



**CLIENT ALERT**

**March 26, 2020**

**CORONAVIRUS (COVID-19)**

**CONTINUITY OF EDUCATION IN PENNSYLVANIA SCHOOLS**

Previously, the Pennsylvania Department of Education provided Districts with three (3) options:

- 1) **“Provide nothing and have the schools be closed, similar to a closure due to inclement weather.”**
- 2) **“Provide enrichment and review.”** As defined by the PA Department of Education, “consists of informal activities to reinforce or extend students’ prior learning. No standards and skills are addressed through Enrichment and Review”.
- 3) **“Provide planned instruction.”** As defined by the PA Department of Education, “is formal teaching and learning similar to that which occurs in a classroom setting. Within this process, teachers use planned courses of instruction of new concepts/skills aligned to grade level standards. Teachers assess the learning of their students and make adjustments to instruction based upon student progress. In order to receive grade and credit, students must attend regularly and complete the course requirement.”

Now, fast forward to Senate Bill 751 that was passed by the Pennsylvania General Assembly on March 25, 2020 and is heading off to the Governor’s Office for signature.

SB 751 has two critical components. See Section 1501.8(c) which provides, in pertinent part:

(4) Each school entity shall provide written notice to the parent or guardian of each student who receives services under an individualized education program under the Individuals with Disabilities in Education Act (Public Law and appropriate public education as required under IDEA.

(5) Each school entity shall make **good faith effort** to plan to offer continuity of education to students using alternative means during the period of closure. The Department of Education shall provide guidance to school entities and intermediate units may provide technical assistance. A school entity shall submit the plan to the Department of Education. The school entity shall post the plans on its publicly accessible internet website.

NOTE: Nowhere in the guidance or within the body SB751 has the term “good faith effort” been defined. Please keep in mind that with the passage of time and Monday morning quarterbacking, your efforts in delivery of instruction to identified students will be viewed under that microscope.

Accordingly, school districts have their marching orders. Clearly, Option 1 to do nothing, which some districts undertook during the first full week of the school closures, has completely gone by the wayside leaving only two viable options at this point.

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School districts since the closures have been working on the next step to provide continuity of education to their respective students. Going in this direction, many schools have conducted surveys and are filling the accessibility gap by purchasing “hot spots“, “pucks” through carriers such as Verizon and ATT and others are entering into more formal arrangements with providers such as T Mobile to get discounted pricing on securing WiFi / hot spots / internet for their students / learners.

No matter what approach best fits your District, it is clear school districts must take clear and affirmative steps to provide review and enrichment or planned instruction. The goal is to provide a continuum of instruction.

As is evident from the above, a big component of not only Senate Bill 751 but the US Department of Education, is providing framework and guidance to schools all across the nation to ensure that special education students likewise receive the same opportunities as their regular education peers given the current situation.

**Serving Children with Disabilities**

As was outlined above, Senate Bill 751 has a specific provision for providing services to special needs children during this time of school closure.

On March 21, 2020, the US Department of Education, Office of Civil Rights and Office for Special Education Rehabilitative Services issued a Supplemental Fact Sheet entitled “Addressing the Risk if COVID-19 in Pre-School, Elementary and Secondary Schools While Serving Children with Disabilities.”

The Supplemental Fact Sheet, in pertinent part, provides as follows:

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. In this unique and ever-changing environment, 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 instruction provided virtually, online, or telephonically.

The Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided. While some schools might choose to safely, and in accordance with state law, provide certain IEP services to some students in-person, it may be unfeasible or unsafe for some institutions, during current emergency school closures, to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services. Many disability-related modifications and services may be effectively provided online. These may include, for instance, extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing.

It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. As mentioned above, FAPE may be provided consistent with the need to protect the health and safety of students

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with disabilities and those individuals providing special education and related services to students. 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.

Finally, although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies. Where technology itself imposes a barrier to access or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students. For example, if a teacher who has a blind student in her class is working from home and cannot distribute a document accessible to that student, she can distribute to the rest of the class an inaccessible document and, if appropriate for the student, read the document over the phone to the blind student or provide the blind student with an audio recording of a reading of the document aloud.

<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>

Everyone is encouraged to pull and read the Supplemental Fact Sheet of USDE as well as the other documents that are listed on the bottom of page 1 of the Supplemental Fact Sheet to provide additional guidance.

Within the last 48 hours, most, if not all, Pennsylvania Intermediate Units have conducted meetings in their regional areas to discuss the issue of continuity of education, particularly for special needs students. Handouts have been provided in each of those locations and representatives have been available from the Pennsylvania Department of Education Division of Compliance to answer questions.

It is specifically outlined that Intermediate Units may provide technical assistance to their various sending and participating schools. Most of those Intermediate Units have offered assistance in providing free access to curated content to assist in planned instruction or enrichment and review.

