

Legal News in Public Schools

Nuttall, MacAvoy & Joyce P.C.

COVID-19 Updates for School Districts

As guidance from state and federal authorities changes rapidly with the increased impact of COVID-19, Nuttall MacAvoy & Joyce, P.C. is available to provide you with the latest information and guidance impacting school districts. This news alert is current as of March 26, 2020. Additional information will be shared with clients via a **free** webinar on **Monday, March 30th from 1:30 p.m. to 3:30 p.m.** with Attorneys Thomas Nuttall, Matthew MacAvoy, and Michael Joyce. Click [here](#) for a link to the webinar sign up. Password is 613657.

Provision of Educational Services & FAPE During School Closures

Since early March, both the U.S. Department of Education (DOE) and the Massachusetts Department of Elementary and Secondary Education (DESE) have issued guidance that has been inconsistent and has left many pressing and important questions unanswered. In the DOE guidance released on March 12, 2020, and the DESE [Frequently Asked Questions \(FAQ\)](#) issued on March 17, 2020, both took the position that so long as a district was not providing any educational services to the general student population while schools are closed, the district was not required to provide a free appropriate public education (FAPE) to eligible special education students during that same period of time. Acting in reliance on this guidance, many Massachusetts school districts took steps to provide “enrichment” activities to both general education and special education students, but, as they were not providing any services to the general education population, understood that they were not required to implement students’ Individualized Education Programs (IEPs) or provide FAPE at that time.

Now, as of this writing, both DOE and DESE have done a complete about-face. DOE on March 21st, in its [March 21, 2020 Supplemental Fact Sheet](#) determined that, contrary

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to its initial March 12th guidance, even if a district is not providing educational services to the general education population, a “[s]chool district **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.” DESE, as of yesterday’s [revised FAQ](#), mirrored US DOE’s position and has now adopted the position that school districts must provide special education and related services and a free appropriate public education (FAPE) through distance learning during this period of closure regardless of whether or not they are providing distance learning to general education students.

The Coronavirus Aid, Relief, and Economic Act is expected to pass the house of representatives today. Under the bill, as proposed, the Secretary of Education would not be allowed to waive civil rights laws, but would be able to report to Congress 30 days after the bill is signed to potentially **(Con’t on page 2)**

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recommend additional waivers to IDEA and Section 504. As of March 27th, however, there has been no official relaxation or waiver of the FAPE standard and, according to a conference call with the National School Board Association on March 25, 2020, such a broad waiver is not anticipated by the NSBA legislative team. As to the FAPE standard, DOE has opined that “it will offer flexibility where possible.” DESE, as it is bound at this point by the federal interpretation of FAPE, has not been able to offer much more guidance, other than encouraging districts to be “creative” and acknowledging that districts “may not be able to provide all services in the manner they are typically provided pursuant to students’ IEPs.”

It is difficult to understand how school districts can have an obligation to provide FAPE (e.g., inclusion services), when the district is not yet providing complete or full education services to the general education population. The practical effect of this guidance is that it essentially provides no relief from the FAPE obligation (“be creative”) and dumps the onus of figuring out how to provide FAPE to school districts and personnel who are also working remotely and have their own responsibilities at home and may have their own personal and health challenges to deal with. From our perspective, it is unfortunate that when school districts and their staff are rallying to serve students under suboptimal circumstances, the state and federal government chooses to ignore the realities that we are confronting, just when we need their support the most. As of this writing, the state and federal governments have created no virtual lessons, developed no viable online platforms, and offered little in the way of substantive support other than their own vacillating and inconsistent guidance.

The practical effect of the latest DOE and DESE guidance is that districts will be in a much stronger position and limit their liability for compensatory services if certain steps are taken now. Notably, [the FAQ](#) echoes that sentiment, “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.”

Districts should begin methodically moving forward with determining what special education services can be provided virtually to each eligible student, and how these services will be provided if/when the district initiates distance learning for all students. Districts do not need to convene IEP Teams to make the determination, but parents should be notified of what special education services will be provided. When doing so, however, there can be no reasonable expectation that districts will be able to replicate an individual student’s special education program or provide all of the individual services set forth in a student’s IEP. It will be imperative that special education directors develop a system for staff to log the delivery of services by staff members (date, time, frequency, duration, IEP goal/benchmark worked towards) and to develop a log to document staff communication with parents and students. Ultimately, it will be the documentation of a district’s good faith efforts to provide FAPE that will be considered when DESE or the BSEA make any individual determinations as to a student’s entitlement to compensatory services down the road.

