



SPECIAL EDUCATION SERVICES DURING A PUBLIC HEALTH CRISIS

Statewide school closures due to COVID-19 have raised a number of questions regarding the delivery of special education and related services during an extended period of time in which all public and private K-12 schools are closed. State and Federal law do not currently address the permissibility of providing special education services remotely, and the New Jersey Department of Education issued guidance in 2019 advising against the use of “teletherapy” to provide related services to students with disabilities. However, on March 19, 2020, the Legislature passed Assembly Bill 3813, which will amend the law to ensure that if schools close due to a State-declared emergency, remote learning will count toward the 180-day school day per school year requirement. It is anticipated that Governor Murphy will sign the bill into law shortly.

The new law will also require that if school districts provide remote instruction to general education students, the same instruction must also be offered to special education students, to the extent practicable, and that speech-language therapy and counseling services may be provided remotely using an appropriate online platform. As such, if the bill becomes law, districts will be obligated to ensure that special education students receive instruction remotely using programs similar to what is used to provide “distance learning” to general education students. The bill appears to allow districts discretion, however, in determining whether they will provide speech-language therapy and counseling remotely to students whose IEPs require those services.

The provisions of the bill regarding the permissibility of delivering speech-language therapy and counseling services remotely using an online platform do not cover the related services of occupational therapy or physical therapy, which are much less capable of being provided remotely. The bill also does not contain any provisions that would eliminate or modify the obligation to provide occupational therapy and physical therapy to special education students whose IEPs require those services, even during a school closure due to a State-declared emergency. Therefore, students who do not receive those services will most likely be entitled to receive them at a later date as compensatory education.

Consistent with the approach taken by the New Jersey Legislature in favor of providing special education and related services remotely when practicable, on March 21, 2020, the United States Department of Education (“USDOE”) issued a “Supplemental Fact Sheet” that explicitly corrected any misconception that “distance learning” should not be provided to any students at all, based on the misguided belief that Federal disability law presents insurmountable barriers to remote education. The USDOE specifically advised that “ensuring compliance with the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act (Section 504), and Title II of the Americans with Disabilities Act should not prevent any school from offering educational programs through distance instruction.”

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While Assembly Bill 3813 remains pending at this time, the following is a summary of our recommendations for addressing various issues that have arisen relating to the provision of special education and related services during a school closure due to a public health emergency:

Offer to Provide Special Education and Related Services Remotely

- To the extent possible, through videoconferencing technology, or even simple telephone conferencing, consider offering to provide services such as speech-language therapy and school-based counseling to students whose IEPs require the delivery of such services.
 - Providing speech and language therapy services and school-based counseling remotely may be particularly feasible via videoconferencing such as Skype or FaceTime. Counseling services could potentially be provided by phone to students who may be unable to access videoconferencing technology.
- Document carefully any and all services that students receive remotely, and maintain a log for each student that indicates the date, time, duration, and provider of each session.
- Consider issuing proposed IEP amendments without meetings to any parents who may be willing to agree to their children receiving special education and related services remotely in any manner the district is able to offer, or alternatively, obtain written parental consent for the remote services, via email or otherwise.
 - Send the proposed IEP amendments to parents' homes by mail, if possible, and/or via email or other electronic means, with a request that they sign and return the amendment form to reflect that the student will receive specific services remotely during the period of time in which schools remain closed.
 - Retain copies of all email correspondence in which a parent states agreement to any matter relating to an IEP or its implementation, and include a copy in the student's Child Study Team ("CST") file.

Postpone or Remotely Conduct IEP Meetings

- Communicate with parents to determine whether they are willing to postpone any IEP meetings by obtaining their written consent, even if via email only, and be sure to carefully document exactly what the parents agreed upon and when the agreement was reached.
- Similarly, if parents agree to postpone evaluation planning meetings, eligibility meetings, and initial identification meetings, and/or waive any assessments or evaluations that might otherwise be conducted for the student, the district should obtain parental consent in

writing, specifically indicating the time frame being extended, the time period of the extension, and/or the type of assessment or evaluation that is being waived.