The Council for Exceptional Children has also provided guidance. CASE, which is the Council of Administrators of Special Education for the Council for Exceptional Children already held a webinar on March 20, 2020, with four presenters for the program. Information can be accessed at: CASE webinar recording: <https://register.gotowebinar.com/recording/7686051777262052098>  
CASE Recommendations for School Leaders: <https://docs.google.com/document/d/1zEH-ggcHSI7sRQy5IpPEC0FaP4Vw5Wm0uUooruNFmrI/preview>

**IMPORTANT NOTE:** On March 27, 2020 and again on April 3, 2020 at 12 pm the Council for Exceptional Children will again provide a webinar once again to provide technical assistance and guidance to school districts on delivery of continuity of education for identified students during this difficult period. CASE has outlined, in order to stay up to date on resources and information, you can visit: <https://www.cec.sped.org/>; <https://www.casecec.org/>

### **Moving Forward**

We are long past the period of time when schools were completely closed and if no regular ed students were receiving services, then there was no obligation to provide FAPE to students with disabilities. Schools will be closed until at least April 6, 2020. Hopefully we will know next week whether schools will be closed for a longer period of time, until after Easter break, or some other point in the future.

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We are also now listening for information from the Centers for Disease Control and Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and member of the White House Coronavirus Task Force, indicating that what they know now about the Coronavirus is that it may be seasonal and outlining that business and schools need to be prepared that this could be a seasonal issue. That means it is clear now that we need to be prepared now that “business as usual” may go by the wayside depending on how things evolve and whether there will be peaks and valleys until such time that a vaccine or other protective measures are implemented to limit the spread of COVID-19.

### **What does that mean for FAPE considerations?**

While many schools are providing homework packets, continuous learning opportunities or doing e-Learning/Distance Learning, one of the key issues here is **What is appropriate in light of the current circumstances?** The critical answer is that school districts need to compare learning of students with disabilities to other students. In other words, is any student getting appropriate instruction?

We already know from what has been included in the Supplemental Fact Sheet that we are in an unparalleled time. What is occurring now is not probably going to be seen again for another 100 years. The Council for Exceptional Children in their webinar on March 20, 2020 outlined items to be considered as it relates to homework packets, continuous learning opportunities, and addressing e-Learning/Distance Learning. Schools are encouraged to review that information.

No matter what, it is clear that school districts have an affirmative obligation to put together and submit a plan to the Department of Education, per the requirements of 1501.8(c)(5) of Senate Bill 751. In addition to submitting their plan to the Department of Education, the school must also post the plan on its publicly accessible internet website.

Even though not required by SB751, it would behoove each school district to provide an open letter or some communication to the greater school community as to how it is going to attack the “continuity of education” issue.

The key is to insure that there open and transparent communication to parents, staff, students and the greater school community throughout this process.

While there is no silver bullet, everyone is encouraged to look around and see what other school districts may have done to keep the continuity of education going. Everyone is encouraged to beg, borrow or steal, or replicate what they believe other schools are doing that might also serve as a benefit to their particular school district.

In a conference call with the Educational Law Center and a number of key players to include the Pennsylvania School Boards Association and various school attorneys across the state on March 25, 2020, we all felt it would be appropriate for the Pennsylvania Department of Education, PaTTAN, to take the lead in providing guidance and some sample templates that could be considered and used by Pennsylvania school entities during this difficult time. It is our understanding that PaTTAN is already reaching out to Pennsylvania school entities to assist in the delivery of educational services. See: <https://www.pattan.net/Home/Mini-Slideshow-With-Image/COVID-19-Resources-1>

While nobody has a perfect answer, attached to this Client Alert is a sample of what one school district rolled out to its teachers to address online/virtual instruction.

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There is another letter forwarded by another school district that extended an opportunity to its career and technical students attending the CTC to return to the sending school for planned instruction if they so desired.

There is another sample where a teacher took the initiative to roll out some instruction to students before the entirety of the online instruction could be formulated in an effort to keep his students abreast of what was occurring in their science class. Please check out what a Bellwood-Antis teacher rolled out online (science lesson) to keep the continuity of education going. See: <https://youtu.be/nsaYD1wzXhE>.

Some people state that “less is more.” That is not true these days. When looking to best practices, best practice would indicate that any type of documents that are being sent out to parents be accompanied by a good cover letter that clearly explains that we are in an unprecedented times and while schools remain closed we are looking at trying to provide continuity of education under the current situation.

It also would be to the district’s advantage at some point in the communication process to also explain that the contents of the current IEP or newly developed IEP will be addressed again when schools reopen.

As noted above, both the Office of Civil Rights and the Office of Special Education Rehabilitative Services had identified that not everything that was being delivered previously will be delivered during this difficult time. Districts can be creative through the online instruction. There is nothing stating that speech or occupational services cannot be delivered online virtually through teletherapy. There is nothing to stop districts from continuing to pay their outside agencies to provide mental health services.

In the end, we are building the plane as we are flying it. Things will get better as time moves on. However, for the interim, no school district can take comfort in the fact that they can simply do nothing during this very critical time when continuity of education is of paramount importance.

Attachments:

- Sample Letter to Staff on Virtual Instruction
- Sample Letter to Parents of Career Center Students

*While the Beard Legal Group Client Alert is designed to provide inform on topics of concern to Pennsylvania Public Schools, it is not legal advice and School Districts should contact their Solicitor, Labor of Special Counsel for advice related to their specific circumstances.*