

Special Education Law and the Coronavirus

Law Office of Lawrence W. Berliner, LLC

Managing Your Child's Educational Journey in this Unprecedented Time of the COVID-19 Virus and School Closings: "The New Normal"

Our challenge is to ensure special needs students obtain the services in their IEP and protecting their rights as provided by state and federal law during this health emergency.

As this health emergency situation evolves, I will be providing updated information on Facebook to address parents' concerns and questions

Special Education Law Attorney Lawrence Berliner

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TOPICS: IEP AND PPT MEETINGS

Attorney Lawrence Berliner: Many parents have contacted me about concerns with their child's IEP and/or the scheduling of PPT meetings during the period of time that their child's classroom and schools are closed due to the health emergency declared by Governor Lamont on March 10, 2020. As the direct result of the Governor Lamont's Executive Orders issued since March 10, 2020, public school classroom instruction has been suspended through at least April 20, 2020, and possibly longer. There is not a single one *size fits all* answer that will address every single situation. However, there are Policy Letters from the U.S. Department of Education and the Connecticut Department of Education that provide some guidance. I have attached links to the Policy Letters referred to in this article.

Scheduling PPT Meetings.

Routine PPT Meeting: If your child is receiving on-line or virtual learning educational services, along with all of the other children in his or her school, then the Connecticut Department of Education has stated in a March 24, 2020 Policy Guidance Letter that:

“...if all students are receiving continued educational opportunities, and therefore the general education population has moved to virtual, online, or distance learning, school districts are not required to revise an IEP because all students are receiving an alternate mode of instructional delivery of the general education curriculum. This would obviate the need to conduct PPT meetings related to the instructional delivery method in those cases and would not constitute a change in placement.”

Therefore, based upon this official information from the Connecticut Department of Education, there would be no need for a PPT Meeting to revise the IEP to change the site of the instruction from a classroom setting to an on-line or virtual setting. Despite clear pronouncements from either the U.S. Department of Education and/or State Department of Education, that on-line instruction does not in or itself, constitute a significant change of placement, when all children, with or without disabilities are receiving on-line instruction; there is at least one special education law attorney in Connecticut who is providing contrary advice to the public on his website, namely that on-line instruction is a change of placement. The Department of Education’s March 24, 2020 letter was directed to the School Superintendents in Connecticut, and in all likelihood your school district will follow the guidance provided in the Policy Letter.

Non-Routine PPT Meetings: The Connecticut Department of Education’s March 24, 2020 letter has recognized that there are situations whereby the Parents and/or the school district believe there may be a need for a PPT meeting. In that situation, the Connecticut Department of Education has recommended that if

“a parent or the school district wishes to discuss the student’s continued educational opportunity, the parent and school district have flexibility to use other means of conferring with one another rather than convening a PPT for a meeting.”

If after that discussion there is a need to review or revise an IEP, then the federal special education regulations provide that an IEP could be revised by written agreement, without the need for a PPT meeting, provided that both the parents and the school district agree in writing to amend the IEP. The Connecticut Department of Education has a form available on their website (ct.gov) to revise an IEP by written agreement without convening a PPT meeting: Form ED634- *Agreement to Change an Individualized Education Program Without Convening a Planning and Placement Team Meeting*.

One attorney whose law firm represents school districts has opined that based upon the March 24, 2020 Letter from the Connecticut Department of Education, that a school district can unilaterally decide what services are appropriate under the current circumstances and reasonable within the school district's resources. *That is not the law and such an interpretation if adopted across the board, would negate the parent's right to meaningful participation into the development of their child's IEP.*

Definite Need for a PPT Meeting: If there is a definite need for a PPT meeting, based upon the parents' and/or school district's collective belief that there is a need to review and revise the IEP, then a PPT meeting should be scheduled as soon as practicable. *It is advisable for parents to communicate their need for a PPT meeting in writing.*

During the period of time of your child's school closure, PPT meetings may be converted from an in-person PPT meetings into a meeting by conference telephone call or teleconferencing. If you insist upon an in-person PPT meeting, then such a meeting may be delayed until such time as your child's school resumes operations and is open for classroom instruction. If parents and the school district agree to a PPT meeting that will be convened by conference telephone call or teleconferencing, then the Connecticut Department of Education has recommended consideration of the following factors:

