

Education Alert
MAY 4, 2020

**NEGOTIATING TIMELINES:
FUNCTIONING AT THE INTERSECTION OF
IDEA PRINCIPLES, PARENT INTERESTS, AND FAPE**

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On May 1, 2020, DESE held a special education leadership meeting led by Russell Johnston to discuss the April 27, 2020 Department of Education (“DOE”) recommendations to Congress (these recommendations are detailed in a separate client alert). Many stakeholders, including DESE, were surprised to learn that Secretary DeVos did not recommend that Congress amend IDEA’s timelines during this period of school closures. DESE further advised districts during the call that remote learning days count as “school working days” for purposes of the IDEA. Mr. Johnston confirmed that DESE’s prior proposal that school districts act in good faith and do their best to comply with timelines to the extent possible is now rendered moot by DOE’s recommendations.

The upshot of this updated timeline information is that, among other things, all formal testing will need to proceed as if school were in session (thirty school days from receipt of consent), team meetings need to occur prior to the expiration of IEPs, and hearing requests regarding the denial of IEE requests would need to be filed within five “school days” with the BSEA. In essence, districts will need to proceed as though school is fully back in session. However, while the official recommendations from DESE have changed, the practical realities of remote learning have not. Evaluators still are not able to meet students face-to-face, BCBAs cannot observe students in a classroom setting, remote data collection is still an uncertain prospect, and for many districts, access to physical student records and other essential resources remains a significant barrier to ensuring thorough record reviews and compliance with IDEA timelines.

During this time of uncertainty, it is important to consider each student’s circumstances individually and discuss what each student needs to receive FAPE with his or her family. Individualized agreements can be made in many cases to extend all types of timelines, if a reasonable extension is in the student’s best interest. For example, while some evaluations may be able to be completed remotely, most evaluations completed remotely will not be comprehensive and appropriate in accordance with Massachusetts law. We strongly advise deferring to evaluators in making determinations of whether or not a virtual evaluation would be effective for an individual student.

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School districts have already found that many parents are willing to accept a modification of timelines when they are necessary to ensure that evaluations are comprehensive and appropriate and IEPs are effectively designed to ensure students FAPE. Parents and staff should discuss how much time is necessary and realistic given the student's needs, and agree upon a specific time period for completion of various tasks. Once this has been done, the district should memorialize the terms of the agreement in the N1. We also advise including a statement indicating that the parent/ guardian/ SESP is welcome to reach out to the district if they change their mind about the modification or otherwise disagree with some aspect of the district's description of the agreement.

Unfortunately, not every family will agree to extend timelines even when doing so is necessary to ensure a student FAPE. When a mutually agreeable resolution is not initially possible, school districts will typically have two avenues to address disputes of this kind. First, school districts can recommend that the parties have a BSEA-facilitated Team Meeting. The presence of a BSEA mediator should help the situation come to a positive resolution designed to ensure the student FAPE. Alternatively, if a BSEA-facilitated Team Meeting is impossible or impracticable, school districts can file a Hearing Request at the BSEA, explaining that additional time will be necessary in order to ensure that the student is afforded FAPE. Should you wish to obtain assistance in requesting a hearing or simply wish to discuss these issues further, please contact the attorney assigned to your account.

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This Client Alert was prepared by Elizabeth Sherwood, Esq. and was reviewed by Mary Ellen Sowyrda, Alisia St. Florian, and Felicia Vasudevan. If you have any questions about this issue, please contact Elizabeth Sherwood or the attorney responsible for your account, or call (617) 479-5000.

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