- Whenever possible, offer to convene IEP meetings by videoconferencing or other technology for any parents who have not agreed in writing to postpone the meeting.

Offer to Conduct Evaluations Remotely

- Arrange for CST evaluations to be conducted remotely to the extent possible using videoconferencing technology, phone calls, and email correspondence. Certain types of assessments, such as a social history evaluation, may be able to be completed by arranging for parents to provide necessary information via phone and email.
 - However, if the written protocols applicable to a specific assessment require a student's physical presence during the testing, the CST should document that it proposed to conduct the assessment for purposes of determining special education eligibility and programming, but it could not be completed due to inability to comply with the required protocols during the period of the school closure.
 - For any type of assessment that is impossible to conduct remotely due to testing protocols that require the physical presence of the student, the district should document that the initial evaluation, reevaluation, and/or a specific assessment that would otherwise be performed as part of the evaluation could not be completed by the date that would ordinarily be required by the applicable special education regulations due to an extended school closure for a public health emergency.
 - The district should also document that the CST intends to use its best efforts to complete the evaluation and/or the necessary assessment, as appropriate, as soon as possible upon re-opening of the district's schools or upon arranging for an alternative means of conducting the evaluation.

Determine How Students Placed Out-of-District Will Receive Services

- The NJDOE has confirmed that school districts must maintain regular communication with any and all out-of-district placements where their students are placed via an IEP, including approved private schools for students with disabilities located in-State or out-of-State, county educational services commissions, jointure commissions, special services school districts, "Naples" placements, regional day schools, the Marie H. Katzenbach School for the Deaf, and other public school districts.
- Each district is responsible for ensuring that all students placed out-of-district are provided with instruction consistent with their IEPs, to the extent possible.

- For any students placed in out-of-state residential schools who will not continue those placements throughout the current school closure, the district should contact the local health agency for guidance regarding the student's return to school.
- In addition, the district should provide instruction remotely to any students previously placed in a residential school who return home during the period of the school closure, consistent with their IEPs, to the extent possible.

Respond to Recently Filed Requests for Mediation and/or Due Process

- In response to any requests for mediation or due process recently filed by parents with the NJDOE, as well as any recently filed requests for a complaint investigation, the district should offer resolution meetings by phone and/or videoconferencing.
 - As usual, the district should carefully maintain records of all correspondence relating to resolution meetings, and may use email to communicate with parents for purposes of offering and convening a resolution meeting.
 - However, it is not recommended that districts conduct any of the substantive discussions regarding any issues in dispute, which would ordinarily occur during an in-person resolution meeting, via email correspondence.
- While the Office of Special Education Policy and Dispute Resolution has advised that it has temporarily adjourned all previously scheduled mediation conferences, and is not scheduling or conducting mediation at this time, districts should promptly notify the NJDOE in writing in the event that a recently filed due process request, mediation request, or request for complaint investigation has been fully resolved between the parties as a result of a resolution meeting or otherwise.

General Recommendations for Special Education Matters During the School Closure

As a general principle, when responding to any issues that may arise related to special education during the period of a school closure due to a public health emergency, all school districts should ensure that they are using good faith efforts to comply with their legal obligations to special education students to the extent possible. In doing so, the appropriate staff members should ensure that they maintain thorough, complete records of any and all steps taken to work with parents and students to provide special education and related services, notwithstanding the school closure, which will help document that the district was using its best efforts to address the needs of students with disabilities during this public health crisis.

While it is certainly possible that many students will require revisions to their IEPs and/or compensatory education services to be provided following the re-opening of public schools, school districts should utilize any and all potential means of providing an appropriate education to special

education students throughout the time period in which schools remain closed, request and obtain written parental consent whenever possible, and maintain detailed records documenting all instruction and services which are offered and/or provided to students with disabilities.

The attorneys at The Busch Law Group understand the impact that this public health crisis is having on school districts. Please rest assured that we are constantly monitoring guidance and directives from Federal, State and local officials, and will continue to provide updates regarding issues of importance as this situation develops. Should you have any questions regarding legal issues implicated by COVID-19, the firm's attorneys are available to assist you.

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