“ • *The parents and the school district agree upon the purpose of the PPT meeting. (e.g., Given that there is no requirement to revise IEPs to include remote continued educational opportunities, is having a PPT meeting necessary? Will holding the PPT meeting affect the continued educational opportunities being provided to the student? etc.).*

- *The PPT membership requirements (e.g., Will each PPT member be available and able to meaningfully participate in the meeting? etc.).*
- *Confidentiality and privacy concerns (e.g., If the meeting is being held telephonically or virtually, will each team member have access to a private space? Is the virtual format that you are using secure? etc.).”*

Parents may need to be flexible with the scheduling of the time and date for the PPT meeting. In addition, Parents may need to provide their consent to excuse the attendance of one or more members of the PPT who may typically attend their child’s PPT meetings because school staff may be unavailable for the meeting.

Parents are supposed to have meaningful participation in a PPT meeting, therefore, consider the technology that is being proposed by the school district to ensure your meaningful participation in the PPT meeting, such as:

- Can you hear the discussion during the meeting?
- Can you see the participants in the meeting?
- Can you have meaningful participation in the discussion during the meeting?

You should be certain that your privacy and the confidentiality of your child’s educational records are maintained during a telephone conference call or teleconference PPT meeting.

- Is the location for the PPT meeting sufficiently private so nobody can overhear the discussion from each of the participants since each participant may be calling in from different locations?
- Is the technology being for the PPT meeting used secure? Many school districts are now offering teleconferencing through *Zoom*, however there are some recent concerns with *Zoom*’s privacy features that are being investigated by the Attorney General of New York State and others. Are the school district staff using their personal cell phones or the school district’s?
- Is the PPT meeting being recorded. If so, Connecticut law requires the consent of *both* parties before a conversation or a meeting can be

recorded. Therefore, if you are planning to record the PPT meeting, you should provide notice of that fact to the PPT.

Annual Review PPT meetings: If your child's annual review PPT meeting date occurs during the period of time when your child's school is closed due to the health emergency, then parents and the school district have the option to extend the IEP annual review date until the next date when your child's school resumes operations and the school is open. The Connecticut Department of Education has recognized that due to the prolonged school closure that:

*“...school districts may find it difficult to conduct Annual Reviews and Reevaluations. **There are no statutory or regulatory provisions that allow extensions of time to conduct these PPT meetings.** Be reminded however, a parent/adult student may agree in writing that a reevaluation (i.e., “triennial review”) is not necessary. If an annual review or reevaluation date is not met, the school district should hold the PPT meeting once school resumes. ...If the effective date of a student’s IEP lapses during the school closure, the student’s IEP will remain in effect until a new IEP is developed.”*

This is voluntary and parents are under no obligation to consent to an extension of time for an annual review PPT meeting.

The U.S. Department of Education has clearly stated that there are no provisions within the I.D.E.A., the federal special education law, permitting extensions of mandatory timelines. However, the federal law does not prohibit parents and the school district from reaching a voluntarily agreement, that due to extenuating circumstances, that they will agree to extend the expiration date of the IEP or a due date for a triennial evaluation until the next PPT, when the school district resumes operations and your child's school is open. If parents agree to an extension of time, then the school district may request a very short telephonic PPT meeting to confirm this agreement. Parents should only consider this option, *only if* there will be no resulting harm to their child's educational programming and/or to their rights during the period of this health emergency. If parents do not agree to an extension of time, then the school district must schedule the annual review PPT meeting, as well as planning the triennial evaluation. As noted above, that PPT meeting may be scheduled as a conference telephone call or teleconference PPT meeting at this time.

Concerns with the IEP and On-Line or Distance Learning.

We are dealing with an unprecedented health emergency since Governor Lamont's initial Executive Order No. 7-C to close classroom instruction in the state's public schools. Since the original declaration of a health emergency, Governor Lamont has amended and expanded upon his Executive Orders at least twelve times, affecting the provision of public elementary, secondary, and post-secondary education; restricting our ability to travel; ordering the temporary closure of certain non-essential businesses; and ordering the reduction and/or modification of services at the state and municipal levels of government. In a March 21, 2020 Policy Guidance Letter, the U.S. Department of Education stated:

"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 with disabilities and those individuals providing special education and related services to students. ... Although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific

[educational] 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. ...The Department encourages parents, educators, and administrators to collaborate creatively to continue to meet the needs of students with disabilities.”