The latest position taken by the DOE also means applicable federal special education timelines under the IDEA remain in effect, absent parent and district agreement to a mutually acceptable extension. Consequently, districts should reach out to parents/guardians, seek extensions of time for IEP Team meetings where appropriate, and move forward and schedule virtual IEP Team meetings when an extension is not appropriate and/or when parent/guardian consent for an extension is not provided. *See Pages 3 & 4 for guidance on timelines and virtual meetings.*

Although we would encourage districts to begin conducting virtual meetings in an effort to comply with existing timelines relative to annual review meetings and reevaluation meetings, we would discourage convening virtual Team meetings at this time to discuss compensatory services that a student may be entitled to as a result of the interruption of all services, as such meetings would, at this time, be premature. DOE specifically noted that IEP Teams “must make an individualized determination whether and to what extent compensatory services may be needed... when schools resume normal operations.”

See *DOE March 21, 2020 Supplemental Fact Sheet (Emphasis supplied)*.

We understand and share your frustration that DOE and DESE have not provided more answers to reasonable questions or confronted the stark reality that we cannot replicate specialized services designed for a brick and mortar school setting. That being said, we continue to be impressed by the efforts of schools and staff across the Commonwealth, and will continue to seek and demand answers and to assist you in the context of the evolving guidance.

FERPA and Virtual Learning

The United States Department of Education has issued a resource sheet regarding student privacy for school districts who are considering virtual learning opportunities. As the DOE notes, “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, U.S. DOE, Student Privacy and Policy Office (March 2020)*. The guidance specifically references its own reasoning in *Letter to Mamas (December 8, 2003)*, which, in the context of an in-person classroom observation by a parents’ expert, determined: “...FERPA does not specifically prohibit a parent or paraprofessional 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.”

As “FERPA neither requires nor prohibits individuals from observing a classroom,” the same would hold true for a virtual classroom. Similar to what would be required of teachers in a standard physical classroom, teachers are required not to disclose

personally identifiable information from a student’s education record during virtual classroom instruction.

A link to the full DOE resource sheet regarding student privacy concerns in virtual learning, which provides links to other DOE resources regarding student privacy while using online educational services is on Page 4.

Special Education Timelines

In the latest guidance provided on March 21, 2020, the U.S. Department of Education (DOE) clarified that the IDEA timelines have not been waived due to the COVID-19 crisis. DOE is encouraging Districts to work with families to reach mutually agreeable timeline extensions.

Annual Reviews: Parents and IEP Teams may agree to a timeline extension for the Annual Review meeting. They may also agree to conduct Annual Review meetings via alternate means (i.e., video or telephone conferencing). When an IEP expires during the school closure, it remains in effect until a new IEP is developed and accepted.

Initial Eligibility Evaluations: Under the federal regulations, evaluations must be conducted within 60 calendar days of receipt of parental consent 34 CFR § 300.301(C)(1). Under state regulations, evaluations must be conducted within 30 school working days and a Team Meeting to determine eligibility must occur within 45 school working days. 603 CMR § 28.04(2); 603 C.M.R. § 28.05(1). As the federal regulations defer to a state-established timeframe, the school working days designation should result in an ability to defer such initial eligibility evaluations and meetings until students are actually in attendance at school for instructional purposes, even if a partial day. 34 C.F.R. § 300.301(c)(1)(ii).

Reevaluations: No waiver of three (3) year timeline, unless parents and District agree a reevaluation is unnecessary. The IDEA provides that a reevaluation may be conducted through a review of existing evaluation data, and this review may occur without a meeting and without obtaining parental consent, unless it is determined that additional (**Con’t page 4**)

assessments are needed. 34 C.F.R. § 300.305(a). Districts should proceed with caution in conducting such a meeting!

IEP Meetings for changes following an Annual Review:

Parents and District may agree not to convene a Team, and instead develop a written Amendment or IEP Modification to a current IEP.

Problem Resolution System IDEA Complaints:

State may extend the 60-day timeline for complaint resolution.

Due Process: Deadline for Resolution Session to be held within 15 calendar days of receipt of due process complaint not waived, unless parties mutually agree in writing to waive the meeting. The parties may mutually agree to extend the timeline because of unavoidable delays caused by the COVID-19 epidemic. Hearing Officers may grant specific extensions of time to hearings at the request of either party. The BSEA is not currently conducting in-person hearings, settlement conferences, or mediations.

