions
 - ❑ April 10, 2020 – Frequently Asked Questions
 - ❑ April 17, 2020 – Frequently Asked Questions
- ❑ Federal resources available at: <https://www.ed.gov/coronavirus>
- ❑ Massachusetts state resources available at: <http://www.doe.mass.edu/covid19/sped.html>



Questions?

Final Thoughts

- ❑ Stay safe.
- ❑ Stay home.
- ❑ Stay healthy.



- ❑ Let us know if there is anything we can do to help.
 - ❑ Wishing safety and health to you and yours,
 - ❑ Tom, Matt, Michael, Leigh, Kelsey, Craig and Carolyn.

Nuttall, MacAvoy & Joyce, P.C.

1020 Plain Street, Suite 270

Marshfield, Massachusetts 02050

Telephone: (781) 837-7428

Facsimile: (781) 837-7498

www.nmjedlaw.com

Thomas J. Nuttall

Matthew W. MacAvoy

Michael J. Joyce



Leigh W. Mello

Kelsey M. Porcello

Craig F. Kowalski

Carolyn J. Wilson