



CLIENT ALERT
March 30, 2020

CORONAVIRUS (COVID-19)

UPDATE ON CONTINUITY OF EDUCATION

On March 26, 2020, we sent out a Client Alert regarding continuity of education. One of the biggest components of that pertains to questions surrounding delivery of education and IEP services during this school closure.

As was clearly addressed in our prior Client Alert, this is not going to be business as usual. This was recognized by the US Department of Education, Office of Civil Rights Compliance as well as the Office of Special Education Programs (OSEP).

Even the Pennsylvania Department of Education has recognized that things will not be 100% perfect.

It is clear at this point that all school districts need to work with families to develop a plan for working with students during the pandemic.

Each school district will develop a plan; however, for the most part, the largest portion will be comprised of a distance learning plan. This means districts need to make "good faith efforts" to develop an individual plan in collaboration with parents for the provision of temporary services until such time as this pandemic may end.

As has been stated, everything down the road will be based on looking back, Monday morning quarterbacking, a third party assessing this, to include Special Education Due Process Hearing Officers, who will look at what had been presented and assess and/or evaluate same both procedurally and substantively in light of the circumstances that existed at the time.

As had been noted previously, Senate Bill 751 (now Act 13 of 2020) provides, in pertinent part, as follows at 1501.8(c):

- (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 EDUCATION ACT (PUBLIC LAW 91-230, 20 U.S.C. § 1400 ET SEQ.) (IDEA) OF THE SCHOOL ENTITY'S PLANS FOR ENSURING THE STUDENT RECEIVES A FREE AND APPROPRIATE PUBLIC EDUCATION AS REQUIRED UNDER IDEA.
- (5) EACH SCHOOL ENTITY SHALL MAKE A 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 PLAN ON ITS PUBLICLY ACCESSIBLE INTERNET WEBSITE.

Various groups, to include law firms across the state, have put a lot of information out as to the best way to address the "written notice". While Senate Bill 751 does not say Prior Written Notice ("PWN") or use the term Notice of Recommended Educational Placement ("NOREP"), a lot of folks have had suggestions as to how that can be approached

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Whether you look at it from the aspect of issuing a NOREP or going with a letter format, the debate over this has intensified in the last week and at least one school district firm has outlined for continuity of educational purposes, which includes new instruction (as opposed to “optional enrichment” activities), notifying parents of the District’s specific plans for their children with disabilities by using a NOREP.

Schools should take a deep breath as it relates to the use of a NOREP. At the end of the day, keep in mind we are not changing a child’s placement as a result of what is occurring right now. Whether a NOREP or a letter, it is up to each district to determine how they want to approach it. In either respect, whether you use a NOREP or letter, language needs to be included to clarify that the interim virtual learning that the District/LEA is offering is temporary and is not intended to change the child’s existing IEP or placement.

There is no dispute that parents could object and file a due process complaint. This would be true whether a NOREP or a letter is used. In unprecedented times, even if a due process complaint was filed, we are in pendency which means they cannot return to preexisting program due to school closures.

As stated before, at the end of the day, the hearing officers are going to balance out what school districts have done versus what they have not done. No one will turn a blind eye to the fact that what districts are doing is based on “current circumstances.”

Therefore, whatever option you pursue, letter or NOREP, the goal is the same, to provide as much to your students, both regular education and identified students, as you can during this period of time.

To that end, one letter that has been circulating is an effective option and can be likely be modified/tweaked for your own school district’s use.

The NOREP option, likewise, is available.

We have been given permission by another law firm, who represents school district, to share an Interim IEP Addendum as well as a Notice of Recommended Educational Placement. The documents speak for themselves.

At Beard Legal Group, we do recommend, however, to avoid any references within the body of the NOREP or letter at this point in time, to mention the phrase “compensatory education or services” only because of the connotations that it takes on when schools are open.

As always, we are more than willing to address for our clients any circumstances that they would like to address or review any documents that they would be sending out

Notice to Parents

Once again, each district is approaching it differently. In some districts, the Superintendent of Schools is sending out a generalized letter to the entire school community addressing the continuity of education and the delivery of education for identified students.

In our prior Client Alert, we addressed and outlined what districts are doing as it relates to delivering related services through teleconferencing and involving teachers, and in some instances paraprofessionals, to assist in the delivery of education.

In some of these situations with group instruction or group therapy, issues have arisen as it relates to confidentiality. A lot of different entities have addressed this; however, at the end of the day schools are permitted to deliver instruction and related services through online that includes group instruction.

Some school entities have gone as far as to create what they refer to as “Acknowledgement of Virtual Group Instruction Privacy Concerns” while others have issued letters directly as it relates to delivery of same through Google, Microsoft Team, ZOOM, Skype, etc. We do not believe districts have to ask parents to sign and return these forms. At the end of the day, schools simply need to implement the plan of virtual instruction.

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In many Q&A or FAQ scenarios, questions have been posed to school districts, if they are utilizing ZOOM, would it be a violation of FERPA. The simple answer is that this would be no different than the students being in the classroom anyway, carrying out their normal day to day activities and being involved in group instruction activities. As such, we do not believe there would be any type of FERPA violation.

We believe the key is to create “rules of etiquette or engagement” as to how this instruction might look. Here are some considerations:

1. Put out what the format will look like relative to how the studies/services/instruction are being delivered and what the District/LEA is proposing to provide those services.
2. Talk to and engage the parents to see if they have any questions.
3. Explain the services are in effect during the closure and that the existing IEP in its present form will resume when school reopens.
4. Establish basic etiquette as to how this is going to work. E.g. Please be mindful that other students could be on teletherapy or other instruction; caution regarding the use of language; dress appropriately, ask parents to create a quiet place for learning within the home setting.

Please keep in mind the key is to get the information out.

Documentation of Efforts

It is absolutely critical that school districts document their efforts making sure documentation is focused, consistent, detailed, and demonstrates a “good faith effort” to provide good services.

As always, down the road the possibility exists for challenges. The possibility also exists for audits. Please see a sample that has been put out by another state and/or organization.

<https://docs.google.com/spreadsheets/d/13JVv7z6MxHwUYJDCiEAAiFLVBBXIMXoG5hqwUOb9E/edit#gid=0>

Each district is encouraged to develop their own spreadsheets or formats for maintaining anecdotal information as to how the programs are being delivered on a daily basis.

See attached samples.

Through the cooperation of a lot of school districts and other law firms, we have attached several sample letters to this Client Alert for your consideration and use. Each district must review and decide for themselves whether they want to utilize and/or modify to some degree, to get out information to the greater school community as to the continuity of education and their own delivery model, which more likely than not will include distance learning plans (“DLP”).

While the Beard Legal Group Client Alert is designed to provide information 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.