

Education Alert
MARCH 16, 2020

**ADDRESSING STUDENTS' NEEDS DURING COVID-19
PANDEMIC**

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Many questions have arisen from school districts on how to address the evolving situation with Coronavirus. Recurrent questions are addressed below in further detail.

School Days

As stated here: <http://www.doe.mass.edu/sfs/emergencyplan/covid19.html>, the Massachusetts Department of Elementary and Secondary Education (“DESE”), has advised that, theoretically, days closed due to Coronavirus between March 16 and June 1 should be made up to ensure a 180-day school year. However, they have limited the impact of that advice by further specifying that no school district will be required to make up lost school days beyond their previously scheduled 185th day. Unless this advice dramatically changes, it appears that schools should not expect to remain open during the summer months to make up for closures.

It is important to note that DESE has stated that online instruction will not count towards the 180-day school requirement, unless a school district is part of the innovation pilot. DESE has nonetheless encouraged school districts to offer online learning opportunities, characterizing them as ‘enrichment’ designed to keep students engaged. School districts that decide to offer ‘enrichment’ should understand before deciding to do so that distance learning could raise equity concerns for certain populations. For example, special education students with certain visual, cognitive, or hearing impairments may not be able to fully access online videos that would be available to students without disabilities..

The United States Department of Education (“DOE”), issued guidance, which can be found here: <https://www.ed.gov/coronavirus?src=feature>, in which the agency explains that “the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE.” Hence, if school districts have not planned for students with disabilities who cannot access or benefit from online instruction, it could be highly problematic to offer such instruction.

Special Education Students

While a school district is closed for both general education and special education students, DESE and the DOE have stated that a school district would not be required to provide

Education Alert
MARCH 16, 2020

services to students with disabilities during that same time period or otherwise take action to ensure students receive a FAPE. However, DESE has indicated that once schools reopen, IEP Teams should discuss the impact of the school closing on students and whether any compensatory services may be needed to make up for skills that were lost. Not every student will experience regression such that she or he will require compensatory services, but it should be a Team determination that each Team makes for every special education student. Therefore, school districts should begin preparing for the influx of Team meetings that will occur after a school re-opens.

DESE also advised that if a school district is closed, but an out-of-district school that a student attends is open, the school district is not required to transport a student to that school. However, failure to transport the student to his or her placement under such circumstances may give rise to a claim for compensatory services. Therefore, we strongly recommend providing transportation, to the extent feasible, to prevent later claims for compensatory services. Furthermore, in those cases, if transportation cannot be arranged, a school district will be required to pay tuition to the out-of-district school if the student is absent for less than twenty (20) days.

Regarding timelines for evaluations and Team meetings to discuss those evaluations, DESE has advised that the relevant timelines are based on school days. Consequently, to the extent school is closed, those days would not count towards the time limit. While school districts can hold virtual Team meetings with the consent of parents while school is closed, it is not required to do so. We caution school districts that to hold a Team meeting, even virtually, the districts would need to have the required members of the Team, which may be impossible if school is closed. As a result, school districts should be cautious about holding virtual meetings.

MCAS

In terms of MCAS, especially the Grade 10 MCAS, DESE states that it may be possible to receive a waiver from the DOE on this requirement and DESE is looking at legislative relief within Massachusetts as well. However, nothing is definitive at this juncture.

Meals

Public schools where at least 50 percent of students are eligible for free or reduced-price meals will be eligible for USDA reimbursement if they continue to provide meals to students during closure. School districts can provide a grab and go option for families.

Education Alert
MARCH 16, 2020

Individual Student Considerations Upon Reopening

Once school districts reopen, it may be the case that individual students continue to be absent for extended periods of time because they are infected. DESE has stated that it is waiving the requirement for doctor's notes for these students, so these absences should be marked as excused. However, DESE has also stated that where a special education student is claiming a need for homebound instruction or a similar change in placement due to the Coronavirus, the Team should obtain a doctor's note if possible to inform the Team's ultimate determinations. Therefore, DESE's official advice on this matter is somewhat unclear. We would advise attempting to obtain a doctor's note from potentially infected students, because virtually all infected students will be out long enough (fourteen days) to trigger homebound instruction under 603 CMR 28.03(3)(c). However, districts should excuse all absences related to potential infection regardless of whether they receive such a note.

If a special education student is homebound or an out-of-district school remains closed for more than ten (10) consecutive school days once the school district re-opens, the DOE has stated that an IEP meeting is necessary to discuss the change in placement and the contents of an IEP. This meeting can occur remotely, as discussed above, so long as the student's parents consent to a virtual Team meeting. The meeting should discuss what, if any, services can be provided while the student is homebound. We note that, for obvious reasons, tutors and service providers will generally not be available to provide services to infected students in either a home or hospital setting, so Teams may need to get creative about providing services remotely. If a child is unable to receive services for an extended period of time, the Team must make an individual determination whether any services are owed. Although DESE has stated that compensatory services would not be owed if a residential school closes, we are not certain that the Bureau of Special Education Appeals would agree with that assessment and caution that compensatory services may be owed in these circumstances.

Student Record Information

Additionally, the identity of a student or staff member with Coronavirus may generally not be disclosed to other parents, the media, or members of the community. There will only be rare situations during a health or safety emergency where parents of students are appropriate parties to disclose the identity of a student with Coronavirus. For example, the DOE stated that "if a student with COVID-19 is a wrestler and has been in direct and close contact with other students who are on the team or who are in the school and have higher health risks, school officials may determine it necessary to disclose the identity of the diagnosed student to the parents of the other students. In these limited situations, parents and eligible students may need to be aware of this information in order to take appropriate precautions or other actions to ensure the health or safety of their child or themselves, especially if their child or they may have a

Education Alert
MARCH 16, 2020

higher risk of susceptibility to COVID-19 or of developing severe complications from COVID-19.”

If a school district determines that there is an articulable and significant threat to the health and safety of students or others because a student has Coronavirus, it can disclose the information to local and state public health departments. School districts must make a written determination reflecting their reasoning and retain the disclosure in the student’s record.

Conclusion

The news is still changing on a daily basis at this time. Our office will continue to update you with additional client alerts should the information contained herein shift over the next few weeks. Please do not hesitate to reach out to the attorney assigned to your account with any questions related to the Coronavirus.

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This Client Alert was prepared by Felicia Vasudevan, and was reviewed by Alisia St Florian, Elizabeth Sherwood, Kevin Bresnahan, Mary Ellen Sowyrda, and Andrew J. Waugh. If you have any questions, please contact Felicia Vasudevan or the attorney assigned to your account, or call (617) 479-5000.

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