Links to Federal and State Guidance

[Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, U.S. Department of Education \(March 12, 2020\).](#)

[Coronavirus/COVID-19 Frequently Asked Questions for Schools and Districts Regarding Special Education, Massachusetts Department of Elementary and Secondary Education \(March 17, 2020 and updated March 26, 2020\)](#)

[Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, U.S. Department of Education, Office for Civil Rights and Office of Special Education and Rehabilitative Services \(March 21, 2020\).](#)

[FERPA & Coronavirus Disease 2019 \(COVID-19\) Frequently Asked Questions, U.S. Department of Education, Student Privacy and Policy Office \(March 2020\)](#)

[FERPA and Virtual Learning Related Resources, U.S. Department of Education, Student Privacy and Policy Office \(March 2020\).](#)

VIRTUAL IEP MEETINGS

The IDEA allows the option of alternative participation to ensure that parents can participate even if they cannot be present. *See* 34 C.F.R. § 300.328. During the current school closures, districts have been encouraged to hold virtual IEP Team meetings; however, they are not mandated. If you choose to hold meetings remember that all the same requirements that apply to in-person meetings still apply. Below are some best practices and factors to consider when holding virtual IEP meetings.

Prioritizing Team Meetings: The decision on which meetings to hold must be made in a manner that is non-discriminatory. Meetings to discuss potential compensatory services or “additional services” as a result of the current closures are not recommended until after school resumes.

- Ensure access to interpreter services to allow for meaningful participation.
- Determine which meetings would be the most appropriate to hold virtually (annual, re-evaluation, high school, elementary).
 - Prioritize meetings to comply with applicable timelines.
 - Inform parents that meetings to discuss compensatory/additional services will be postponed until school resumes.
- Transition meetings for graduating high school seniors should focus on the summary of student’s current needs and abilities that will be issued at the time of the student’s graduation.

Choosing a platform: The District and parent will need to work together to determine the most accessible way for all meeting participants to be included in the discussion.

- Determine which “virtual” options are available to both staff and parents.
- Review confidentiality and privacy concerns before selecting the platform. Consider teleconferences over video conferencing to better ensure privacy and protect from surreptitious recording.

Planning for the Meeting: Planning ahead is essential to a successful virtual meeting.

- Once a meeting is scheduled, an IEP Team meeting invitation must be sent to parents.
- All “required” Team members must participate, including a regular education teacher of the child.. If a Team member is unable to attend or needs to leave early, ask the parent for emailed authorization to excuse that person.
- Remind staff to dress professionally (for video conferences) and act as if they were at school.
- Provide clear communication to parents that they are agreeing to participate in the “virtual” meeting on a specific platform and that they understand that all documents will be sent electronically during the closures. Upon request, send hard copies when school re-opens.
- Ensure all participants have access to any documents being reviewed prior to the meeting.
- Have staff confirm that they will not save the documents on their personal computer, and will destroy any printed documents to properly maintain student record information.

At the Meeting: The actual meeting requires an opportunity for all Team members to contribute to the development of the IEP document just like an in-person IEP Team meeting.

- Have Team Chair/District representative facilitate the meeting and confirm that all members are present and that parent understands and consents that participation in a secure, private location, as would be typical in a brick and mortar school setting.

VIRTUAL IEP MEETINGS, CONT'D

At the Meeting, cont'd:

- Note on the attendance sheet that the meeting was held virtually. Confirm attendance via email and identify all participants in the Notice of Proposed District Action (N1).
- A Team member should be assigned to take notes that summarize the discussion, recommendations of the Team, and any changes proposed to the Student's IEP or services. Email a copy to the parent after the meeting.

After the Meeting: After the meeting it is essential that the District issue the required documents. The same timelines for issuing documents following an in-person meeting should be followed.

- Ensure the IEP software can be accessed remotely and has the capacity to generate a PDF of required documents that can be emailed.
- Electronic signatures from the District and parents are sufficient.
- If parents are provided with a copy of the Team Meeting Summary (notes) then the District can assume that they have two (2) calendar weeks to send the new IEP.
- Use the Notice of Proposed District Action (N1) to document the circumstances of the meeting, meeting attendance, and implementation of proposed services during the mandatory school closure.
 - i.e., "Due to the current mandatory school closure, the Student's IEP Team was convened via telephone conference call/video conference to..."
 - At the conclusion of the N1, there should be a statement indicating that: "The services identified by the IEP Team at the virtual Team meeting conducted on _____, and provided for in the enclosed IEP/Amended IEP will, in most circumstances and regardless of consent thereto, not be implemented as written prior to the reopening of school facilities to students."

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*Join Attorneys Nuttall,
MacAvoy & Joyce for a
Webinar on COVID-19 related
information on Monday,
March 30th at 1:30 p.m. Link
to the webinar [here](#). Password
613657.*