

"How About Never!?" - COVID-19, School Closures, and Planning and Placement Team Meetings

Education Law Notes

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There is a classic *New Yorker* cartoon in which an executive, discussing on the phone a possible meeting, says: "How about never – is never good for you?" This cartoon comes to mind when considering the requirement to hold Planning and Placement Team ["PPT"] meetings during the COVID-19 pandemic. With the United States Department of Education ["the Department"] issuing new guidance on a weekly, if not almost daily, basis regarding the delivery of special education and related services during the public health crisis, opining on it is like trying to hit the proverbial moving target. Advice that is correct today may by the end of the week need to be

revisited. That caveat aside, there is some confusion as to whether school districts are currently permitted to unilaterally decline parent requests to PPT meetings or to otherwise indefinitely postpone them. In a nutshell, they cannot, for while, as noted, the Department could suddenly reverse course, both its prior and current guidance establish that there is no legal authority for districts to do so.

While some have turned to the State of Connecticut Department of Education for succor, and although the State Department has the right to expand upon the rights granted disabled students, it lacks the authority to limit their rights, such as by waiving federal mandates, unless Congress or the United States Department of Education has expressly empowered it to do so. For example, although the federal Individuals with Disabilities Education Improvement Act of 2004 ["IDEA"] sets forth timelines for conducting evaluations, it also authorizes states to adopt and follow their own timelines. Such exceptions, however, are extremely limited, and for the most part, school districts remain bound by federal, IDEA obligations. This includes complying with the Department's directives pertaining to PPT meetings.

With respect to these federal obligations, it is informative to consider the Office of Special Education and Rehabilitative Services' November 20, 2012 *Letter to Geary*. OSERS' letter was issued in response to inquiries from the New York State Education Department requesting "flexibility in light of the damage caused to some New York School districts by Hurricane Sandy." The flexibility sought by New York included "timelines for . . . annual review meetings." OSERS replied to that query by noting: "In general, the [Department] does not have the authority to waive the requirements in Part B of the IDEA. Therefore, the Department *cannot extend*

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timelines for the above requirements" (emphasis added). Thus, despite the devastating consequences of Hurricane Sandy on New York City and surrounding communities, the United States Department of Education declined to waive school districts' obligations to adhere to IDEA timelines.

In fact, in the course of noting one limited exception pertaining to Individualized Education Programs ["IEPs"], OSERS implicitly declined to waive timelines for convening PPT meetings. Specifically, OSERS cited 34 C.F.R. §300.323(c), which provides that a PPT meeting to develop an IEP must be conducted within thirty days of the determination that a student qualifies for special education and related services, adding that such services are to be made available to the student "as soon as possible following development of the IEP." OSERS construed Section 300.323(c)'s use of "as soon as possible" as allowing districts some leeway in the initial provision of services in "some isolated circumstances" resulting from catastrophic events, although it promptly advised that "once a school is open, the LEA must make every effort to make available special education and related services to the child in accordance with the child's IEP."

It is probably safe to assume that the current COVID-19 public health crisis would qualify as one of the oddly labeled "isolated circumstances." Nonetheless, while recognizing the consequent delay in the initiation of services, OSERS does not note any similar flexibility with respect to the actual holding of the PPT meeting. On a related note, it would be ill-advised to take OSERS' reference to "once a school is open" literally; rather, it should more reasonably be read as meaning "once instruction resumes." In short, nothing in this language would permit a school district to unilaterally cancel or otherwise indefinitely postpone PPT meetings.

At the same time, OSERS did discuss the limited possibility of a collaborative agreement to extend non-annual-review PPT meeting dates, writing:

The IDEA requires that the child's IEP be reviewed periodically, but not less than annually There is some flexibility in this provision. For example, in making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

There is much to unpack from this language. First, OSERS essentially treats it as a given that the annual review meeting is mandated and is not subject to modification; rather that potential flexibility only applies to non-annual-review PPT meetings, such as those called in the midst of a school year to review and possibly revise the goals and objectives which were adopted at the annual review. Second, the decision to forgo an interim PPT meetings is not a unilateral district right; to the contrary, parents have to agree to it. Third, even if the parents agree not to hold the meeting, the PPT is not entitled to leave the IEP in abeyance; instead, it is expected that in lieu of the meeting there will be a written amendment to the IEP to which both parties have agreed.

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The guidance which the Department has issued within the past two weeks pertaining to PPT meetings has done nothing to modify its stance in the November 20, 2012 *Letter to Geary*. In its March 16, 2020 guidance, the Office for Civil Rights ["OCR"] addressed the logistics – not the necessity -- of the PPT meeting, relieving districts only of the obligation to hold face-to-face meetings while schools are closed. If OCR intended to release school districts from their obligation to hold PPT meetings, instead of writing "IEP Teams are not required to meet *in person* while schools are closed" (emphasis added), it would have simply stated: "IEP Teams are not required to meet while schools are closed." Obviously, and significantly, it did not say that.

Consider also the fact that OCR additionally advised that if a student "does not receive services after an extended period of time, the [PPT] . . . **must** make an individualized determination whether and to what extent compensatory services are needed" (emphasis added). What OCR considers an "extended period of time" is defined in the Department's guidance from earlier this month, March 2020, in which it wrote that "an extended period of time" is "generally more than 10 consecutive school days." Using that rubric, and in light of OCR's use of the mandatory language "must," if a district has chosen not to provide any instruction to any of its students during the initial, State-ordered two-week school closure, it would seem that OCR expects PPTs to convene and make "individualized determination[s] whether to what extent" the district is required to provide compensatory services to its special education students.

The Department's early-March guidance also reminds school districts that if they are providing "educational opportunities to the general student population during a school closure . . . [districts] . . . must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP." One might argue that the Department's use of a subjective phrase such as "to the greatest extent possible" provides districts with leeway to decline parent requests to convene PPT meetings during the current pandemic. There is some question as to whether such an interpretation is one with which the Department would agree. After all, if a district is able to provide virtual learning opportunities, why would it not be able to hold virtual meetings? More likely, the Department would claim that that language pertained to the provision of the actual services, not to the meeting called to determine what those services would be.

There is nothing in the law that precludes a district from asking parents whether they are amenable to postponing scheduled PPT meetings or to holding off on PPT meeting requests for a limited period of time – although such an agreement would not necessarily supersede the IEP annual review date. If, however, parents decline to withdraw their meeting request or is insistent on going forward, under current guidance, the district would be obligated to do so.

Posted in COVID-19, Special Education

Tags: Individuals with Disabilities Education Improvement Act (IDEA), U.S. Department of Education