IMPORTANT NOTE; If your child is NOT receiving all of the services listed in his or her IEP, then parents should keep track in writing of those missing academic and/or related services hours for use at a later date. In a March 12, 2020 Policy Letter, the U.S. Department of Education stated that PPTs

“... must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.”

In other words, a school district may be required at a later date, to make up the academic instruction time and/or the related services time contained in the IEP, that was not provided during the period of time that your child’s school was closed due to the health emergency.

Parents and school districts should work in a cooperative, collaborative, and creative manner to ensure the needs of your child are met during the period of time that direct classroom instruction and/or the provision of related services are not being provided due to the health emergency.

Note that the neither the U.S. Department of Education, nor the Connecticut Department of Education have mandated that on-line or virtual learning is the only way to educate children with disabilities. As noted in the U.S. Department of Education’s March 21, 2020 Policy Letter:

“... some schools might choose to safely, and in accordance with state law, provide certain IEP services to some students in-person.”

In fact, one attorney who represents Boards of Education, had commented that Governor Lamont’s Executive Order No. 7-C mandated the cancellation of public school *classroom instruction* during the period of the

health emergency, however, that attorney also noted the Executive Order did not order the outright closing of the school building altogether. Therefore, if your child has complex learning needs and the individual services in the IEP, such as the related services, could only be provided in the school building because that is where the adaptive equipment and therapeutic services are located, consider asking your school to use the school building to provide in-person services, provided that the health and safety of your child and school staff will be protected and will not be compromised, and the provision of services in the school building are not expressly contravened by the Governor's Executive Orders and applicable Policy Guidance Letters.

PARENTS: Consider a request for specific instruction and consultation with your child's teacher and other staff, if the on-line instruction is not meeting your child's learning needs. Communicate directly in writing to request this specific instruction for your child.

C.A.R.E.S. ACT:

Please note that the economic stimulus legislation that was recently passed by the Congress called the *C.A.R.E.S Act*, contains a provision that will authorize the Secretary of the U.S. Department of Education to prepare a *Report to Congress* during April. That *Report to Congress* could recommend *additional waivers* from the requirements of the I.D.E.A., the federal special education law. Therefore, it is possible that the state and local education agencies in Connecticut could be excused from their obligations to provide an appropriate education to your child called FAPE, based upon the recommendations in that *Report to Congress* and whether or not the U.S. Department of Education will grant any applications for I.D.E.A. waivers submitted by the state and local education agencies in Connecticut. Please contact Senators Murphy and Blumenthal and your U.S. Representative if you are concerned with the likely impact that waivers from the I.D.E.A. requirements could have on your child's special education program.

Now, more than ever, parents need to be their child's best advocate.

- Be proactive
- Understand your child's learning needs,
- Work collaboratively with the school district to ensure that the school districts are meeting their special education obligations to provide FAPE to your child during this health emergency.

Stay safe and healthy.

My daughter, Rachel, is updating our Facebook page daily with information about parents, schools, anxiety, stress, coping, etc. and my updates regarding special education law and your concerns:

@berlinerspecialedlaw or

<https://www.facebook.com/berlinerspecialedlaw/>

After 35 years, I continue to be dedicated to the needs of families and their children with disabilities and I will work tirelessly on your behalf. Your concerns at this time are of the utmost importance. Please contact my office at: [203-255-0582](tel:203-255-0582) or write: lwb.esq@gmail.com to set up a consultation via phone or video conference at this time to discuss your concerns.

LINKS:

March 24, 2020 Connecticut DOE Letter: ct.gov - Bureau of Special Education Memorandum: Continued Educational Opportunities and Special Education During the COVID-19 Pandemic

March 12, 2020 and March 21, 2020 U.S. DOE Letters: ed.gov - COVID-19 ("Coronavirus") Information and Resources for Schools and School Personnel. (click on specific letters, dates, and topics).

Disclaimer: *This is for informational purposes only and should not be construed as providing specific legal advice for your child's circumstances. You should consult an attorney for specific legal advice.*